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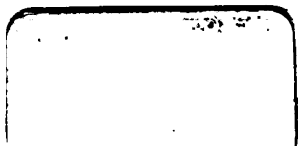
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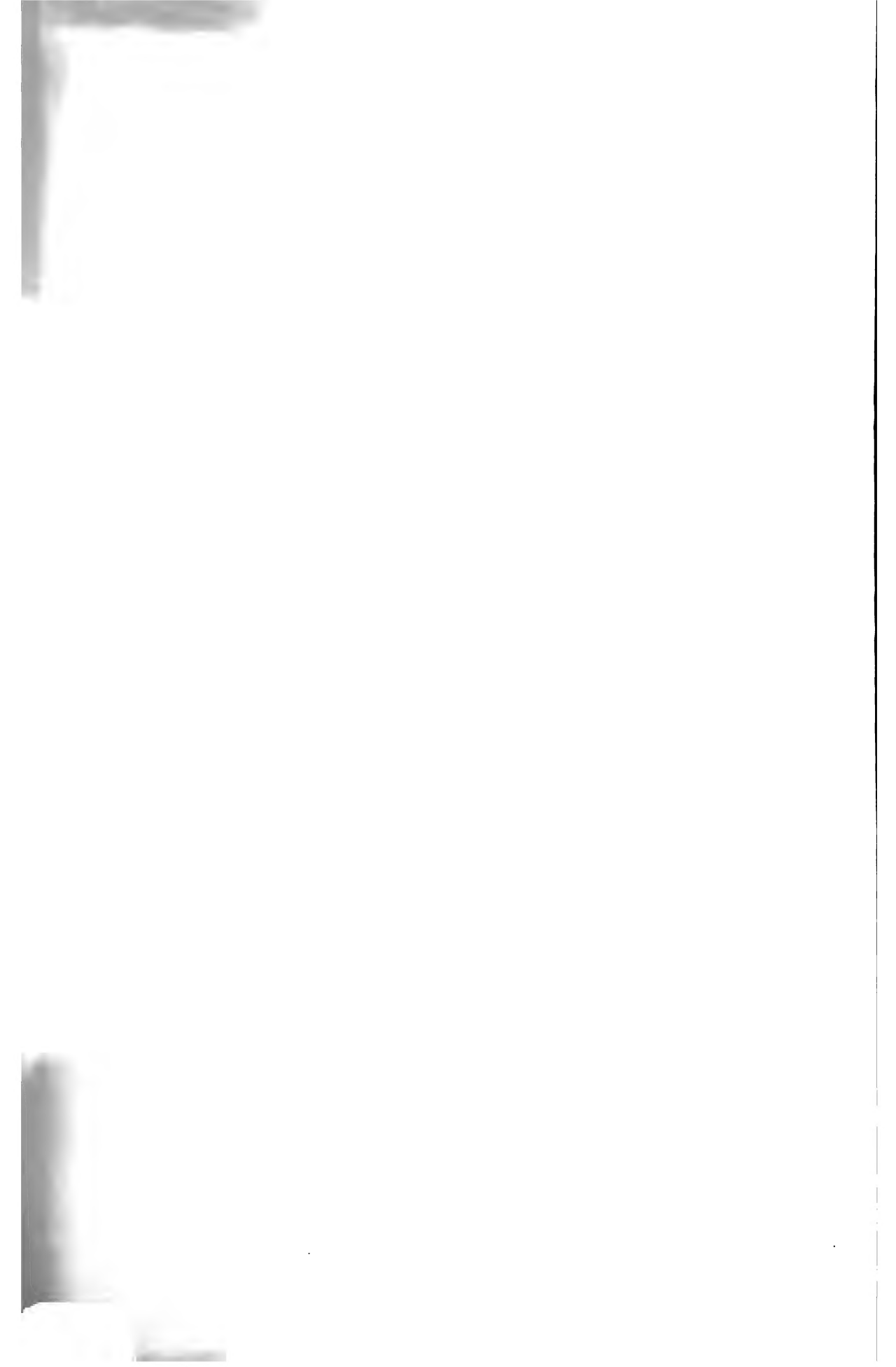
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IRISH JURIST.

VOL. XVI. (VOL. IX. NEW SERIES.)

CONTAINING

REPORTS OF CASES DECIDED IN THE SEVERAL COURTS OF EQUITY AND COMMON LAW, THE LANDED ESTATES COURT, COURT OF PROBATE, COURT OF BANKRUPTCY & INSOLVENCY, AND COURT OF ADMIRALTY.

With a Digest

OF THE CASES REPORTED DURING THE YEARS 1862 AND 1863 IN THE JURIST, AND IN THE 14 IR. CHAN. AND 14 IR. C. L. REPORTS.

AND AN

Appendix of the Statutes relating to Ireland.

BY WILLIAM WOODLOCK, ESQ. BARRISTER-AT-LAW.

DUBLIN:

E. PONSONBY, 116 GRAFTON STREET.

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THE COURTS OF EQUITY AND COMMON LAW IN IRELAND, AND IN THE HOUSE OF LORDS.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF FREDERICK OLDEN AND ANDREW WILLIAM OLDEN, BANKRUPTS; EX PARTE SARAH LUNHAM, PETITIONER.—June 22, 1863.

Notice—Mortgages—Purchaser for valuable consideration without notice—Gross negligence.

X. by his will, devised the interest in a lease for a term of years to A. & B., subject to certain charges thereby created, and appointed A. & C. his executors. A. & B. subsequently executed to D. a mortgage of the premises comprised in the lease, but did not produce the original lease, nor deduce their title to it, the indenture of mortgage merely reciting that the premises had been demised to X., and were "now vested in A. & B., or one of them," for the residue of a term of years, and no mention being made of the will of X., under which A. and B. derived, nor the charges created thereby. Held, that the mortgagees were guilty of gross negligence in not requiring the deduction of the mortgagor's title from X., and therefore was affected with constructive notice of the charges created by the will of X.

By indenture of lease, dated the 20th of December, 1825, Henry Leader, of the city of Cork, demised to Robert Olden, tallow chandler, a house and other premises, situate in Duncan-street, in the parish of St. Peter, in the city of Cork, to hold to the said Robert Olden, his executors, administrators, and assigns, for a term of 900 years, at a yearly rent of £31 10s. sterling. Robert Olden, for upwards of twenty six years, carried on in these premises an extensive chandlery and soap-making business, and continued to do so until the date of his death, which took place on the 3rd of February, 1844. By his will duly made, and dated the 27th of January, 1844,

Robert Olden bequeathed the sum of £200 to his daughter Elizabeth, and the sum of £400 to each of his daughters, Anne, Adelaide, Louisa, and Emily Olden, and charged the said five several sums with interest at 5 per cent., and also an annuity of £100 per annum for his wife, Elizabeth Olden, during her life, on the testator's stock in trade and establishments in Daunt's-square and Duncan-street aforesaid; and as to his dwelling-house and premises at Daunt's-square and Duncan-street, and all his interest therein, and all his stock in trade, goods, chattels, and effects, in the respective establishments, the testator gave the same, charged and chargeable as aforesaid, to his two sons, Frederick Olden and Andrew William Olden (the bankrupts) as tenants in common. The testator further appointed his wife, Elizabeth Olden, and his eldest son, Frederick Olden, executors of his will, which was subsequently duly proved by them in the Prerogative Court, Ireland, on the 1st of March, 1844.

Frederick Olden, and his brother, Andrew William Olden, entered by virtue of this will into possession of the soap-making and chandlery establishment, and carried on the business under the style of "Robert Olden & Sons," in the above mentioned premises and others adjoining thereto which they afterwards acquired. Frederick and Andrew William Olden subsequently paid off the said sums of £250 and £400 respectively, with interest thereon, as given by the said will to Elizabeth Olden, the testator's eldest daughter, and Emily Olden, and also made several payments to the other daughters, and to Elizabeth Olden, the testator's widow, on foot of the said charges and annuity respectively, leaving due to Elizabeth Olden on foot of her annuity up to the 29th day of September, 1862, the sum of £14 16s. 8d.; to Anne Olden the sum of £400 before mentioned, and £17 6s. 8d. for interest up to the 1st of December, 1862; and to each of the said Louisa and Adelaide Olden, the said sum of £400 principal money, and £7 17s. 4d. for interest up to the last-mentioned date.

By indenture bearing date the 18th day of September,

ber, 1861, made between Frederick Olden and Andrew William Olden, the bankrupts in this matter, of the one part, and Sarah Lunham, the appellant in the present appeal, of the other part, after reciting a lease dated the 14th of April, 1845, by Mary and Anne O'Leary to Frederick Olden, his heirs and assigns, for three lives, at the yearly rent of £28, and two conveyances dated respectively the 21st of March and 26th of May, 1859, to Frederick Olden, his heirs and assigns; and also another lease dated the 27th of July, 1850, by Denis O'Connor to Frederick Olden, his executors, administrators, and assigns, for thirty-one years, at the yearly rent of £8, the indenture continued in the following words:—"And whereas the several parcels of ground, tenements, and hereditaments, granted and demised by the several indentures of lease and conveyances herein before recited, together with certain other ground and buildings demised by Henry Leader, of Mount Leader, in the County of Cork, esquire, to Robert Olden, deceased, for a term of years, whereof more than 100 years are unexpired, at a yearly rent of £31 10s. sterling, and which said last-mentioned premises adjoin those comprised in the herein-before recited indentures, and are now vested in the said Frederick Olden and Andrew William Olden, or one of them, for the residue of the term of years thereof granted by the said Henry Leader to Robert Olden, deceased, (are held by the said Frederick Olden and Andrew William Olden) as partnership property for the purposes of their said trade or business of chandlers and soap manufacturers." And after reciting an agreement for a loan by the said Sarah Lunham to the said Frederick and Andrew William Olden of a sum of £2,000, for the purposes of their said trade or business, the premises comprised in the lease of the 20th of December, 1825, were, by the said indenture of mortgage, conveyed to the appellant, Sarah Lunham, her executors, administrators, and assigns, subject to the said rent by the following description:—"and all that and those the premises comprised in and demised by the indenture of lease herein before mentioned to have been executed by Henry Leader to Robert Olden, with their appurtenances," to hold to the said Sarah Lunham by way of mortgage, to secure repayment of the said sum of £2,000 sterling, with interest for the same at the rate of £5 per cent. per annum. A petition of bankruptcy having been filed against Frederick and Andrew William Olden, and an adjudication of bankruptcy having been made, Sarah Lunham, on the 3rd of November, 1862, filed a charge in the matter of the bankruptcy, setting forth the facts relative to the above mortgage, and stating further that there was due to her on foot of the said mortgage the sum of £2,000 for principal, and the sum of £60 for one-half year's interest thereon up to the 18th of September, 1862, and charging that she was entitled to an order of the Court of Bankruptcy for a sale of the mortgaged premises. On the 15th of December, 1862, a charge was filed in the Court of Bankruptcy by Elizabeth Olden, widow, Anne Olden, Adelaide Olden, and Louisa Olden, putting forward all the facts herein before stated, and claiming that the annuity, principal sums, and interest herein before mentioned, should be held the first

charges on the said premises charged therewith as aforesaid, and prior and paramount to the interest of the bankrupts in the same premises, and to the interest of all persons claiming from or deriving from or through the said bankrupts. And the chargeants submitted that they were entitled to have the said premises given by the will of Robert Olden as aforesaid sold by order of the Court of Bankruptcy, and the proceeds of such sale applied in payment of the costs and expenses of such sale, and in satisfaction and discharge in their aforesaid priority of the said chargeants' annuity, principal sums, and interest. On the 15th of January, 1863, Sarah Lunham filed a discharge to the last-mentioned charge, alleging that she was ignorant of the several matters stated in the said charge, and stating moreover that at the time of the extinction of the mortgage of the 18th of April, 1861, she was not aware, and had no notice whatever of the alleged claims of Elizabeth Olden, Anne Olden, Adelaide Olden, or Louisa Olden, or of any of them, and, therefore, she relied upon her title as mortgagee of the several lands and premises comprised in the indenture of mortgage, and as purchaser thereof for valuable consideration without notice of the said claims or any of them. By an order of the Court of Bankruptcy, bearing date the 13th of February, 1863, it was ordered by the Honorable Judge Berwick that the charge of Elizabeth Olden was well proved for the sum of £1,247 8s., with further interest on the principal sum until paid. By another order of the Court in this matter, dated the 1st of May, 1863, it was declared that the charge of Elizabeth Olden, filed on the 19th of December, 1862, was well charged on the premises in the said charge mentioned in priority to the mortgage of the said Sarah Lunham. From this order of the Court of Bankruptcy Sarah Lunham now appealed.

The Solicitor-General (with whom was *Brewster, Q.C.*, and *Jones*) for the appellant.—Sarah Lunham had no notice of the charges created by the will of Henry Leader, and being a purchaser for value without notice, the mortgage executed to her is entitled to priority over the claims of the respondent, Elizabeth Olden, on foot of the annuity. *Jones v. Smith* (1 Hare, 43) is an express authority on this point. The whole tendency of modern decisions too, is to contract rather than extend the doctrine of constructive notice. The legal estate and interest in the mortgaged premises demised by Henry Leader to Robert Olden is now vested in the appellant, and became vested at a time when she had no notice, actual or constructive, of the claims of the annuitants. The legal estate became vested by the will of Robert Olden in Frederick Olden as one of the executors and as he was a granting party to the deed of mortgage, the legal estate is now in Sarah Lunham.

Heron, Q.C., (with him *William M. Johnson*) for the respondents.—The mortgagee was bound to examine more closely into the title before taking a mortgage of the premises, and mere negligence in not investigating the title will not put the mortgagee in a position to set up the plea of being a purchaser for valuable consideration without notice. At the time of the execution of the mortgage, the bankrupts, it is true, were in possession of the premises, but mere pos-

session is not in itself even *prima facie* evidence of title.—*Dryden v. Frost* (3 Myl. & Cr., 670); *Moor v. Bennett* (1 Eq. Ca. Abr., 33); *Jackson v. Rowe* (2 Sim. & St., 472); Sugden's *Vendors and Purchasers*, p. 790; *Worthington v. Morgan* (16 Sim., 547); *Buckley v. Lanauze* (Ll. & Gool. 327); *Carter v. Carter* (3 K. & J., 639). In *Hiern v. Mill* (13 Ves., 119), the Lord Chancellor remarks, "There is a marked distinction in this respect between a real estate and a personal chattel. The latter is held by possession—a real estate by title. Possession of an estate is not even *prima facie* title. It may be by lease, or only from year to year. The cases have gone upon that distinction. Is there any instance of a purchase upon mere possession?" This was clearly wilful blindness on the part of the mortgagee. She was furnished with an abstract of title, it appears, which showed no legal title at all. The lease of 1825 was not her title deed; the will of Robert Olden was her title deed, and if she had examined it, the prior charges would have been known.

W. M. Johnson on the same side, cited *Jones v. Smith* (1 Phill. 244); *Neson v. Clarkson* (2 Hare, 163); *Jones v. Williams* (24 Beav. 47); *Dart's Vendors and Purchasers*, 3rd edition, p. 559; *Gurney v. Oranmore* (5 Ir. Ch. Rep., 436).

Brewster, Q.C., in reply.—The case of *Jones v. Smith* (1 Hare, 43), has always been recognised as a leading case on the subject of constructive notice, and was affirmed by Lord Lyndhurst on appeal (1 Phill., 244); *Hewitt v. Loosemore* (9 Hare, 449); *Attorney-General v. Stephens* (6 De G. M. & G., 147); *Ware v. Lord Egmont* (4 De G. M. & G., 460), lay down the true principles upon which a purchaser will be considered to be affected with notice. The question is not whether the purchaser might with prudent caution and careful investigation have obtained the knowledge, but whether the not obtaining it is an act of gross and culpable negligence. Such is the tenor of Lord Cranworth's judgment in *Ware v. Lord Egmont* (loc. cit.). The case of *Dawson v. Prince* (2 De G. & J., 41), is even stronger. *Stephenson v. Royce* 5 Ir. Ch. Rep., 401, is also an authority. As to *Carter v. Carter* (loc. cit.), cited on the other side, it is not reconcilable with the current of decisions, and can hardly be considered as law.

THE LORD CHANCELLOR.—I confess that when I first read this case the doctrine of constructive notice, upon which the respondent relies, appeared to me to be carried very far. Now, however, that the case has been fully discussed I am clearly of opinion that the order of the judge of the Court below was right, and that the charge of Mrs. Olden is entitled to priority over the mortgage executed by the bankrupts to the appellant, Mrs. Lunham. With respect to the cases which have been cited in support of the appellant's case, in every one of them, it seems, a clear legal title was conveyed by the deed or instrument, and was apparent on the face of the document; and the question was, whether the holder of that legal title should be considered to be fixed with notice of prior equities affecting the estate conveyed. Here, however, the instrument under which the mortgagee claims does not appear to convey any title at all. All that is said is that the interest in the mortgaged pre-

misses is vested in Frederick Olden and Andrew William Olden, or one of them. Now, it appears from the evidence in this case that in the abstract of title furnished to the appellant, the lease of 1825 was omitted altogether. No inquiry was made as to how the Messrs. Olden had acquired possession. By the will of Robert Olden the legal estate in the premises comprised in the lease of 1825 became vested in Frederick Olden as one of the executors of the will; and thus, as it were, by accident the legal estate was conveyed to the appellant, Mrs. Lunham, by the mortgage deed. The respondents, however, say to her that by gross negligence—by wilfully shutting your eyes and taking a conveyance with no legal title on the face of it—the legal estate you have accidentally acquired cannot operate to the prejudice of our interests. On a careful consideration of the case and the authorities, whatever doubts I may have had at first, I am now of opinion that the appellant was guilty of *crassa negligentia*, and that the order of the Court below must be affirmed.

THE LORD JUSTICE OF APPEAL.—I also concur with the judgment of the Lord Chancellor that the order of the Court of Bankruptcy must be affirmed. The conduct of the appellant on the occasion of taking the mortgage from the bankrupts appears deservedly to merit the imputation of the grossest degree of negligence. Here is a person entitled to an annuity charged on the interest in a long term of years which, subject to a number of other charges, is devised to the bankrupts, Frederick and Andrew William Olden. The executors of the will are trustees for this annuity. One of the trustees, who is at the same time a devisee, with a third party professes to convey to a purchaser for valuable consideration the interest in this lease of December, 1825; the purchaser never insists on the production of the title deeds, and takes a conveyance upon which no legal title is shown. Under such circumstances I do not think the mortgagee is entitled to set up the plea of being a purchaser for value without notice, having acted with manifest carelessness and negligence in not investigating the title. These charges, and all information respecting them, might have come to the knowledge of the appellant if ordinary caution and care had been employed.

Order below affirmed, with costs.

Court of Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

MASTER LITTON'S COURT.

M. CATHY v. THE ATTORNEY-GENERAL.

Chancery Regulation Act, s. 15—Will—Construction of—Trusts.

A. K., by will bearing date the 12th February, 1862, bequeathed *F. M'C.*, and *E.*, his wife, all her property, "trusting to their charitable and pious recollection of the spiritual wants of me and mine." On behalf of the Crown it was contended that this was a valid disposition of the property for charitable purposes, and that a scheme should be settled

by the Court for that purpose. By the next of kin it was insisted that the trust was uncertain and void. Held, that the trust was void for uncertainty, and that the next of kin was entitled thereto.

THIS was a cause petition presented by Mr. Florence M'Carthy under the fifteenth section of the Chancery Regulation Act, 1850, for the administration of the assets of Anne Kenny, deceased, and praying that a scheme might be settled and approved of for the administration of any charitable dispositions contained in the said will, bearing date 12th February, 1862, which is as follows: "I, Jane Kenny, late of Ballymona, in the county of Wexford, do make and publish this my last will and testament; first, I devise and bequeath all my property of every kind to Denis Florence M'Carthy, Esq., of Summerfield, Dalkey, and Elizabeth, his wife, for their sole use and benefit, trusting to their charitable and pious recollection of the spiritual wants of me and mine; I direct that Mr. Simon Brazil shall be permitted to pay the debt he owes me by instalments (to be applied for charitable purposes), and I appoint Denis Florence M'Carthy and Elizabeth his wife the executor and executrix of this my will." Testatrix died on the 13th of February, 1862. The petition stated that it was alleged by one Bridget Agnes Burke, that the property of the said Anne Kenny was, by her said will of 12th February, 1862, bequeathed to petitioner and his wife, upon a trust either uncertain or otherwise void, and that there was, therefore, an intestacy, of which she, the said Bridget Agnes Burke, as the sole next of kin of the said Anne Kenny, should have the benefit; that, on the other hand, the Attorney-General put forward a claim insisting that there was a valid disposition of the property for charitable purposes, and that a scheme should be settled by the Court for that purpose; and on behalf of petitioner it was submitted to the Court that he did not desire to reap any personal benefit from the dispositions contained in said will, and that he was willing to declare a trust for charitable or pious purposes, and to have a scheme settled by the Court.

Frederick Walsh, Q.C., (with John O'Hagan) appeared for the petitioners.

John Edward Walsh, Q.C., (with J. C. Armstrong) were counsel for Bridget Agnes Burke, the next of kin.

George Waters for the Attorney-General.

Feb. 1, 1864.—MASTER LITTON delivered judgment as follows:—In this case the testatrix, Anne Kenny (who died on the 13th July, 1862), on the day before her decease, made her will, and thereby bequeathed to the petitioner, Mr. Denis Florence M'Carthy, and Elizabeth, his wife, all her property, adding the following words, "trusting to their charitable and pious recollection of the spiritual wants of me and mine." It appears that Anne Kenny was in her lifetime a Roman Catholic, and died professing the Roman Catholic religion, and farther, that the members of her family, her brothers and sisters, were all in their lifetimes persons holding the same views, and belonging to the same Church, and the question which the Court, under the above circumstances, is called on to determine, is, whether the foregoing bequest, as it is ex-

pressed in the will, is such as the Court can give effect to, or whether the next of kin are entitled to the fund, on the ground that the trust is of "such a nature," or "has been so expressed as regards certainty that the object fails," and accordingly that Anne Kenny must, in respect of the fund, be deemed to have died intestate. It is admitted in the argument by the next of kin that it is the duty, and should be the object of every court of justice, to effectuate, if possible, the intention of the testator or testatrix. But it is conceded that though a general charitable purpose is indicated by the bequest, in respect to the particular objects of that bequest, it may be void. Charity, in its general sense, includes all acts of benevolence, but when a Court of Equity comes to deal with a charitable use, the meaning is much restricted—*vid.* the case of *Jones v. Williams* (Ambler, Rep., p. 600), which defines a charity to be "a gift to a general use, which extends to the poor as well as to the rich." Generally speaking, in order to ascertain what are charitable purposes, reference is had to the objects enumerated in the statute of Elizabeth, and it has been held that the statute embraces not alone the specified objects, but also all cases coming within its spirit and intendment. It will be found, therefore, upon the authorities (and they are not a few), that a charitable purpose within the meaning of or in analogy to that statute, must have some public object in view, and must not be confined to the benefit of a particular family, person, or single purpose. On this branch of the case, I will content myself with referring to the report of *Gilley v. Hey* (1 Hare, 580); where a trust "to distribute the rents and profits of an estate, on certain days amongst certain specified families, according to their circumstances, as in the opinion of the trustees they might need such assistance, was held not to be void as a devise for charitable purposes," nor, I may add, void on the ground of uncertainty, for the reason that the families indicated were specially pointed out and named. The latter ground of this decision is of importance in dealing hereafter with the question whether in the present case the trust has been sufficiently expressed. Now, as regards what are called "superstitious uses," (and I think the present bequest is to be referred rather to this class,) there is no statute making such uses void generally: it is so stated by Sir William Grant in *Casey v. Abbot* (7 Vesey, Jun., 494), but such uses are, nevertheless, void in England by the general policy of the law, and the current of authorities, so that, in England, though charity be not the object of the bequest, yet if the design be to secure a benefit to the testator himself, as, for instance, masses for his soul, in such case the fund would be disposed of just as if there had been no such bequest or gift. In the present case, having regard to the religion of the testatrix, it cannot be doubted that the general intention was the benefit of her soul, and of the souls of those connected with her, according to the well-known tenets of the Roman Catholic Church, and although, if I presided in a Court of Equity in England, I should be bound to declare such a trust or bequest, even though adequately expressed, to be void, yet in Ireland it is equally clear that such a bequest may be valid. Some years since, this question excited considerable atten-

tion, but I consider that it has been set at rest by the decision of Lord St. Leonards in the case of *Reade v. Hodgson* (7th Ir. Eq. Rep.); the same point was decided by Lord Manners in the case of *The Charitable Commissioners v. Walsh*, referred to in Mr. O'Leary's work on Charitable Bequests, page 65. Mr. Blackburne, also, when Master of the Rolls, decided that same point, and now the very serious questions arise, has a trust been impressed upon the bequest by the testatrix? and if so—2ndly, has it been expressed with sufficient certainty? is the language sufficiently definite and free from ambiguity, to enable the Court to give effect to it? The Court shall decide this second question in the negative. The next of kin will become entitled, for the bequest does not confer on Mr. M'Carthy a discretion so wide and so large as to relieve the gift from being a trust, and, therefore, Mr. M'Carthy could not successfully contend, and does not contend, that he is beneficially entitled. Now, in the case of *Briggs v. Newry* (3 Macn. & Gordon, 546) Lord Truro lays down the rule arrived at from a full consideration of the previous authorities, in the correctness of which rule I fully concur. At page 554, he thus speaks, "I conceive the rule of construction to be, that words accompanying a gift or bequest expressive of confidence, or belief, or desire, or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon three conditions—firstly, that they are to be used, as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; 2ndly, the subject must be certain; and thirdly, the objects expressed must not be too vague or indefinite to be enforced. If the trustee named cannot act according to the trust, on the ground that the gift is uncertain, the trust fails, and the next of kin must take. Regarding, then, the language of this will, the question is not what the testatrix might have expressed, but what she has expressed, and here I conceive that nothing can be more uncertain, indefinite, and ambiguous; her confidence is placed upon the recollection of Mr. M'Carthy to have certain things done, but does not direct or point out which is to be done to secure the welfare she had in view. There are not any words directing the application of the fund, or any part of it, to her welfare. Who can say that the testatrix did not mean the recollection of the deceased by Mr. M'Carthy in his own prayers? who can say whether she adverted to prayers, alms-giving, or other acts, which, according to the tenets of the Roman Catholic religion, might be considered to conduce to her spiritual welfare? so that, in this respect, there is room for the widest option or discretion on the part of the trustees.—See the case of *Ellis v. Selby* (1 Myl. & Craig, 298), where Lord Cottenham, referring to the case of *Williams v. Kenshaw*, decides that the words used by the testatrix created a trust, but a trust of so indefinite a nature, that it could not be carried into effect; the trust, therefore, failed, and the fund fell into the residuum. Lord Cottenham, in that case, declares that the direction is not as large as to relieve the gift from being a trust, but that it is too indefinite to be carried into effect. Again, are the words, "the spiritual welfare of me and mine," to apply to the living next of kin, or to the dead next of

kin. If she had said, "of the souls," &c., it would be more certain. In my opinion, it is impossible to give a certain meaning to the language used, and accordingly the third condition laid down by Lord Truro in *Briggs v. Renny* has not been complied with, viz., the objects expressed must not be too vague or indefinite to be enforced. The case of *Ommaney v. Butcher* (1 Turner & Russel, 270,) says that when a charitable purpose is general and indefinite, and when there is no trustee named by the will, the disposition is in the Crown by sign manual, that where there is a trustee, and the trust is such as the Court can execute, it will take upon itself the execution of the trust, but if the trust has not been effectually created, or fails, the next of kin take. It has been urged in argument that Mr. M'Carthy might now declare a trust. The case of *The Attorney General v. Dillon* (13 Ir. Ch. Rep.) has been referred to, but this course is not open, where the testatrix has taken upon herself to express her intentions in her will. In such case the result must be arrived at by reference to the will itself. It has also been argued that evidence of the special intentions might be given to explain the words of the bequest. If the ambiguity was latent, as, for instance, if the bequest was to build a "chapel," evidence might be given of the religious opinions of the testatrix to explain whether it was to be a Roman Catholic chapel, or a dissenting chapel; but the ambiguity in this will is of a different kind—it arises from the failure clearly to declare the wishes and objects of the testatrix. I have looked into, and considered the numerous authorities that have been cited; I need not refer to them here. I think they are all consistent with the opinion I have arrived at, and, however I may regret that the intentions of the testatrix should be disappointed, I have no option but to declare the next of kin entitled, costs of all parties to be costs in the matter.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

HANBURY v. JONES.—Nov. 3, 1863.

Practice—Compromise—Altering venue—Rescinding writ—Misprision.

Circumstances held to amount only to a negotiation pending, and not to a compromise.

Where a summons and plaint in ejectment was issued, the venue in the margin not being the county where the lands lay, and which was stated in the body of the writ; and on the same day the mistake was corrected without order of the Court and the writ revealed. Held—that the error amounted to a mere misprision, and that the correction of it without order did not vitiate the further proceedings in the action.

THIS was a motion on behalf of the defendant that the judgment in this cause and any *habere* issued thereon should be set aside, upon the grounds that said judgment was marked irregularly, in breach of good faith and by surprise; and also upon the ground

of irregularity, inasmuch as after the original writ of summons and plaint in the cause had issued, and passed the seal of the Court, the writ was altered and the venue therein erased, and another venue substituted and written on said erasure without having obtained any order for liberty to change the venue or amend the writ; and also upon the ground that no rule to proceed compromise off was entered before the making of said judgment. This motion was by way of appeal from an order of Judge Hayes made on the 2nd October, by which he refused a motion similar in its terms to the present. The action was one of ejectment on the title to recover certain lands described in the body of the writ of summons and plaint as "All that and those part of the lands of Rathfarnham, containing twenty perches statute measure, be the same more or less, which said premises form part of the premises now called Rose Villa, and are situate near Roundtown, in the parish of Rathfarnham, in the barony of Rathdown, in the county of Dublin." The writ was issued on the 10th of July, the venue in the margin being then stated to be "county of the city of Dublin." On discovering the mistake, the clerk of the plaintiff's attorney, on the same day and within a short time after he had issued the writ, and before the same left his possession or was in any way acted upon, changed the venue to the county of Dublin, and got the officer to re-seal the writ. The writ was served upon the defendant on the 17th July, the last day to plead to it being the 31st of the same month. Shortly after the issuing of the writ the defendant procured Mr. Molloy, of the firm of Molloy & Watson, to call upon the plaintiff's attorney to make terms; and on the 30th of July plaintiff's attorney wrote as follows to Molloy and Watson: "My client called since I had the pleasure of seeing you, and I mentioned what occurred; and he desires me to say if £2 10s. be paid for the costs, and 30s. towards the rent, he will take the stones for the balance; or he will take £4 for rent, provided the costs are paid. He is under the impression your client can pay all." Towards the close of the month the defendant called upon the plaintiff's attorney and explained to him that he had an agreement for a lease, and that the proceeding was groundless, whereupon the plaintiff's attorney stated he would see the plaintiff on the subject, and would not do anything further until Tuesday, the 4th August. On the 3rd August the defendant had another interview with the plaintiff's attorney, when certain terms were offered to the defendant and refused. The defendant then again procured Mr. Molloy to speak on his behalf to the plaintiff's attorney, which having been done, the plaintiff's attorney, on the 5th August, wrote to Molloy and Watson in the following terms:—"I have written to the plaintiff to get him to make an abatement in his rent, so as to have this case settled and to save your client further expense; so I have succeeded in getting his consent to take £2 10s. in lieu of rent, and £2 10s. costs; so will you communicate with your client, and let me know in the course of to-morrow if he will settle on those terms." After the interview of the 3rd August defendant employed his present attorney to prepare a defence for him. The defence was prepared and handed to the officer on the

5th August, but refused as too late; judgment was marked on the 6th. A notice had been sent on the 5th apprising plaintiff's attorney of the supposed irregularity in the change of venue, which had been discovered by defendant's attorney when he went to file his defence, but this notice did not reach plaintiff's attorney until after the judgment marked. There was some conflict of testimony as to whether the writ had been re-sealed on the 10th July; but on production of the book from the office it appeared that such was the case.

Dowse, Q.C. and *O'Neill* in support of the motion.—There was a compromise pending here—*O'Gorman v. Mahon* (1 H. & J. 259). Then the officer had no right to re-seal the writ without the order of the Court. The venue should not have been altered—*Freeman v. Kellett* (8 Ir. C. L. Rep. 92); Common Law Procedure Act, 1853, ss. 16 & 44; 40th G.O. *Sidney, Q.C.*, *contra*, was not called on.

LEFROY, C.J.—In this case, which is an appeal from my brother Hayes, several grounds of objection are advanced to his decision. It is said that at the time the judgment was marked there was a "compromise—a negotiation—pending, and that it was contrary to good faith to take any proceedings under those circumstances. Another distinct ground of objection is, that the writ under which the party proceeded was sealed by the officer contrary to law, and without authority. The first objection is founded upon a mistake of the meaning of the term "compromise." There was no compromise here: there was merely a negotiation. Then with respect to the effect of the negotiation, the letter of the 5th of August shews the other party had during the whole of the next day to say would he accede to the compromise; and that shews it was only matter of negotiation and not a compromise. But before twelve o'clock the next day he served a notice which put an end to the negotiation altogether and put the parties at arms' length. Therefore there was neither compromise pending nor breach of good faith; that then reduces the case to the other objection. The other objection, I think, has been rested upon in forgetfulness of the doctrine of common law as to misprision. By the common law, the clerk who issued the writ had a right, while it was within his power, to correct misprisions—mistakes—on the face of the writ, although he had sealed it, if after the correction he had resealed it, because then he had made it a legal document. Now, in this case the writ as it was issued—and I will take it as it was sealed—was a perfect nullity; for it was a writ of summons and plaint in ejectment, the venue being in the margin of the writ laid in one county, while in the body of the writ the lands were stated to be in another. That was an illegal document—a nullity; and it was the duty of the officer, in compliance with the paramount duty of every officer, not to allow such a document to issue. He had a right when he discovered the mistake to correct that document, which was a nullity on the face of it, and to set it right by the authority which the common law gave to every clerk of court to correct a mistake which appeared on the face of the writ, sealing it after the correction; so that the writ, when it went forth from the office should be according to law.

There is nothing in this case but the correction of a misprision, the venue in the body of the writ being right, and that in the margin being wrong; and the writ being so corrected, the officer re sealed it. It is not contended that the party had it, or used it, or attempted to use it before it was re-sealed. We have the record to shew us that when it issued it was as it ought to be. It is entered in the book with a correct venue; and on the face of the document there appears the re-sealing, for the original seal which is put to it is partly effaced by the additional seal; and so it appears now on the record, the book, which is the record, coinciding with the document which is produced to us, and corroborating everything which is stated. We therefore affirm the order on every ground.

O'BRIEN, J.—I concur, but I confess to have some difficulty—though in this case the alteration is a merely technical one—on the question, whether the writ can be altered without leave once it has been sealed.

FITZGERALD, J.—I desire to say that I concur in the observations of my Lord Chief Justice, and that I think the judgment is correct. I think the order made right so far as regards the alleged irregularity in the alteration of the writ. The description of the premises is rightly stated in the writ as “near Roundtown, in the parish of Rathfarnham, and county of Dublin;” and the 196th section of the Common Law Procedure Act requires that in actions of ejectment the venue shall be laid in the county where the lands are situated. When the writ was presented to the officer the lands here were in the body of the writ, correctly stated to be in the county. The misprision was in the venue in the margin, which ought to have been corrected at the moment. It is not corrected at the moment; but that same day, and before it leaves the hands of the clerk, he discovers the misprision, and goes back to have it corrected. And we must hold that that was done on the same day; for we must take it on the book that the correction of this mere misprision was on Friday, the 10th July; and viewing it in that light, there being no alteration in the record itself, it being made on the same day by the officer, this misprision being apparent on the face of the writ itself, the error is corrected in the writ itself, and by way of security the officer re-seals it. While I wish to express myself strongly on the alteration without order of writs which have issued, I think this is not an alteration of a writ but the correction of a mere misprision done on the same day as part of the same transaction, and accordingly I think the order of my brother Hayes right on this ground. On the other ground also I think it was correct, as I do not consider there was any compromise here at all. As I read it, a representation was made by Messrs. Molloy & Watson for the defendant; and a suggestion was made that the plaintiff should take less than the full amount due to him. That appears by the letter of the 30th July, followed by that of the 5th August. It is plain that the plaintiff was willing to accept less; and it is quite new to me that there is a compromise, because the defendant offers to pay less than he owes.

Motion refused, with costs.

[CORAM LEFROY, C.J., HAYES, AND FITZGERALD, JJ.]

CONWAY v. RICHARDSON.*—Nov. 17, 1863.

Case stated by magistrates—Striking out—Costs.

Where a case stated by magistrates was struck out, it not having been transmitted, and notice of it not having been served as required by the statute, the Court refused to give costs against the appellant.

THIS was a case stated by the justices of Tyrone under the 20 & 21 Vic. c. 43.

Fetherston H. Lowry moved on notice that the case stated should be struck out of the Crown paper on the grounds that the appellant had not served the respondent with a notice and a copy of the case stated within three days after receiving it from the justices, and had not within three days transmitted the case to the Court. The affidavits of the respondents and the petty sessions clerk of Cookstown deposed that the justices signed the case on the 24th of October, that by the direction of the appellant it was forwarded by post, and the letter registered, to the attorney, who must have received it on the 26th. The respondent was not served with the notice or copy of the case until 2nd of November; and on the same day the officer of the Court received the case. Counsel cited *Morgan v. Edwards* (5 Hur. & N. 415); *Woodhouse v. Woods* (29 Law J., M. C., 149).

M. Causland, Q.C.—The Court having struck out the case from want of jurisdiction, cannot give costs—*Fraser v. Fothergill* (14 C.B. 298).

F. Lowry, contra.—The appellant by transmitting the case has brought himself within the jurisdiction; and per Alderson, B., in *Peters v. Shannon* (10 M. & W., p. 214), every person who comes before a Court is liable to the jurisdiction of the Court as to costs. But the cases of *Carr v. Stringer* (1 E. B. & E. 125), and *Regina v. Padwick* (8 E. & B. 701), are clearly in point, that where a case has been dismissed for want of jurisdiction the Court has power to give costs. *Fraser v. Fothergill* is clearly distinguishable. The Court never had any jurisdiction, and the respondent had done nothing to bring him within the jurisdiction.

LEFROY, C.J.—Strike out the case; the Court says nothing about costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

HASTINGS v. THE LOWER BANN NAVIGATION TRUSTEES.
April 29, 30, 1863.

Demurrer—Mandamus—Damage to several fishery.

A summons and plaint recited certain Acts of Parliament and awards made in pursuance of them by the Commissioners of Public Works, by which the Lower Bann Navigation and all locks, weirs, &c., thereto belonging, were made to vest in the defendants as a body corporate; and by which powers to levy tolls in respect of the use of the navigation,

* Ex relatione.

and to make bye-laws and prosecute and enforce penalties against persons who would obstruct the free passage of the water were conferred. It then stated that the plaintiff was entitled to the exclusive right of fishing for eels in a portion of the Lower Bann River, within the jurisdiction of the defendants, and complained that the navigation was obstructed by stakes and poles, and that the channel and navigation had been frequented by poachers who obstructed the plaintiff's fishermen and intercepted the eels. The plaintiff claimed a writ of mandamus to compel the defendants to remove the stakes and poles to be removed. Held, upon demurrer by the defendants, that the summons and plaint disclosed no cause of action against the trustees and no grounds entitling the plaintiff to a writ of mandamus.

THE summons and plaint complained that by a certain Act of Parliament passed in the session of Parliament holden in the 18th and 19th years of her Majesty Queen Victoria, chapter 110, after reciting certain Acts of Parliament previously passed concerning the drainage of lands in Ireland, and the improvement of navigation connected therewith, and that in connexion with such drainage of lands in certain districts, the four several navigations therein-after mentioned had been undertaken and in part executed under the provisions of certain of the said recited Acts, that was to say (amongst other navigations), "In the district of Lough Neagh, situate in the Counties of Antrim, Derry, Tyrone, Armagh, and Down, the navigation of the Lower Bann River, from the bridge of Coleraine in the tidal part of the said river to Lough Neagh, and extending thence to the first lock or entrance of the Lagan, Newry, Ulster, and Coalisland Canals;" and after further reciting that free grants to the amounts therein mentioned had been theretofore made by the authority of Parliament for the purposes of the said navigations, and that it was expedient to make further provision by way of free grant for the completion of the said navigations respectively, it was, amongst other things, enacted, that it should be lawful for the Commissioners of her Majesty's Treasury, out of the monies therein mentioned, to issue such sum as might be necessary towards defraying the expenses incurred in respect of the several navigations aforesaid, and towards the completion of the same as therein mentioned, and that the said Commissioners of the Treasury might authorise and direct the Commissioners of Public Works to cause to be completed the said navigation works, or such of the same or such portions of them as therein mentioned, and with any modifications or alterations as therein mentioned; and that it should be lawful for the Commissioners of Public Works, by and with the consent of the Commissioners of her Majesty's Treasury, by warrant under the hands of the said Commissioners of Public Works, or any two of them, from time to time to direct that the said navigations, or any of them, with the tolls thereof, should be deemed and become the public property of the county or counties, if more than one, in which respectively the lands chargeable under the award in relation to the navigations respectively are situate, and that from and after the date of

any such warrant, such navigation, together with all locks, weirs, and other works, rights, members, and appurtenances thereto belonging, should be deemed and taken to be the public property of such county or counties as aforesaid, and be held, maintained, and preserved by the grand jury or juries of such county or counties, with such powers and authorities, and subject to such provisions and regulations as might thereafter be established by Parliament in relation thereto. And whereas afterwards, by a certain Act of Parliament passed in the session of Parliament holden in the 19th and 20th years of her said Majesty, chapter 62, intituled, "An Act to provide for the Maintenance of Navigation made in connexion with Drainage, and to make further provision in relation to Works of Drainage in Ireland," after reciting the Act of Parliament first herein-before mentioned, and that three of the navigations therein mentioned (including the said navigation in the district of Lough Neagh aforesaid), with certain modifications or alterations directed under the said Act, had been or shortly would be completed; and after reciting further that it was expedient to provide for the due and proper maintenance and regulation of the said navigations, and for that purpose that such navigations should be vested in trustees as therein-after provided, it was enacted, amongst other things, that the said navigation in the district of Lough Neagh should for the purposes of that Act (being the Act now in recital) be divided into two navigations, and one of such navigations should be called "Lower Bann Navigation," and should consist of the portion of the said navigation in the district of Lough Neagh next therein-after described (that is to say), the portion of the said navigation which extends from the bridge of Coleraine in the tidal part of the River Bann to Lough Neagh in the Counties of Londonderry and Antrim respectively, including that part of Lough Neagh situate in the said last-mentioned counties according to the boundaries of the said counties through the waters of the said Lough as laid down in the ordnance survey; and it was further enacted that the said Lower Bann navigation, and the other navigations therein mentioned, together with all locks, weirs, and other works, rights, members, and appurtenances thereunto belonging, should, by virtue of the said Act now in recital, and from the date of the award of the said Commissioners of Public Works under the said Act first herein-before mentioned in relation thereto, vest in the trustees for the time being incorporated under the said Act (now in recital) for such navigation, for the use of the counties, townlands, and townlands, chargeable under such award, and should be held, maintained, and preserved by such trustees subject to the provisions contained in the Act now in recital; and it was further enacted that the works to be vested in the aforesaid trustees of the said navigations respectively under the said Act (now in recital) should be the works described in that behalf in the award of the said Commissioners of Public Works, and the works (connected with such navigations respectively) for the maintenance whereof, as works of drainage trustees were to be appointed under the several Acts therein referred to should be the works described in that behalf in the

award of the said Commissioners of Public Works, and it was further enacted that certain persons therein named should be the trustees of the said Lower Bann navigation, and that the trustees for the time being of such navigation should be a body corporate by the name and style of "The Lower Bann Navigation Trustees," and by that name have perpetual succession and a common seal, and the said Act now in recital contained certain powers and provisions enabling the said trustees therein mentioned respectively (including the said Lower Bann Navigation Trustees), from time to time, and at all times thereafter, to demand, receive, levy, and take, for and in respect of the use of the navigation of which they should be trustees, certain rates and tolls therein mentioned; and it was further enacted that the income which the said trustees should receive for or in respect of any tolls or other rates to be imposed and levied under the Act (now in recital) should be applied in the first instance in paying certain salaries and expenses therein mentioned, and the expenses attending or incident to the maintenance of the works of the navigation of which they should be trustees, and all other expenses attending the conservancy of such navigation, and that all expenses of and incident to the maintenance and conservancy of each of the said navigations, should (so far as the same might not be defrayed out of the income aforesaid) be borne and paid by such counties, baronies, and townlands, and parts thereof respectively, and in such proportions as by the award of the said Commissioners of Public Works should be in that behalf provided. And the said Act now in recital contained certain provisions enabling the monies requisite for the expenses aforesaid to be raised from time to time by grand jury presentments, and to be paid to the said trustees respectively, and also certain provisions for enabling the trustees of the said several navigations respectively, from time to time, and at all times thereafter, to make bye-laws for regulating the conduct and management of their business, and the conduct of all officers, workmen, and servants employed by them, and for the well and orderly using and preserving the navigation of which they should be trustees, and the off-branches thereof respectively, and the banks, basins, reservoirs, tunnels, locks, sluices, and all other works thereto respectively belonging, and for regulating the passing and re-passing of all ships and boats, lighters, barges, and other vessels, and the carrying of all goods and commodities, and for the orderly behaviour of all seamen, boatmen, watermen, bargemen, and others, who should navigate such ships, boats, barges, lighters, or other vessels, and for the superintendence, management, and conservation of the said navigations respectively, and their off-branches, in all other respects whatever, and from time to time to alter or repeal all or any of such bye-laws, and to make others, and to impose fines and penalties as therein mentioned upon all persons offending against any of such bye-laws, which fines and penalties are thereby made recoverable on summary conviction; and by the said Act now in recital, the said trustees of the Lower Bann Navigation were and are authorized and empowered to prosecute to conviction, and to enforce penalties against any persons who should (amongst

other offences) throw or deposit any ballast, gravel, or other matter or thing, so as to interrupt or obstruct the free passage of water or vessels into, through, or in the said navigation, or do any other damage to the said navigation; and it was further enacted that nothing in the said statute now in recital contained should be deemed, construed, or taken to affect, prejudice or diminish any estate, right, title, or interest of the Most Noble the Marquis of Donegal, his heirs or assigns. And the plaintiff further saith that afterwards the works necessary for the improvement of the navigation in connection with drainage in the district of Lough Neagh aforesaid, were duly completed pursuant to and by virtue of the provisions in that behalf of the several Acts of Parliament hereinbefore mentioned, and afterwards, by a certain award of the Commissioners of Public Works in Ireland, made and executed in writing under the hands and seals of two of the said commissioners, bearing date the 18th day of February, 1859, in due form, and pursuant, and in exercise, and by virtue of the provisions, powers, and authorities of the aforesaid statutes in that behalf, and made of and concerning the navigation undertaken in connection with drainage in the district of Lough Neagh aforesaid, it was declared that they, the Commissioners of Public Works in Ireland, acting in the execution of the said Acts, did make that their final award as follows, that was to say, that the said navigation which had been so made and improved consisted of two divisions, *videlicet*, the one of such divisions called the Lower Bann Navigation, extending from the bridge of Coleraine in the tidal part of the said River Bann to Lough Neagh in the Counties of Antrim and Londonderry respectively, including that part of Lough Neagh situate in the said last-mentioned counties, according to the boundaries of the said counties, through the waters of the said Lough as laid down in the ordnance survey, and the other division of the said navigation extending and situate as therein particularly described, and that the works connected with the said navigation were the works appearing and set forth in the map or plan signed by the said Commissioners of equal date therewith, and to be enrolled in the Rolls Office of her Majesty's High Court of Chancery in Ireland, and in the Schedule marked B. to the said award annexed, and the said Commissioners, by their said award, in pursuance of the provisions of the said Acts, and in conformity with the directions of the said Commissioners of the Treasury given to them as therein stated, did specify, order, and award a certain sum therein mentioned to be charged as the costs and expenses of the said navigation, and that the counties, baronies, and townlands, liable to the payment of the said sum were those in the Schedule "A." to the said award annexed respectively mentioned; and they further awarded that the said sum should be presented and paid by the grand juries of said counties respectively in certain proportions as therein mentioned, and should be charged upon and levied thereout; and they further awarded and directed that all expenses of and incident to the maintenance and conservancy of the said Lower Bann Navigation (so far as the same might not be defrayed out of the income thereof) should be charged upon, borne, and paid by the

townland, and baronies in the said Schedule mentioned in manner by said award set forth; and the said Commissioners of Public Works did further, by their said award in pursuance of the provisions of the said Acts, state, and specify, and award that the works executed in the said district connected with the said navigation, the maintenance whereof as works of navigation was to be vested in and undertaken by the Trustees of the Lower and Upper Bann Navigations respectively, were those respectively mentioned in the said Schedule B. to the said award annexed; and the plaintiff further saith that the said Schedule B. to the said award annexed is described in the heading or title thereof in the words and figures following, that is to say, "referred to in the foregoing award," showing the works executed in the said district, the maintenance whereof as works of navigation is to be vested in and undertaken by the Lower Bann Navigation and the Upper Bann Navigation Trustees respectively appointed under and by virtue of the Act, 19th and 20th Victoria, chapter 62, and under the heading or title of "Lower Bann Navigation" in the said schedule, are contained, amongst other things, the words and description following, that is to say, "The entire channel of the Lower Bann River, as improved from the bridge of Coleraine to Lough Neagh, except as therein mentioned," and also the words and figures following, that is to say, "The channels excavated to navigation depth through the several shoals and fords on the Lower Bann are of the following breadths at Brecarte and Toome, 60 feet." Guide piles are fixed to mark the channels through these shoals, wherein the depth of water is from six to eight feet at ordinary summer level, which stands about eight feet on the sills of the several locks; and the plaintiff further saith that, afterwards, by a further award of the said Commissioners of Public Works, made and executed in manner aforesaid, bearing date the 4th day of April, 1859, in due form, and pursuant to, and in exercise, and by virtue of, the provisions, powers, and authorities of the said statutes in that behalf, and made of and concerning drainage and water power in the said district of Lough Neagh, they, the said Commissioners, did award and state (amongst other things) that the works which had been completed for the drainage and improvement of the lands therein mentioned within the said district (including those for navigation and works in connexion therewith) were the several works mentioned in Schedule B. to the said award annexed, and by the said Schedule the said works so executed in the Lough Neagh district are described as consisting of (amongst other things) the improvement of the channel of the Lower Bann River, from the cutts of Coleraine to Lough Neagh, by excavations of channels through the shoals, at (amongst other places) Lough Beg, Brecarte, and Toome, construction of two stone moles, 800 yards long each, at South Bar of Lough Beg, also excavations of weir basins at site of each weir, also erection of piles to mark sailing channel where necessary, through Lower Bann and Lough Beg, and also erection of sundry other works and operations incidental to and necessarily connected with the aforesaid works; and the plaintiff further saith, that from and after the making of the said award first herein-

before mentioned, the said Lower Bann Navigation, together with all locks, weirs, and other works, rights, members, and appurtenances thereunto belonging, became, and ever since continued, and now are, by virtue of the said herein-before mentioned statute in that behalf, vested in the defendants, being the Lower Bann Navigation Trustees by the said statute constituted and incorporated as aforesaid; and the defendants, from and after the making of the said award, accepted and took upon themselves the duties, trusts, and responsibilities, and the exercise of the powers and authorities intended to be vested in such trustees by the said statutes and awards respectively, and have since so continued, and have ever since been, and now are, in the enjoyment and receipt of the income, tolls, rates, funds, and monies thereby provided for the purposes of their said duties, trusts, powers, and authorities, and with notice of all and singular the matters and things aforesaid; and the defendants, after the making of the said first-mentioned award, made certain bye laws and regulations concerning the said navigation by virtue of their powers in that behalf as aforesaid, and afterwards, to wit, on the 1st day of July, 1860, caused a notice in writing to be published and circulated under their authority in the said district, that the navigation had been opened from Lough Neagh to Coleraine, since which time the said navigation has continued professedly open, but nevertheless with such obstructions and encroachments as herein-after mentioned; and the plaintiff further saith, that at and before the time of the opening of the said navigation as aforesaid, the plaintiff was, and has since continued, and now is, entitled to all the eel fishery and the exclusive right of fishing for and taking eels in, over, and through that part of the Lower Bann River between the bridge of Coleraine and Lough Neagh aforesaid, which runs, flows, and extends from the eel weirs next above and to the south of the New Cutt unto the Salmon Leap at Coleraine, and which, according to the course of the said river, is below Toome Bridge and the places known as the Toome Fisheries; and the plaintiff was and is entitled as aforesaid, as tenant of the said fisheries under the Most Noble the Marquis of Donegal, who, and his ancestors, have been from ancient times hitherto the sole and exclusive proprietors in fee-simple of the fisheries along the whole navigation whereof the defendants are the trustees; and the plaintiff, as such tenant as aforesaid, renders and pays for and out of his said fishery to the said Marquis a large yearly rent, to wit, £300; and the plaintiff, for the reasons aforesaid, has been during all that time, and still is, personally interested in the maintenance and conservation of the navigation of the said Lower Bann River as improved and effected by the said Commissioners as aforesaid, not only over those parts of the river over which the plaintiff's said right of fishing extends, but also at those parts higher up the river, to wit, where the Toome Fisheries subsist, and which parts also are situate between the bridge of Coleraine and Lough Neagh aforesaid; and the plaintiff was and is personally interested in this, that no obstruction should exist in the channel above the plaintiff's fishery which would restrict, impede, or intercept the free passage down the river towards the plaintiff's boats and nets

of the fish which the plaintiff is entitled to take and catch in his fishing as aforesaid; and the plaintiff is personally interested in this, and is entitled to this, that the channel of the said river along its length from Lough Neagh to the bridge of Coleraine aforesaid, and to the full breadth specified in that behalf by the said several awards, should be and be maintained by the defendants open, navigable, and free from obstruction, and should not be frequented or used by poachers, trespassers, and others, for unlawful purposes, so as to prejudice the plaintiff's rights as aforesaid; and also that the plaintiff, his fishermen, servants, boats, nets, and implements of fishing, while lawfully engaged and employed in and about the said fishery of the plaintiff, should be by the defendants kept protected from all violence, injury, damage, and hindrance on the part of such persons as aforesaid or otherwise however, and during all that time it was, and it now is, the duty of the defendants, pursuant to the provisions of the several statutes and awards aforesaid, to maintain and conserve at all times the navigation of the said Lower Bann River as improved and effected as aforesaid at all parts thereof between Lough Neagh and the bridge of Coleraine, and to take care and procure that the channel of the said navigation above the plaintiff's said fishery to the full breadth so specified as aforesaid, to wit, 60 feet, should be, and continue, and be maintained at all times open and free from obstruction and impediment, and should not be frequented or used by poachers, trespassers, or other persons, for unlawful purposes, so as to prejudice the plaintiff's rights in relation to his said fishery; and it was and is also the duty of the defendants at all times to protect the plaintiff, his fishermen, servants, boats, nets, and implements of fishing, while lawfully engaged and employed as aforesaid, from all violence, injury, damage, and hindrance, on the part of such persons as aforesaid, and, if necessary for any of the purposes as aforesaid, to make suitable and proper bye-laws and regulations under their authority in that behalf as aforesaid; that the defendants always had notice, but nevertheless, the defendants, during all that time, neglected to maintain and conserve the said navigation as aforesaid, and did not take care or procure that the channel thereof to the full breadth aforesaid should be, and continue, and be maintained open and free from obstruction and impediment, nor that the same should not be frequented or used by poachers, trespassers, or other persons as aforesaid, nor did the defendants at all protect the plaintiff, his servants, boats, nets, and implements of fishing in manner aforesaid, and as it was their duty to do, but on the contrary, the defendants acted so negligently and wrongfully in the performance and discharge of their duties aforesaid, that from time to time during all that period the navigation of the said Lower Bann River was, and now is, obstructed and impeded at various places thereof (to wit, at the eel weirs in Mr. Meehan's possession, and at the eel weirs to the south of the New Cut at Brecarte aforesaid), and the due breadth of the channel as the same ought to be, free and navigable as aforesaid, was and is greatly narrowed, restricted, and confined by divers piles, stakes, poles, timbers, ropes, nets, and other implements of obstruction, being fixed, set, erected, stretched, and

kept in, upon, through, and across the said channel at various places as aforesaid; and the said channel and navigation have been from time to time frequented and used by poachers, trespassers, and other persons, for unlawful purposes, with boats and implements of fishing and of obstruction, and have been by them unlawfully obstructed, and the persons aforesaid have frequently committed violence, and done injury and damage to and obstructed the plaintiff's fishermen, servants, boats, and fishing implements, while lawfully employed and used in and about the plaintiff's fishery aforesaid, and from time to time have unlawfully intercepted and taken large quantities of eels, which otherwise the plaintiff of right would have taken in and by his said fishery, and by reason of the premises, and of the neglect of duty of the defendants as aforesaid, the plaintiff has lost and been deprived, and still is deprived, of the due gains and profits of his said fishery, and has wrongfully suffered and incurred divers injuries, damages, and expenses, in the premises, of all which the defendants frequently had notice, and they were frequently requested by the plaintiff, and in particular by certain notices in writing, dated respectively the 5th day of September and the 13th day of October, 1862, to redress the said grievances and perform their duties in the premises, as they always had, and still have, the means, power, and authority to do under and by virtue of the said several statutes, awards, and bye-laws, and yet the defendants have refused, and still do refuse, to comply with such requests, to the plaintiff's damage of £500, and therefore he brings his action; and the plaintiff also, by reason of the premises, claims a writ of *mandamus* to command the defendants to cause to be removed and henceforth discontinued all obstructions by stakes, piles, poles, timbers, ropes, nets, and other implements, in, through, upon, or across the channel of that part of the Lower Bann River running and flowing between Lough Neagh and the bridge of Coleraine aforesaid, and moreover henceforth to maintain and conserve the said channel and the navigation thereof open, free, and unobstructed, according to the full breadth, and in as full and ample manner in all respects as the said channel and navigation were cleared, excavated, and improved, under and pursuant to the several statutes in that behalf, and as the same ought to be maintained and conserved pursuant to the same statutes and the several awards aforesaid. To this the defendants demurred, on the grounds that the summons and plaint did not disclose any cause of action good in substance, because, amongst other reasons, that no facts were stated in said summons and plaint to show the existence of the alleged duties on the part of the defendants alleged in said summons and plaint, nor was any legal injury or legal special damage resulting to the plaintiff, or which might result to the plaintiff from the non-fulfilment or neglect by defendants of said duties shown by the said summons and plaint, nor any duty on the part of the defendants shown by the said summons and plaint in the fulfilment of which the plaintiff was personally interested within the meaning of the statute in that case made and provided, for the breach or neglect of which the plaintiff would be entitled to claim a writ of *mandamus*, nor was any breach of any such duty shown

by the said summons and plaint, nor was any interest personal to the plaintiff in the fulfilment of any such duty within the meaning of the said statute shown by the said summons and plaint, and also for that no wrongful act, neglect, or default on the part of the defendants was shown by said summons and plaint to entitle the plaintiff to such writ, nor to shew the existence of the interest personal to the plaintiff as alleged in the summons and plaint, and also because the said summons and plaint claimed to recover damages from the defendants for the alleged wrongful acts of third parties for whom the defendants were not shown or alleged to be responsible, or with whom they were therein alleged to be in privity, and also claims damages for alleged loss of profits in the plaintiff's eel fishery, which was not shown to have, nor could same have, any connection with the navigation of which the defendants were trustees, nor was any sufficient demand or refusal of performance of the alleged duties mentioned in said summons and plaint shown, nor had the plaintiff pleaded or alleged any facts to show he was entitled to the writ of *mandamus* therein claimed, or to sustain the present action, and because the said summons and plaint was otherwise repugnant, insensible, and insufficient.

D.R. Pigot (with him *Jay, Q.C.*) for the demurrer, cited *Vicars v. Wilcocks* (2 Smith's L. C. 461; *Walker v. Gos* (3 H. & N. 395, and 4 H. & N. 350); *Hoey v. Felton* (11 C. B., N. S. 142); *Caledonian Railway Company v. Ogilvy* (2 Macqueen's Cases, 229).

Dowse, Q.C., and *Phillips*, in support of the summons and plaint, cited *Buller's Nisi Prius*, 264, a; *Parnaby v. Lancaster Canal Company* (11 A. & E. 223); *Mersey Dock Board v. Penhallow* (7 H. & N. 329); *Wells v. Watling* (2 Wm. Blackstone, 1233); *Hobson v. Todd* (4 T. R. 71); *Patrick v. Greenway* (1 Wm. Saunders, 346, b); *Woolrych on Waters*, 239; *Wood v. Wand* (3 Exchequer R. 748); *Rochdale Canal Company v. King* (14 Q. B. 122); *Bouver v. Hill* (1 Bingham, N. C. 549); *R. v. Bristol Dock Company* (9 Dowl. & Ry. 309); *Hamilton v. Marquis of Donegal* (3 Ridgeway's Parl. Cases, 267); *Broom's Legal Maxims*, 771; *Reedie v. London and North Western Railway Company* (4 Exchequer R. 244); *R. v. Moore* (3 B. & Ad. 184).

Jay, Q.C., in reply, cited *Dimes v. Petley* (15 Q. B., 276); *Duncan v. Findlater* (6 Cl. & Fin. 894); *Dobson v. Blackmore* (9 Q. B. 991).

May 2.—*MONAHAN, C.J.*, stated the nature of the case.—Our jurisdiction in *mandamus* is, of course, much more restricted than the prerogative jurisdiction of the Crown side of the Queen's Bench. Duties are imposed on these trustees, and if a proper case were made out, a *mandamus* might properly be granted against them. Clearly, the object of the plaintiff is, not to undo anything which the trustees have done since their appointment, but to compel them to make alterations in the state of the navigation from what it was when they first became trustees. There is no allegation here that the boats of the plaintiff, or of any other person, are impeded in navigation, or that the upper weir interfered with the plaintiff's rights. As to the poachers, of course he cannot proceed against the trustees in respect to them. The allegation in truth is, that by an omission on the part of the trustees, the

plaintiff's fishery is not improved. There is no authority for this, and on the whole of the case, we are of opinion that this demurrer is well founded.

Judgment for the defendants.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

CUFFE v. HOLMES AND OTHERS.—Nov. 27.

Action of ejectment for non-payment of rent—Pleading—Embarrassing defence.

To an action of ejectment for non-payment of rent, the defendant pleaded, "That before this suit the plaintiff issued a summons and plaint out of the Court of Common Pleas in Ireland against the defendant in an action of ejectment for non-payment of rent for the same lands as in the summons and plaint herein mentioned, and the plaintiff and the said defendant were respectively plaintiff and defendant in said former suit, and that the said former suit was still depending."

Defence set aside on the ground that it was not averred that the rent for the nonpayment of which the present action was brought was the same as the rent claimed in a pending action.

THIS was a motion to set aside the defence to an action of ejectment for non-payment of rent as embarrassing, on the grounds that a plea of pendency of a former action was not capable of being pleaded in an action of ejectment for nonpayment, and also in not stating that the cause of action in the present case is the same, and no other or different cause of action than in the former suit. The summons and plaint was as follows: "The defendants are summoned to answer the complaint of Harriet Cuffe, who complains that the defendants hold All That and Those that part of the lands of Gortrush and Kilmore containing, by a survey thereof made by T. Elliott, five acres, or thereabouts, and fifteen perches, Irish Plantation measure, be the same more or less, in the parish of Dromore, barony of Armagh, in the County of Tyrone, as tenants to the plaintiff under a lease, at the yearly rent of £13, and that the sum of £45 10s., being for three years, and one-half year of such rent due and ending on the 1st of May, 1863, is due to the plaintiff, and therefore the plaintiff prays judgment against the defendants to recover the possession of the said lands and premises. Therefore," &c. To this plaint the defendant pleaded the following plea:—"Robert Holmes, one of the defendants, and tenant to the lands and premises mentioned, appears and takes defence, and says that before this suit the plaintiff issued a summons and plaint out of the Court of Common Pleas in Ireland against the said Robert Holmes and others, in an action for ejectment for non-payment of rent for the same lands as in the summons and plaint herein mentioned, as by the records and pleadings thereof remaining in the said Court appears, and the plaintiff and the said Robert Holmes were respectively plaintiff and one of the defendants in the said former suit, and the said for-

mer suit is still depending in the said Court, and therefore he defends the action.

Dowse, Q.C., (with him *William Irvine*) now applied to set aside the defence, on the grounds that no such plea was pleadable in an action of ejectment for nonpayment of rent, and if it were that it was not in this case properly pleaded, inasmuch as the plea did not allege that the cause of action in the present action was the same and no other, nor different from the cause of action in the former. In support of the latter proposition, counsel cited *1 Saunders on Pleading* under the head of pendency of a former action, p. 21. In support of the former proposition, he cited *Doe v. Langdon v. Langdon* (3 B. Ad. 864), and various authorities referred to in *Cole on Ejectment*, 77-78. The proper course for the defendant to have adopted was by motion to the Court to stay proceedings.*

Hazlet in support of the plea.—It is not necessary that there should be a specific averment in the plea that the pending action was brought for the "same causes of action" as the present one; it is sufficient if the plea does so in substance. The gist of an action of ejectment for non-payment of rent is the recovery of the possession of the lands; it is averred here that the lands are the same. It is said in *Bacon's Abridgment*, tit. Abatement, M., wherever it appears the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate—*Comyn's Digest*, tit. Abatement, H. 24.

Fitzgerald, B.—The cause of action is the forfeiture arising from the non-payment of the rent; it is not averred that the rent was the same. Set aside the defence with costs, but set off the costs of the pending action against the costs of the present proceedings.

GIBBONS v. CUSACK.—Jan. 16.

[CORAM PIGOT, C.B., FITZGERALD, HUGHES AND DEASY, BB.]

Pleading—Action for breach of promise of marriage—Plea of justification; immorality of plaintiff, not stating with whom the acts were committed, set aside.

To an action for breach of promise of marriage the defendant pleaded "that the defendant made the said agreement upon the faith and under the belief that the plaintiff had always been and then was a chaste and modest woman, and of correct habits and conduct, and of good character and reputation, whereas the plaintiff, before and at the time of the making of the said agreement in plaint mentioned, was a woman of unchaste and immodest behaviour, and of incorrect and immoral habits and conduct, and of bad character and reputation, which the defendant first discovered after making the alleged agreement, and before the alleged breach thereof." Held that the allegation of unchastity, immodest behaviour, and immoral habits, were too general accusations, and that the plea should have stated the names of the persons with whom the acts of unchastity were committed.

This was an application to set aside the second para-

graph of the defendant's defence as embarrassing. The summons and plaint was for breach of promise of marriage, and complained "that the plaintiff and defendant agreed to marry one another, and a reasonable time had elapsed, and the plaintiff has been always ready and willing to marry the defendant, yet the defendant had neglected and refused to marry the plaintiff to the plaintiff's damage," &c. To this plaint the defendant filed two defences; the first, a traverse of the agreement to marry each other; the second plea was as follows:—"And for a further plea in this behalf the defendant says that the defendant made the said agreement upon the faith and under the belief that the plaintiff had always been and then was a chaste and modest woman, and of correct habits and conduct and of good character and reputation, whereas the plaintiff before and at the time of the making of the said agreement in the said writ and summons and plaint mentioned was a woman of unchaste and immodest behaviour, and of incorrect and immoral habits and conduct, and of bad character and reputation, which the defendant first discovered after making the alleged agreement, and before the alleged breach, and therefore," &c. The grounds upon which the defence was sought to be set aside were, that it did not disclose the names of the persons with whom defendant alleges that plaintiff was guilty of immorality; and that the charges in said defence mentioned were too vague; and that no proper issue could be taken on them.

Devitt in support of the motion.—The defence is faulty in not disclosing the names of the parties with whom the acts of unchastity were committed. In *Godfrey v. Cross* (12 Ir. C. L. 333), which was an action for libel in imputing misconduct to the plaintiff, a medical officer of a dispensary district, the defendant pleaded a plea of privileged communication, setting forth that he was a poor-law guardian, and that he made the communication (the subject matter of the libel) to the poor-law commissioners in his capacity of guardian, *bona fide*, &c. And the plea alleged that this plea was founded upon information obtained from "certain trustworthy persons." The plea was set aside as embarrassing, as not containing the names of the persons from whom the information was received—*J'Anson v. Stuart* (1 T. R. 748) was also an action for libel. The same doctrine is laid down in *Baddley v. Mortlock* (1 Holt's Rep. 151) decides that in an action for breach of promise of marriage when the defence relies on the bad character of the plaintiff, proof of the bad character must be given, and mere rumour is not sufficient. Bad reputation goes in mitigation of damages, but is no bar to the action. The names must be given, otherwise the defendant must be prepared with evidence as to her course of conduct all through her life. The rules of pleading are positive that when acts of unchastity are given, the names of those parties with whom the acts were committed must be given, or it must be alleged that the persons with whom the acts were committed are to the defendant unknown. The pleading should have averred that the parties were to defendant unknown, as it might have followed the plea in *Young v. Murphy* (3 Bing. N. C. 54, & 2 Hodges, 147) or the precedent given in *Pearson's Chitty*, 362, 2nd ed. noted.

* See also the case of *Williamson v. Bluel* (81 L.J. Ex., 131

M'Mahon contra.—This plea is correct and follows the precedent in *Bench v. Merriok* (1 Car. & K. 463, 464); *Foulkes v. Selway* (3 Esp. 235); *Irving v. Greenwood* (1 Car. & P. 350). It would be absurd to say that we are obliged to give all the names of those with whom the acts of immorality were committed. [*Pigot, C.B.*—It is held to be necessary to specify in a plea of justification to an action of slander the specific acts upon which the defendant relies.] [*Fitzgerald, B.*—Does not the rule in slander which requires the defendant to state the specific acts bear still more strongly in pleas justifying breach of promise of marriage, where in fact the plaintiff cannot be her own witness?] There is this distinction: that the defendant in libel is guilty of a criminal act in publishing the libel. It is not requisite to declare the names in our plea of justification—*Noden v. Johnson* (16 Ad. & E., 218). [*Pigot, C.B.*—Is not this a case of great injustice. If a lady be engaged to a man to be married, and the marriage put off for a time, that afterwards on the eve of the marriage being solemnized, rumours wrongfully and maliciously got up of the lady's want of chastity reach the man's ears, would it not be cause of great hardship that those imputations could be pleaded to an action of breach of promise of marriage without disclosing who the parties were?] The case of *Noden v. Johnson* is in point.

Devitt in reply.—*Foulkes v. Selway* decides only that evidence of reputation is allowable in mitigation of damages, *Jones v. Stephens* (11 Price, 235) the marginal note says "that pleas by way of justification generally aspersing the character of the plaintiff by averments, without stating particular acts of bad conduct apposite to the justification, are not only demurrable but ought to be demurred to, as due to the court and to the judge before whom the action is to be tried."

Jan. 19.—*Pigot, C.B.* [reads the plea and defence].—This is an application to set aside the defence on the grounds that the defence imputes unchastity, immodest behaviour, immoral habits and conduct; and further, that plaintiff was a person of bad character and reputation. With respect to unchastity, the proper proof is to show with whom she was guilty of unchastity. When charges of misconduct are made general in their nature, the defendant must state some specific instances of misconduct imputed to the plaintiff. It was so held in *Hickinbotham v. Leach* (10 M. & W. 361); it was urged in the argument before us that the plea in libel and slander are not applicable to the present. The case of *Young v. Murphy* (2 Hodges, 147), which has been relied on at the bar, was where an action was brought for breach of promise of marriage; and the second defence there put in was that the defendant discovered and received information that the plaintiff was an immodest, lewd, unchaste, and immoral person; and being sole and unmarried, had committed fornication with one Henry Penlèaze. The third plea was that after making the promise, and undertaking in the declaration mentioned, he received information and had notice that the plaintiff, being sole and unmarried, had committed fornication with some person or persons to the defendant unknown, and was pregnant with a child likely to be

born. To those pleas a demurrer was taken by the plaintiff on the grounds of vagueness; and the counsel in support of the demurrer relied upon the doctrine that if a party published of another that he was a swindler, he would be compelled, in an action for libel, to justify, by setting out the facts specifically which constitute the charge. This must be done to give the plaintiff an opportunity of denying the facts, because he could not come to the trial prepared to justify his whole life, and *J'Anson v. Stuart* (2 Smith's Leading Cases, 55,) was then relied on. The reporter of this case of *Young v. Murphy* gives the judgment of the Chief Justice (Tindal) in four lines: he says that in the cases which have been cited, the defendants who published the libel were wrongdoers, and then merely adds that the replication *de injuria* would put the matters in issue, and the plea was held sufficient; and there the first plea gave the name of the person with whom the immorality was committed, and the second says that the person was to the defendant unknown. There is a case, however, which was not cited at the bar, which bears on the one before the Court, the case of *Burgess v. Beaumont* (7 M. & G. 962). That was an action for breach of agreement to make the plaintiff (who had been governess in the defendant's family) an annual allowance for maintenance and instruction until the plaintiff should be required by the defendant to resume her situation. The defendant there pleaded that he entered into the agreement in the belief and on the representation by the plaintiff, that she was an honest and moral person, and a fit and proper person for the situation and employment in the declaration mentioned, and that before any breach of agreement he discovered that the plaintiff had become and was an immoral and dishonest person, and wholly unfit and improper for the situation aforesaid, and a person whom it would be improper and wrong for him to employ as a governess and teacher of his children. It was there held that the plea was bad, as being too general, and Chief Justice Tindal, in giving judgment, says that the plea was too general; that in order to meet the case which might be set up against her, the plaintiff would be compelled to come prepared with witnesses to justify her whole conduct from the day mentioned in the plea, without having any intimation with what particular misconduct the defendant meant to charge her. The judgment of Tindal, C. J., is peculiarly applicable in the present case. The charge of immorality is too general. How would the plaintiff meet such an accusation? immorality comprehends lying, murder, robbery, and fraud: the accusation of immodest behaviour is likewise too general, and it is uncertain what the defendant means. Does it mean disgraceful conversation with persons of her own sex, or acts with those of the other? the plea should have stated the names of the persons with whom the acts were committed. The defence must be set aside unless the defendant amends, paying the costs of the motion.

THE QUEEN v. BANON — Feb. 1, 1864.

Pleading—Demurrer to scire facias on a crown bond—Practice.

A demurrer taken to a writ of scire facias (on a crown bond) which followed the uniform course of practice in the office, overruled.

THIS case came before the Court on demurrer, taken by defendant to a *scire facias*, which was tested the 12th January, 1863, and returnable the 2nd November, 1863, and filed the 6th November, 1863. The writ was as follows:—"Court of Exchequer. Victoria by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, and so forth, to the sheriff of the county of Tipperary, greeting. Whereas Michael Banon, of Tonagher, Thurles, in the county of Tipperary, farmer, by his writing obligatory, dated the 9th day of August, in the year of our Lord 1862, sealed with his seal and perfected in the city of Dublin, in the parish of St. Michael the Archangel, in the ward of St. Michael in the county of same city, and now remaining of record in our Court of Exchequer in Ireland, became bound to us, our heirs and successors, in the sum of £1,300 of good and lawful money of the United Kingdom of Great Britain and Ireland; and whereas the said Michael Banon hath not as yet paid or caused to be paid to us the said sum as is said; and we, willing that the said sum of £1,300 sterling should be satisfied to us with all speed as is just, do therefore now command you that you omit not by reason of any liberty in your bailwick, but do enter the same, and by honest and lawful men of your said bailwick, make known to the said Michael Banon that he be before the Barons of our Exchequer, at the Queen's Courts, Dublin, on Monday, the 2nd day of November next coming, to shew and propound cause, if any he can, or know wherefore we ought not to have execution against him for the sum of £1,300 sterling; and you are then to have there the names of those by whom you shall make it known to him; and this writ witness," &c. The following is the sheriff's return to the writ:—"By virtue of the within writ to me directed I have by Michael Sullivan and John Doe, honest and lawful men, caused it to be made known to the within named Michael Banon that he be and appear before the Barons within mentioned at the time and place within written, to shew cause as the within writ requires. Signed, —, Sheriff." To the above writ of *scire facias* the defendant demurred as follows:—"As of Michaelmas term, in the 27th year of the reign of her Majesty Queen Victoria. And the said Michael Banon, by James Barron Kennedy, comes and says that our said Lady the Queen ought not to have execution against him for the said sum of £1,300 in said writ of *scire facias* mentioned, because he says that the said writ of *scire facias* and the said sheriff's return thereto and the matters therein respectively contained in manner and form as the same is above stated and set forth are not sufficient in law for our said Lady the Queen to have execution for the said sum against the said defendant; and that the said defendant is not bound by law to answer the same; and this he is ready to verify; wherefore by

reason of the insufficiency of the said writ and sheriff's return thereto in this behalf the said defendant prays judgment, and that our said Lady the Queen may be barred from having execution against him for said sum of £1,300 in said writ of *scire facias* and writing obligatory mentioned. The following were the points for argument: 1st,—That the bond or writing obligatory in the said writ is set forth by way of recital and not by express or positive averment. 2nd,—That it does not appear by said writ that the said bond or writing obligatory is a debt of record. 3rd,—That there is no reference to the record of said writing obligatory in said writ by a *prout patet per recordum* or other sufficient reference. 4th,—That the time or day of making said writing obligatory is not stated in said writ. 5th,—That it is not stated in said writ to whom the sum of £1,300 to the amount of the bond was to be paid, whether it was to be paid to the Queen or when it was to be paid, or whether the time of payment has arrived or has elapsed, and for anything appearing in the writ, the bond may not yet be payable, or any forfeiture yet happened. 6th,—That there is no proper *venire* on the said writ. 7th,—That it is not stated in the writ when the bond was made a record of the Court. 8th,—That the sheriff's return is defective; and that it does not shew that the sheriff informed the defendant to appear at the time or place of his appearance, in the writ mentioned, before the barons of the Exchequer; and it does not pursue or comply with the exigency of the writ; and it does not follow the usual course of precedents, and is otherwise defective. 9th,—That the writ and return are in other respects uncertain, informal, and insufficient.

J. M'Mahon in support of demurrer.—It is submitted that this is not a bond which the Crown can sue on, there being no words in the *scire facias* saying that it was to be paid to the Queen, or when it is to be paid. It does not appear to be a Crown bond at all.—Foster on *Scire Facias*, 331. By the statute 33 Hen. VIII., ch. 39, s. 50, these bonds are made of "the same kind, quality, force, and effect to all intents and purposes as recognisances acknowledged according to the statute staple at Westminster—*solvendum eidem domino regi heredibus vel executoribus suis*." For aught that appears this bond might be payable to a stranger. A *scire facias* must be certain as a pleading at common law; it should, therefore, be stated that the bond was payable at a day past.—Tidd's Forms, 443, where a precedent is given, and the expression "payable at a day past," is there used; and so it is found in all the forms. *Vide* Lillie's Entries, 185; 2 Chitty's Pl. 314; Pleader's Assistant, 347, 357, 366; 3 Malloy's Entries, 178, 241. As to the second point of objection, the *scire facias* should aver that the bond is a debt of record. *Laverty v. Duffin* (Al. & Nap. 295)—*M'Nevin v. Dolphin* (4 Ir. L. 407), shews the return must be certain. [*Pigot, C.B.*—This case relates to *scire facias*, between party and party, and not to the Crown.] The 21 & 22 Geo. III., ch. 20, Irish, section 1, corresponds with the 33 Hen. VIII., ch. 30, English. The Acts are the same, with the exception of the English using the words *solvendum*. [*Pigot, C.B.* A very material difference.] Again, the writ should

state that the sum was payable on a day certain; this it omits to do. [*Fitzgerald, B.*—What do you mean by bound to the Crown?] Bound to the Crown does not mean bound in money payable *in presenti*; it may mean that he was bound, in a sum of money to be paid hereafter, or to a stranger, or conditioned to go to Rome; it is uncertain—*Vide Bacon*, word "obligation," 810. The words to be paid are in the bond itself, though not in *scire facias*—*Chitty*, 7th ed. 235, 276, referring to *E. v. Lyme Regis* (Douglas, 159); *Andrews v. Whitehead* (13 East. 115). The bond should have been set forth *in hac verba*, or its legal effect should have been given: the record must have sufficient certainty, *Weir v. Weir* (2 Lev. 152). [*Pigot, C.B.*—Bacon says, any words declaring the intention of the party are sufficient.] But supposing the bond to be good, still on the record the legal effect must be averred in the pleading. *Vide Stephen on Pleading* 5th edit. 128. In the pleading here it is a matter of record that is pleaded and not a bond. If a matter of record it should have a *prout patet per recordum*. Again, there should be an averment of time and place *King v. Holland* (5 T.R. 620). [*Pigot, C.B.*—Is the time of making the bond material?] In 2 *Chitty*, it is stated that time must always be given. Lastly, the sheriff's return should have been certain as in pleading.

Jebb (with *M'Donough, Q.C.*)—The demurrer in this case is utterly untenable and must be overruled. This is the case of a *scire facias* on a common Crown bond and of the usual return thereto of *scire feci*. Both the *sci. fa.* and the return are in the regular stereotyped form uniformly used in the office for a long series of years. The defendant has filed a general demurrer to the *sci. fa.*, so that he must shew it is bad on general demurrer. In the first place the fact of the *sci. fa.* and return following the established precedents would be a sufficient answer of itself. In *Attorney-General v. Hartley* (Hayes & Jones, 763), Pennefather, B., says (p. 768), "If we were to allow this demurrer we should upset the uniform practice of this country." In *Morgan v. Odum* (Alc. & N. 300, note) it is laid down that the Court will follow precedents in the office on the ground of public convenience. In *The Attorney-General v. Freer* (11 Price, 183) the same principle is laid down, though in that case it is applied to revenue informations. It is there laid down that in penal informations ancient precedents are considered good authority for the forms of particular counts. In this case the forms are not only conformable to those always used in the office, but correspond with those in the English books of practice—*Tidd's Practical Forms*, 443–4. And it is no answer to say that there is a difference between the practice of the two countries, a declaration being filed in England; because the declaration is nothing but a transcript of the writ—*Tidd's Forms*, 444 where the directions as to preparing the declaration are, "Here copy the writ *verbatim*." So far from this being an argument for the defendant it rather tells the other way. *Joy, C.B.*, in *Attorney-General v. Hartley* (H. & J., p. 767), says, "Many of the cases cited are of force in England, where a declaration is filed, but cannot apply to

this country, where the defendant pleads to the writ." That case was in 1834, a year after the case of *Laverty v. Duffin* (Al. & N., 295), where Burton, J. (p. 298), asks why in this country a writ should not be as special as a declaration. If that case be relied on as an authority to show that precedents in the office will not be adhered to—it will fail for that purpose: because it appears from that case that the precedent was not followed. The objection was, that the *sci. fa.* writ, which was on a recognizance of bail, did not appear founded on any record, the recognizance not having been stated to be of record or to have been taken in Court; and *Jebb, J.* (p. 298), observes that the precedents in the Q. B. do state the recognizance to have been taken in Court. Now, as to the several objections as set out in the defendant's points. 1st,—That the bond is stated with a *whereas*, by way of recital. This is settled to be sufficient. The words *whereas* or *are given to understand and be informed*, are well enough, for they are sufficient to put the party to his answer. 2 *Saund. R.* 72, reciting 3 *Lev.* 222. As to the second point—That it does not appear that the bond is of record. It does so appear, for the writ says "now remaining of record in our Court of Exchequer." This is sufficient. Even "duly of record" would be enough—*Attorney-General v. Sirr* (H. & J. 760). The same words as here are used in *Attorney-General v. Hartley* (H. & J. 763); and there is no plea of *nul tiel* record. 3rd,—The want of *prout patet per recordum* is only a subject of special demurrer—*Kelly on sci. fa.* 253, citing *Morse v. James* (Willes, 126 127); *Powdrick v. Lyon* (11 East., 565); stat. 17 & 18 Car. 2, c. 12, s. 1, Irish; 9 Anne, c. 10, Irish; *Attorney-General v. Sirr* (Hayes & J., 760). 4th,—The time and day of making the bond are stated in the *sci. fa.* 5th,—That it is not stated to whom the sum of £1,300 was to be paid, or whether the time of payment had arrived. The writ says the bond was made to the Queen. And as to the time of payment, it must be taken to be payable immediately. The time when payable is not mentioned in *Attorney-General v. Sirr* (H. & J., 760): or *Attorney-General v. Hartley* (H. & J. 763). In declarations on bonds it was not necessary to state when they were payable. The precedent in 2 *Chitty* on Plead. 437 of a declaration in debt on a bond says that "the defendant on a certain day acknowledged himself to be held and firmly bound unto the plaintiff in the sum of £ to be paid unto the said plaintiff" (without saying when); and then the editor says in a note, "Here are usually inserted the following words:—*When he the said defendant should be thereunto after requested*; but as they are not usually in the bond, they seem better omitted in the declaration." Then the precedent goes on to say that defendant has not yet paid the sum. The latter part of the 5th objection is answered by saying that the defendant might have set out the condition and pleaded general performance in the usual way, upon which the Crown would assign breaches and show that there was a forfeiture. 7th,—That it does not appear when the bond was made a record of the court. This is totally unnecessary according to all the precedents. Lastly—Objections to the return. It exactly accords

with the form in Tidd. The bond cannot be referred to further than as it appears in the *sci. fa.*

M'Mahon replied:

Pigor, C.B.—If this form were to be settled for the first time there would appear several things that might be objected to; for example, the expression "became bound;" but even so I think by fair intendment the meaning is, he declared himself bound to the Queen, and that this is a recital of so much of the bond, which is a declaration under seal. Can it mean anything but that he is bound from that moment? No doubt, there may be something to control the words. There may be a condition, but we must take the words as we find them. This has been very properly called a judicial writ. I might object to the words "became bound" if I were to settle the form for the first time; but I have inquired from the officer, and find it has been long the deliberative practice. A very remarkable instance of the effects of precedents is in *Lyme Regis v. Smith*. In the case of *The Attorney-General v. Sirr* (Hayes & Jones 760), the court having inquired of the officer, stated "that the writ of *sci. fa.*, which was there demurred to, was in the form that had been in use for fifty-two years, and was settled when Lord Clare was Attorney-General;" and the Court there followed the precedents which were sanctioned by usage. The demurrer must be overruled.

Fox v. Broderick—Jan. 28.

Practice—Application to reply and demur on affidavit of plaintiff's attorney—Common Law Process Act, 1853, s. 59.

Where an application is made for liberty to reply and demur, grounded on the affidavit of the plaintiff's attorney, it was objected that the affidavit should be made by the plaintiff and not by his attorney. Held that the attorney's affidavit was sufficient.

This was an action for libel.

H. Mac Dermot moved on behalf of the plaintiff for liberty to reply and demur to a special defence pleaded to all the counts of the summons and plaint, and which purported to be a defence of privileged communication. Counsel moved on the affidavit of the attorney of the plaintiff, which stated that the deponent was advised and believed the several objections sought to be raised by demurrers were good and valid in law, and that the plaintiff had just ground to traverse the several matters sought to be raised by the replication.

Sidney, Q.C., and *Coates contra*, objected that the affidavit was insufficient. This was an application to the discretion of the Court, and the Court would not be satisfied with the affidavit of the attorney as to the facts sought to be put in issue by the replication. *Lumley v. Gye* (16 Jurist, 1048), and an unreported case in the Queen's Bench was cited. *Vide*, note to *Ferguson's Common Law Act*, p. 90.

Mac Dermot replied that *Lumley v. Gye* was an English case, founded on the corresponding section in the English Act, which required an affidavit as to

facts upon which the section in the Irish is silent. But even should the Court refuse to exercise their discretion without such an affidavit as would be required, under the English section the affidavit upon which the present motion is founded is clearly sufficient. The section contemplates that an affidavit by the attorney may be sufficient; and as no new facts are now sought to be replied by way of confession and avoidance, and the propriety of traversing the facts in the plea and the justness of the grounds upon which they are traversed, are just as much within the knowledge of the attorney as of the plaintiff. *Lumley v. Gye* establishes no more than this,—that where it is sought to reply facts within the personal knowledge of the plaintiff, the plaintiff ought to be the person to verify those facts. Here we do not seek to reply facts specially within the knowledge of the plaintiff.

Motion granted; costs to be costs in the cause.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

CORCORAN v. DUGGAN.—Jan. 22, 1864.

Practice—Peremptory exception—Interest suits.

In interest cases, where the kindred of either party is disputed, the question should be raised by petition, by way of peremptory exception, and not by affidavit.

In this case the plaintiff, who was a cousin-german of the deceased, Mary Duggan, denied the interest of the defendant, who was a caveator, and who had appeared as a nephew and one of the next of kin. The assets were very small, not exceeding in all £80, and the plaintiff, by his affidavit, detailed the facts, and stated in terms that the defendant had no interest, as his father was not the natural and lawful brother of the deceased, but was an illegitimate son of the deceased's father, and, therefore, not of kindred to the deceased. An affidavit had been filed by the defendant, alleging generally that the defendant's father was not illegitimate.

Dr. Miller now moved that the caveat lodged by the defendant should be set aside.—In Probate cases, the course is, where the interest is denied, to file a petition by way of peremptory exception, as in *Davidson v. Woods* (7 Ir. Jur., N. S., 202), but as no pleadings are filed in practice in interest cases, the case here was made by the affidavit, which was in substance an exception.

Bond Coxe for the defendant.

KEATINGE, J.—I think as a general rule the same practice should prevail in both interest cases and Probate cases on this point, and the case should come before the Court by way of peremptory exception; but as the assets here are so small, and the case has been fully made by the affidavit, on consent, of both parties, I will direct an issue to a jury to try whether the defendant's father was the legitimate son of his father.

The consent was accordingly drawn up, and made a rule of Court, and the issue directed.

SAME CASE.—Feb. 2.

In interest cases, where legitimacy is disputed, the onus of proof lies on the party alleging legitimacy.

THIS case now came on for the trial of the issue, before the Court and a jury.

Bond Coxe, for the defendant, submitted that the burden of proof lay on the plaintiff, and that he should begin. The presumption always was in favour of legitimacy, and therefore the general rule that the party relying on the affirmative should begin, did not apply (Roscoe on Evidence, 91).

Dr. Miller for the plaintiff.—That is only as to cases of an admitted marriage. There the presumption is in favour of the children being legitimate. But there is here no marriage at all, and there is no presumption in favour of legitimacy. The exact point besides was ruled by the Court in *Davidson v. Woods*, where it was held that the party who asserted that the person whose kindred was impeached was next of kin, should commence and state his case.

KEATINGE, J.—There is no presumption here of legitimacy, and the rule is settled that the onus lies on the party who pleads or asserts legitimacy.

[The defendant not having any evidence to offer, a verdict was found that the party was not legitimate, and the caveat was set aside with costs by the Court.]

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF PHILIP TAAFFE, OWNER; ALEXANDER ARMSTRONG, PETITIONER.—Feb. 2 & 10.

Mortgagor and mortgagee—Clause of re-entry—Remittance of interest—Waiver.

A mortgage deed contained a proviso making the principal money payable, in case any half-yearly payment of interest should be postponed for more than 40 days, and the clause of re-entry provided that this stipulation should not be considered as waived by any subsequent acceptance of interest. The mortgage money and interest were payable in Ireland, but upon one of the half yearly gales of interest becoming due, the mortgagee was not in Ireland to receive it. The 40 days grace expired before the mortgagor, by the mortgagee's directions, remitted it by a letter of credit. Before the next half-year's gale was due, the mortgagor accepted a bill for the amount, at the mortgagee's request, and for his convenience. Held, that there was no forfeiture; and if there had been, that it would have been waived by the transactions relating to the next gale of interest.

On the 13th day of September, 1861, Philip Taaffe, the owner, granted and demised certain lands for a term of 500 years from 13th day of September, 1861, to petitioner, his executors, administrators, and assigns, by way of mortgage to secure the sum of

£1,750, with interest, at the rate of 5 per cent. per annum, payable 15th day of February and 15th day of August. The money secured by said mortgage was thereby made payable on the 15th day of February, 1862, with a covenant on petitioner's part that if each half-yearly gale of interest was paid on the respective gale days of 18th February, or 15th August, or within 40 days petitioner would not call in said mortgage money until the 15th day of August, 1867, but it was expressly provided for by said mortgage deed, that if default should be made in payment of the said sum of £1,750, or the interest thereof, or any part thereof, contrary to the provisions of the said deed the petitioner should be at liberty at any time or times thereafter, notwithstanding any subsequent acceptance of interest to compel payment of said principal money. The following were the clauses in the mortgage—"Provided that if the said money, £1,750, shall not be paid to the said Alexander Armstrong, his executors, administrators, or assigns, on the said 15th day of February, 1862, he, the said Philip Taaffe, his heirs, executors, administrators, or assigns, shall and will, so long as the said principal sum of £1,750 shall remain due and owing on the security of these presents, pay or cause to be paid unto the said Alexander Armstrong, his executors, administrators, and assigns, interest for the said sum of £1,750, after the rate aforesaid, by equal half-yearly payments on the 10th day of February and the 15th day of August in every year. Provided always, and it is hereby declared and agreed between and by the parties to these presents, that if the said Philip Taaffe, his heirs, executors, administrators, or assigns, do and shall, on every 15th day of February and 15th day of August, until the 15th day of August which will be in the year 1867, or within 40 days next after each of the said half-yearly days respectively, pay to the said Alexander Armstrong, his executors, administrators, or assigns, interest for the said sum of £1,750 at the rate aforesaid, up to the said half-yearly days of payment respectively, he, the said Alexander Armstrong, his executors, administrators, or assigns, shall not nor will, before the said 15th day of August, 1867, call in or require payment of the said principal sum of £1,750, or any part thereof, or take any proceedings to enforce same; and the said Philip Taaffe doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said Alexander Armstrong, his executors, administrators, and assigns, in manner following, that is to say, that he, the said Philip Taaffe, now hath in himself good right, full power, and lawful and absolute authority to grant and convey the said lands, hereditaments, and premises hereby granted, or demised, or expressed, so to be with their appurtenances unto the said Alexander Armstrong, his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, and that if default shall be made in payment of the said sum of £1,750, or the interest thereof, or any part thereof respectively contrary to the true intent and meaning of these presents, then and in that case it shall and may be lawful for the said Alexander Armstrong, his executors, administrators, and assigns at any time or times

thereafter, notwithstanding any subsequent acceptance of interest to enter into and upon the said lands, hereditaments, and premises, or any of them, or any part thereof, and to have, hold, occupy, possess, and enjoy the same, and receive and take the rents, issues, and profits thereof, and of every part thereof to and for his and their own use and benefit, without any let, suit, trouble, interruption, &c." Default was made in payment of the gale of interest, which fell due on the 15th day of February, 1863, and the same was not paid within the period of 40 days allowed by the terms of said mortgage deed for payment of each half-yearly gale of said interest; it was in fact not paid until the 9th day of April, 1863.

Warren, Q.C., and Graydon, for the petitioner, in support of motion to make order for sale absolute.—The consideration for not calling in the money was punctuality in paying the interest; but there was failure of punctuality—consequently the consideration failed. The gale of interest which fell due on 15th February, 1863, was remitted in a letter dated 30th March, 1863, by a draft of the Bank of Ireland on the Bank of England, which was not payable for ten days after date, and sent through post to Armstrong at Liverpool. The petitioner never intended, by receipt of the interest, to waive or abandon his right under the provisions of the mortgage to enforce payment of the principal, in consequence of the default made by Taaffe in paying the interest. The conveyance of the lands became absolute at law on 15th February, 1862, and petitioner had a right to sell in equity and sue in covenant at law, or eject and enter. The qualifying proviso must suspend all or none of the remedies.

Flanagan, Q.C., and O'Hagan, contra.—The interest in the mortgage was regularly paid up to the gale of the 15th February, 1863; the last day for that payment, taking into account the 40 days allowed by the mortgage deed, was the 27th March. It was then remitted, at the mortgagee's request, by a bank order, and the receipt for the amount is dated the 31st March. The petitioner never complained of the few days' delay, and in letters sent to the owner subsequently, he never intimated that he considered the principal as having become payable, but, on the contrary, treated the mortgage as in full force in all its provisions. In July, 1863, before the next gale became due, the petitioner asked the owner to accept a bill for the accruing gale, which would fall due on the 15th August, and in compliance the petitioner accepted a bill for £42 under a belief that all the provisions of the mortgage remained in force; Even if it could be contended that the omission to pay the March gale for a few days after it became due, gave the petitioner a right to enforce payment of the principal, such right has been waived and abandoned, and the provisions of the mortgage restored by the petitioner's own acts in connection with the August gale of interest.

Cases cited—*Forde v. Lord Chesterfield* (19 Beav. 428); *Langridge v. Payne* (2 Johnson & Hemming, 423).

HARGREAVE, J.—I have looked over the principal clauses in the mortgage of 13th September, 1861;

and I have no doubt that its correct construction is that contended for by the petitioner, viz., that the principal of £1,750 is to become immediately payable in case any half-yearly payment of interest should be postponed for more than forty days; and that this stipulation in the mortgagee's favor is not to be considered as waived by the mere subsequent acceptance of such interest. This latter clause is inserted in order to prevent the application of the doctrine of *Langridge v. Payne* (2 John. & Hem. 423); a doctrine which, if reviewed, would, I think, be overruled. The reasons of the doctrine are not given, and I cannot conjecture them. The questions for decision therefore are, 1st, whether the half-year's gale due 15th February last was by any omission or neglect of Mr. Taaffe's unpaid beyond the forty days of grace; and if so, whether the transaction connected with the next half-year's gale due 15th September last amounted to a waiver of the forfeiture occasioned by such neglect. I think it important to observe that the mortgage was an Irish transaction, and that the mortgage money and interest are all clearly payable in Ireland. Both parties at the time were resident in Dublin, and are so described in the deed of mortgage. The mortgagees having been previously resident in the United States. At the time when the gale of 15th February fell due the petitioner was resident in Liverpool; and had not given any power of attorney to any one resident in Ireland; so that the debtor could not make a tender, nor could he make a payment, until he should receive instructions from the creditor whether the money was to be remitted to Liverpool, and how. If Mr. Taaffe, without such instructions, had sent a remittance, it would have been at his own risk, if the letter should be lost or go astray, or the banker should fail. The debtor therefore had no alternative but to wait for orders. The forty days expired on the 27th March. On the 28th petitioner wrote to Mr. Taaffe, desiring him to remit the interest by a letter of credit on one of the Liverpool banks. It appears from the letter that petitioner had sent a previous letter to the same effect on the 24th. Mr. Taaffe's solicitors have furnished me with that letter since the argument. It was not, however, sent directly to Mr. Taaffe, but to Mr. James J. Moore, who was decreed to leave it at his house, or forward according as he was in or out of Dublin. There is no affidavit from Mr. Moore; and it does not appear when this letter of the 24th reached Mr. Taaffe's hands; nor do I think it very material. Mr. Taaffe, on the 30th, sent the required letter of credit, which of course was not payable for ten days. Mr. Taaffe sent the money to Liverpool entirely for the convenience of the petitioner; and he could not be expected to pay the 2s. 6d. per cent. on the remittance, which would have saved the ten days' delay. The petitioner not being in Ireland, where the money was payable, in order to receive it cannot, I think, raise any question as to whether the forty days' grace were exceeded or not; and if the Court should consider Mr. Taaffe bound to exercise diligence in sending the money as soon as he could do so with safety, that is, as soon as he got his creditors' instructions authorizing him to purchase a letter of credit with it, I think he did all that could be expected. If he did not

get the letter of the 24th immediately, it is impossible to charge him with delay; but, in fact, the letter of credit was sent on the 30th, evidently under the instructions contained in the letter of the 28th. The money was not paid within the forty days owing to the creditor's absence; and it was paid in reasonable time after the creditor pointed out a mode of remittance. I therefore think that the facts of this case do not call into action the clause of the mortgage making the principal money forthwith payable. I need not detail the transaction relative to the September gale. I am bound to say, however, that it is wholly inconsistent with the idea that both principal and interest were actually payable in *presenti*. Before the gale was due Mr. Taaffe accepted a bill for the interest at the petitioner's request and entirely for the convenience; and the bill could be immediately negotiated on Mr. Taaffe's credit. It is immaterial that the bill did not fall due until after the gale would have been due, for Mr. Taaffe's credit was pledged for two months before. I have no doubt that a court of equity would regard such a proceeding as this on the part of a mortgagee as waiving a forfeiture which never suggested itself to his mind until afterwards. The petitioner in his petition admits that he would not have thought it right to rely on any forfeiture arising from the nonpayment of the February gale if it were not for the circumstance that he considers his principal in peril in consequence of the large amount of prior incumbrances. It appears, however, that the £1,750 was not money lent at the time, but part of a balance ascertained by a compromise to be due to Mr. Armstrong by Mr. Taaffe, one half of which was to be and was paid down, and the other half to be paid in August, 1867, and to be secured by a mortgage of the lands, which are expressly stated to be subject to certain incumbrances. The petitioner made no searches in order to ascertain their amount; and if he had done so, and objected to the security which Mr. Taaffe could give, it is to be presumed that the compromise could not have been effected. I do not think Mr. Taaffe is under any obligation to pay off the charges; but if he should allow the interest to fall into arrear to petitioner's prejudice, probably the petitioner would be relieved from the obligation of leaving his money out, as such conduct would be a waste of the petitioner's security. I am of opinion therefore that petitioner had no right to file the petition, and that it must be dismissed, with costs.

Cause allowed; petition dismissed, with costs.

Court of Bankruptcy & Insolvency

Reported by John Levy, Esq., Barrister-at-Law.

IN RE SAMUEL BELL CARPENTER.

Bringing a frivolous or unfounded action—Debt fraudulently contracted.

A party bringing a frivolous or unfounded action, by

which the defendant is put to costs, is a debt fraudulently contracted by the plaintiff in such action, who seeks to take the benefit of the Insolvent Act. Dunne's Case, in 1 B. & J. Reports, adopted.

THE insolvent, who is an attorney, brought an action against J. F. Teeling, local inspector of the Four Courts Marshalsea, for having confined him in a cell in the prison for alleged misconduct. There was a verdict against him, and having been arrested for the costs of that verdict, he filed his petition and schedule as an insolvent. The governor of the prison was also returned as a creditor for the costs of an action previously brought against him for having prevented the solvent from visiting the prison for the alleged purpose of seeing clients.

Waters, for Mr. Teeling, opposed on the ground of the debt having been fraudulently contracted by bringing an unfounded action. He cited *Re Richard Dunne* (1st B. & J. Reports, 119).

Buchanan opposed for Mr. Caulfield, governor of the prison.

Heron, Q.C., for the insolvent, contended that *Dunne's case* was not sustained by any authority to be found in the books, and, at all events, it did not bear the slightest analogy to the present case. *Dunne* took proceedings against Miss Burdett Coutts, to recover an enormous sum of money, knowing that there was not one sixpence due to him;—in fact, he never had any transaction of any kind with Miss Coutts. In the present case, the insolvent was thrust into a cell, and confined in it for several hours, and it was not because he failed in that action that it could be said he had contracted a debt fraudulently. If every man who failed in an action was to be said to have contracted a debt fraudulently, the Courts of Justice might be shut up.

JUDGE LYNCH said if solvent parties brought unfounded actions, and paid the costs, there could be no fault found with them. He thought nothing could be more harassing or annoying than a party bringing a frivolous and unfounded action, and upon the speculation of getting costs, and if he fails, coming into that Court to take the benefit of the Insolvent Act. *Carpenter*, who was an attorney himself, knew well that his action was unfounded, and that Mr. Teeling, in the exercise of his duty, could do no less, under the rules of the prison, than put him in the cell for the period he was in it. He thought *Dunne's case* good law, and would adopt it.

The insolvent was remanded for a month.

Court of Appeal in Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

IN THE MATTER OF THE ESTATE OF JOHN GERRARD, OWNER; EX PARTE PATRICK BRADY, PETITIONER.—November 24, 1863.

Construction—13 & 14 Vic. c. 29, ss. 1, 10.—Judgment mortgage.—Equity of redemption in chattel interest.—Fieri facias.

The sheriff cannot take in execution, under a writ of fieri facias, a chattel interest against which a judgment mortgage, under the 13 & 14 Vic. c. 29, has been registered.

The words "anything in this Act notwithstanding," in the 10th section of the 13 & 14 Vic. c. 29, are equivalent to "anything to the contrary in this Act notwithstanding," and refer to that clause of the 1st section of the Act, which abolishes execution against all interests in lands.

By an indenture of lease, dated the 1st day of Nov., 1853, Smith Ramadge demised to John Gerrard the lands of Chamberstown, in the county of Meath, to hold for a term of thirty-one years, at a yearly rent of £1 15s. per acre.

In accordance with the provisions of an indenture of settlement, executed on the occasion of the marriage of John Gerrard and Rosaline Sullivan, in consideration of her marriage portion of £200, and for the other considerations in the indenture of settlement mentioned, John Gerrard, on the 12th of January, 1847, executed to Patrick Brady and John Sullivan, the trustees of the settlement, a bond, with warrant of attorney for confessing judgment in the penal sum of £600, upon the trusts contained in the settlement.

Judgment was entered on this bond, on the 8th of November, 1862, by Patrick Brady, as surviving trustee of the marriage settlement, and on the 13th of November, 1862, this judgment was duly registered as a mortgage under the 13th & 14 Vic. c. 29, against John Gerrard's interest in the lands of Chamberstown.

On the 1st of December, 1862, a petition for a sale of the lands of Chamberstown was filed in the Landed Estates Court, by Patrick Brady; and on the 10th of December a conditional order for sale was made by Judge Dobbs. On the 18th of December, 1862, a judgment was obtained against John Gerrard by John B. Fottrel, for the sum of £100 4s. 10d., and on foot of it a writ of *feri facias* against the goods and chattels of John Gerrard was issued, and lodged with the sheriff of the county of Meath. On the 20th of December an advertisement was published by the sheriff in the *Drogheda Argus* to the effect that John Gerrard's interest in the lands of Chamberstown would be sold under the writ of *feri facias*, on the 24th of December. On the 22nd of December the conditional order for the sale of the lands in the Landed Estates Court, was made absolute, and on the same day a notice was served by the solicitor of Patrick Brady, on the sheriff and sub-sheriff of the county of Meath, cautioning them against proceeding to the sale advertised, and informing them that an absolute order

for a sale of the lands had been made in the Landed Estates Court, and that the proceedings in the Landed Estates Court had been registered as a *lis pendens*.

The sale of the lands under the writ of *feri facias* did not take place as advertised on the 24th of December, but afterwards, on the 30th of December, John Gerrard's interest in the lands of Chamberstown was put up for sale by the sheriff, and was purchased by William Forde, in trust for Thomas Bride, for £100, subject to the judgments and incumbrances thereon. Patrick Brady, the petitioner, attended on this occasion and informed the sheriff that a judgment mortgage had been obtained over the lands, and cautioned him against proceeding to a sale. On the 1st of Jan., 1863, the sheriff executed, or purported to execute, a deed of conveyance of the interest of John Gerrard in the lands to Thomas Bride. An application on behalf of Thomas Bride was made to Judge Dobbs, on the 5th of February, to stay all further proceedings in this matter, and it was then ordered that all proceedings should be stayed upon the terms of Thomas Bride lodging in Court the amount of the petitioner's claim, and undertaking to pay the petitioner's costs when taxed and ascertained. An application having been subsequently made to Judge Dobbs, pursuant to the order of the 5th of February, that the sum of £300, which had been lodged by Thomas Bride in Court should be paid to the petitioner, the matter came on to be heard on the 13th and 20th of June, and it was contended, on the part of John Gerrard, that the sale by the sheriff was not legal, inasmuch as on the registration of the judgment, John Gerrard had ceased to have any legal estate in the lands but only an equity of redemption, which could not be seized and sold under a writ of *feri facias*. By an order of the 20th of June, it was declared that it appeared to the Court there within the meaning and upon the true construction of the Acts of Parliament relating to Judgments, Thomas Bride had become the owner of the lands of Chamberstown by purchase from the sheriff of Meath, and that the sum of £300 had been lodged in Court, and it was ordered that the money so lodged should be paid to the petitioner Patrick Brady, and that on the petitioner being paid the principal, interest, and costs, he should satisfy the judgment, and that all further proceedings should be stayed. From this order John Gerrard now appealed, being desirous that the proceedings for a sale of the lands of Chamberstown in the Landed Estates Court should be continued.

Flanagan, Q.C. (with whom was *Hamill*) for the appellant.—The question to be decided in this case is whether the sheriff can, under a writ of *feri facias*, seize and sell, by virtue of the Judgment Acts, an equity of redemption in a chattel interest. That such a proceeding was not warranted by the common law, is a matter too well known to require any authorities to be cited on the subject. The principle that an equity of redemption could not be taken in execution is established in *Metcalf v. Scholey* (2 Bos. & Pull N. R. 461), and in other early cases, and has been acted on uninterruptedly ever since. Unless, therefore, a fair construction of the 13 & 14 Vic. c. 29, necessarily involves the truth of the proposition for which the respondents here contend, the Court will

not give to words, which, perhaps, may be slightly ambiguous, such a meaning as to alter seriously well known and long recognized principles of law. But there is no necessity to strain the meaning of any words, for the sections in question admit of a simple intelligible construction. The 13 & 14 Vic., c. 29, s. 1, after reciting the provisions of the Sheriffs' Act (5 & 6 Wm. 4, c. 55), and the Abolition of Arrest on Mesne Process Act (3 & 4 Vic., c. 105) proceeds thus: "be it enacted . . . that the provisions hereinafter recited of the said Acts of the sixth year of King William the Fourth and the fourth year of her Majesty, shall not in anywise extend, or be applicable to any judgment entered up in any of her Majesty's superior Courts at Dublin, or obtained in any inferior Court of Record after the passing of this Act, nor to any decree, order, or rule made after the passing of this Act; and no writ of *elegit*, or writ of execution (*save as hereinafter mentioned*) shall issue or be sued upon any such judgment, decree, order, or rule against any lands, tenements, or hereditaments, or any estate, or interest therein; nor shall any lands, tenements, or hereditaments, or any estate, or interest therein be charged or affected by any such judgment, decree, order, or rule, save as provided by this Act." The operation of this section is to sweep away all execution whatsoever against all lands and hereditaments, or any estate therein, with this qualification, "save as provided by this Act." Now the provisions referred to in this qualification are to be found in the 10th section of the Act, which is in the following terms: "Provided always, and be it enacted, that all such chattel interests in lands, tenements, or hereditaments as might have been taken in execution under any writ of *fiery facias* if the said Act of the fourth year of her Majesty had not been passed, may be taken in execution and otherwise dealt with under any writ of *fiery facias* already issued, or hereafter to be issued, anything in this Act contained notwithstanding." This plainly places the operation of a writ of *fiery facias* on the footing it occupied under the old law, and by this, incontestably, an equitable interest in a chattel could not be seized in execution. The concluding phrase of the 10th section is equivalent to "anything to the contrary in this Act notwithstanding." Judge Dobbs, on the other hand, considered its meaning to be, "any mortgage, &c., executed in accordance with the provisions of this Act notwithstanding." That is, if a judgment mortgage be registered against a chattel interest by virtue of this Act, it shall still be lawful to take that chattel interest in execution under a writ of *fiery facias*.

Battersby, Q.C. (with whom was *Sir Colman O'Loughlin, Q.C.*, and *Molloy*) for the defendants.—It is necessary, in order to insure a right interpretation of the 10th section of the 13 & 14 Vic., c. 29, to consider what was the former state of the law with respect to judgments, and what changes have been introduced by modern legislation. Prior to "Pigot's Act" (3 & 4 Vic., c. 105) the judgment creditor had no specific lien upon the lands of his debtor. The Sheriffs' Act enabled him to obtain a receiver over the entire lands, and then Pigot's Act gave the judgment the effect of a specific charge upon the lands of the judgment debtor. Neither of these Acts, how-

ever, interfered with the rights of the judgment creditor to an execution against the chattel interests of the debtor under a writ of *fiery facias*. The 13 & 14 Vic., c. 29, was then passed, and one of its principal objects was, that the creditor should, for the benefit of others, specify the lands upon which his judgment was to operate as a charge. By this Act he obtained the legal estate in the lands, against which his affidavit was registered, as completely as if the judgment debtor had executed a deed to him. This estate was a mere creation of the statute, which gave new principles and more immediate remedies. Therefore, although at common law it is clear that an equity of redemption cannot be taken in execution, it is by no means a necessary consequence that this peculiar statutable estate should be in a similar position. A judgment mortgage under this Act, according to the authorities is, in a measure, a conveyance subject to redemption—*Eyre v. M'Dowell* (9 H. of L. Ca. 619; 7 Ir. Jan. N. B. 45); *M'Auley v. Clarendon* (Drury, temp. Nap. 433; 8 Ir. Ch. Rep. 568). As has been already stated, neither the Sheriffs' Act, nor Pigot's Act affected the operation of a writ of *fiery facias*, and but for this Act it is unquestionable that the sheriff might have seized and sold a chattel interest under a writ of *fiery facias*. It is not, then, unreasonable that the Legislature should introduce such a provision into this Act as would prevent judgment creditors from being deprived of this right. Hence, at the end of the Act, after its main provisions, is inserted the 10th section, which enacts that the chattel interests may be taken in execution, "anything in this Act contained notwithstanding." The words, "if the said Act of the fourth year of her Majesty had not been passed," are useless and meaningless, for Pigot's Act did not touch the right to take a chattel interest in execution under a writ of *fiery facias*.

Sir Colman O'Loughlin, Q.C., on the same side.
Flanagan, Q.C., in reply.

THE LORD CHANCELLOR.—I have no doubt that this order of the Court below cannot be sustained. The 13 & 14 Vic. c. 29, gives to a judgment, when registered in accordance with its provisions, all the characteristics of a mortgage under seal. There may be language in this Act which is far from being clear and unambiguous; and there are certainly some expressions, the object and force of which, I confess, I cannot understand. However, I must take them as I find them; and there is no doubt but that this Act, by the seventh section, enacts that the registration of the affidavits required shall operate to transfer to and vest in the creditor all the estate of the debtor in the lands, and that the creditor "shall have all such rights, powers, and remedies whatsoever as if an effectual conveyance, assignment, appointment, or other assurance to such creditor of all such estate and interest," had been executed and registered at the time of registering the affidavit, or, in other words, as if the debtor had executed to him a legal mortgage. Now, I am called on to say that under the 10th section of the Act the sheriff can, under a writ of *fiery facias*, seize and sell a chattel interest against which a judgment mortgage has been registered under the provisions of this Act, and that the words "anything in this Act notwith-

standing" at the close of the section are in fact tantamount to "any judgment mortgage registered by virtue of this Act notwithstanding." Now, although there is, as I have already observed, some obscurity in the wording of the statute, which appears to have been framed in a hasty way without sufficient consideration, I think a very intelligible meaning can be put upon the concluding clause of the tenth section by taking it as an exposition of the saving of the first section. That section enacts that no writ of execution, "save as hereinafter mentioned," should be sued upon any judgment against any lands but what is "hereinafter mentioned?" The tenth section re-establishes the right to take a chattel interest under a writ of *fiat facias*, which would have been otherwise abolished by the comprehensive language of the first section. If this equity of redemption were excluded from the general rule of law, this new code of laws would turn a sheriff's sale into an equity suit. I do not think that if it were intended to make this exception it would have been done in this inferential manner. I think it would have been stated in express terms that the judgment mortgage given by the Act, although it conveyed the legal estate, should not prevent the taking in execution of a chattel interest under a writ of *fiat facias*.

THE LORD JUSTICE OF APPEAL.—I am of entirely the same opinion. I cannot draw a distinction between the operation of a mortgage and a judgment mortgage under the Act. The execution of a mortgage rendered it impossible to reach an equity of redemption; and the registration of a judgment mortgage must be considered to have in every respect the same effect.

Order below reversed.

Rolls Court.

[Reported by John Munroe, Esq., Barrister-at-Law.]

BURROWES v. O'BRIEN AND GIBBINGS,—Nov. 25, 1863;
Jan. 22, 1864.

Breach of Trust—Suit for recovery of trust fund—Parties.

The trustees of a settled fund committed a breach of trust by paying over the whole to the tenant for life.

Held.—In a suit brought by the cestui que trust in remainder against the trustees, for the recovery of the trust fund—that the representatives of the tenant for life were necessary parties.

THE petition was filed to compel the respondents to bring in certain trust monies, and to lodge them in Court to the credit of the cause. The facts were these:—Prior to the marriage of George Burrowes with Elizabeth Roberts, his then intended wife, a marriage settlement, bearing date 21st October, 1834, was executed, whereby certain house-property as well as a policy of insurance effected on the life of the Very Rev. Robert Burrowes,—George Burrowes's father—were conveyed to trustees to secure an annuity of £150, which was settled on the husband for life, remainder to the wife for life, remainder, in

default of appointment by the survivor, to and among the children equally. The petitioner was the only child of the marriage, and he attained his majority in 1857. Robert Burrowes died 13th September, 1841, and, as the trustees had declined to act, and one had actually disclaimed, the Insurance Company refused to pay the amount of the policy until new trustees were appointed. The matter was accordingly referred to the Master, and new trustees were appointed, and the property vested in them by deed bearing date, March, 1843. These were, Henry James O'Brien, one of the respondents, and Thomas Gibbings, of whom the second respondent was the widow and personal representative. Immediately on their appointment the £1,200, being the amount of the policy, was paid over on their joint receipt, absolutely to George Burrowes, the father, instead of being invested pursuant to the limitations in the marriage settlement. This was the breach of trust complained of, and this sum it was now sought to make the trustees restore. George Burrowes died on the 20th September, 1861, having previously made his will bearing date, 17th March, 1858, wherein was contained the following clause:—"I have paid debts which my son Robert Francis Burrowes (the petitioner) contracted, amounting up to this present time to £750. This £750 is to be deducted from £1,200 which was left him in settlement, and I give him my property in Charleville in place of the remainder." He also bequeathed to him a reversionary interest in certain Dutch funds, after the death of the second wife, to whom he gave a life interest in them. The will was proved by the widow alone, she and the petitioner having been appointed executors. It was urged on the one side that petitioner should be compelled to elect between the benefits taken under the settlement and those under his father's will: while on the other, it was contended that meantime, prior to the election, the fund should be brought into Court and lodged to the credit of the cause. But the main question argued in the case was whether or not the suit was defective for want of parties. It was objected on behalf of the respondents, that Elizabeth, the wife and personal representative of George Burrowes, the tenant for life, should have been made a party, since his assets were primarily liable. It was urged on the other hand that, having regard to the object of the suit, which was merely to have the trust money brought into Court, and to the further important fact that a suit was pending at the instance of the respondent O'Brien for administering the assets of the tenant for life, there were sufficient parties before the Court.

Chatterton, Q.C., (with him *William M. Johnson*) for petitioner.—The weight of authorities seems to be in favour of petitioner's right to have the money brought into Court. The respondent O'Brien has already brought a suit for the administration of the assets of the tenant for life, when he will be recompensed should those assets prove sufficient. The trustees are all jointly liable, and therefore, the person suffering by a breach of trust is at liberty to proceed against any he may think proper. No doubt, the case of *Williams v. Allen* (29 Beav. 292) is an authority against the proposition contended for: but it is sub-

mitted there must have been some peculiar circumstances in that case which do not appear in the report. When the case came on, upon appeal, on another point, (31 L. J. Ch. 551) both the Lords Justices expressly guarded themselves against intimating any opinion as to the necessity of making the representatives of the tenant for life parties to the suit. In *Perry v. Knott* (5 Beav. 293) where a breach of trust was committed by several executors, it was held that the *cestui que trust* might proceed against one in the absence of the others.

Exham, Q C, (with him *Jones*) for the respondent O'Brien.—The rule is now well settled by recent cases that this suit is defective for want of parties. A stronger case against a petitioner never came before a Court. It is sworn that the trust money misappropriated was invested in Dutch funds, which were settled by the tenant for life on his second wife for life, with remainder to the petitioner himself. This then is the case of a person who has already profited by a breach of trust, who has already enjoyed part of it, to whom his father has bequeathed certain properties in satisfaction of his claim, and who has a vested remainder in the property purchased with part of the trust money, coming into Court to compel the trustees to restore that trust fund. Reason and authority are against such a doctrine. Why should the trustees be compelled to bring a fund into Court when it appears by the will of the Rev. George Burrowes that his assets are ample to satisfy all his liabilities? The case of *Perry v. Knott* relied on at the other side completely upsets the doctrine which they contend for. That was a case in which one George Aldrige bequeathed to his son Joseph Aldrige, his executors, and administrators £1,000 stock in trust for the separate use of Elizabeth, the wife of William Howell, for life, and after her decease, equally amongst her children living at her decease. He appointed several executors. After his death the executors transferred the stock into the joint names of Joseph Aldrige and Elizabeth Howell. Subsequently, Aldrige transferred it to the name of Elizabeth Howell, and she applied it to her own use. A bill was filed by the children of Mrs. Howell against the representative of Joseph Aldrige, who objected that the other executors, as well as the representatives of Mr. Howell, should be made parties. It was held under the 32nd General Order of August, 1841, that the other executors were not necessary parties; but it was also decided that the representatives of the tenant for life were necessary parties, "since she had reaped the benefit of the second breach of trust." If a *cestui que trust* concur in a breach of trust or benefit by it, he becomes a trustee *de son tort* and is primarily liable. *Jesse v. Bennett* (6 De G. M. G. 609). In *Orrett v. Corser* (21 Beav. 52) where a plaintiff sued his trustee to make him responsible for a trust fund which had been wrongfully paid to the plaintiff's father, and the plaintiff had as one of the next of kin of his father, received two-thirds of his estate, it was held that the father's assets, in the hands of the plaintiff, were primarily liable to make good two-thirds of the trust fund in exoneration of the trustee. The point was also before the tribunals of this country in *Bentley v. Robinson* (9 Ir. Ch. 479; on ap-

peal 10 Ir. Ch. 287). The very recent case, however, of *Williams v. Allen* (*ubi. sup.*) is decisive of the matter. "I am of opinion," says the Master of the Rolls, "in this case that if the money has been so paid over to them, (the tenants for life) the defendant would have a right to make any interest in the trust fund belonging to them available, and, therefore, that their legal personal representatives ought to be parties." That is exactly the case now before the Court.

Jones, on the same side, cited Mitford, p. 190.

W. R. C. Smith, for respondent, Gibbings.—He submitted that however his co-respondent might be affected by the filing of a petition for the administration of the assets of the tenant for life, his client was not thereby prohibited from insisting on the objection of want of parties, as she was no party to the administration suit. He also cited *Rahy v. Ridehalgh* (7 De G. M. & G. 104); and *Robinson v. Bransby* (6 Madd. 348).

Johnson in reply.—The case of *Williams v. Allen* was one in which the trustee of a marriage settlement was sought to be made personally liable for a portion of the trust-fund which was not forthcoming. It would seem, though this does not appear in the report, that a part of the trust-fund could only be reached by making the representatives of the tenant for life parties. At all events the Lords Justices expressly guarded themselves against confirming the decision of the Master of the Rolls in this respect. However, they expressly negative the doctrine contended for on the other side, viz., the primary liability of the tenant for life. Lord Justice Turner said he never recollected a decree, in a suit of this nature, being made primarily against a tenant for life; and failing that, secondarily against the trustee. The case of *Jesse v. Bennett* was different from the present, as that was a case where the representatives of a deceased trustee were seeking a contribution for a breach of trust from the surviving co-trustee. Putting the case in the strongest light against the petitioner, he can be only what is called on the other side a trustee *de son tort*. He is not primarily liable. When trustees are jointly liable, a *cestui que trust* may proceed against any one (*Killaway v. Johnson*, 5 Beav. 319). [*The Master of the Rolls*.—Suppose one receives the entire amount and misappropriates it, must he not be made a party?] All are jointly liable, and therefore each is liable for the whole. In *Strong v. Strong* (18 Beav. 408), relief was granted for a breach of trust committed by two trustees against one, in the absence of the representatives of the other. See also *Ling v. Coleman* (10 Beav. 371).

January 22.—THE MASTER OF THE ROLLS, now delivered judgment. The simple question, he said, was whether, where trustees commit a breach of trust by handing over a fund to the tenant for life, the *cestui que trust* in remainder can file a bill against them to compel the restoration of the trust-fund, without making the representatives of the tenant for life parties to the suit. It was contended for the petitioners, that the case was governed by the 28th general order of 1843, which provided: "That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the

Court, as parties to a suit concerning such demand, all the persons liable thereto, but the plaintiff may proceed against one or more of the persons severally liable. But the Court may, on the motion of the defendants, or on the hearing of the cause, if it shall think the justice of the case requires the presence of other parties, direct that they shall be made parties accordingly." The justice of the case *did* require that the representatives of the tenant for life should be made parties. But, even, disregarding this latter clause of the General Order, there were sufficient authorities under the 32nd English General Order, which contained no such clause, to render them necessary parties. The case of *Jesse v. Bennett* (6 De G. M. & G. 609), was a distinct authority for this. In that case a bill was filed by one trustee against his co-trustees to compel him to replace the trust-fund which had been misappropriated by him. It was contended that as the *cestui que trust* had concurred in the breach of trust, his estate was primarily liable, and, therefore, he should have been made a party to the suit. The Lord Chancellor in giving judgment said—"There is no doubt as to the general rule, that it is not necessary to make the *cestui que trust*, *quâ cestui que trust*, parties to a suit for the administration of the trust property. But anybody, whether he is a *cestui que trust* or a stranger, who has received the trust property, and been guilty of a breach of trust, must, of necessity, be made a party to the suit," and accordingly he allowed the objection. The case of *Perry v. Knott* (5 Beav. 293) was quite conclusive on the point; and petitioner's counsel, in citing it, must have been misled by the marginal note which omitted one of the principal points decided. It was there held that a *cestui que trust* might proceed against one of several executors who had been guilty of a breach of trust; but it was also held that the personal representatives of the tenant for life, who had reaped the benefit of the breach of trust, were necessary parties. The distinction must be carefully observed between those cases in which there was a mere improper investment on the part of the trustees, and those where the benefit of the breach of trust was derived by one of the *cestui que trust*. In the former case the *cestui que trust* might proceed against any one or more of the trustees; but, in the latter, the estate of the *cestui que trust* who reaped the benefit was primarily liable; and his representatives (if he had died) were necessary parties to a suit for the restoration of the trust funds (Lewin on Trusts, 646; *Browne v. Mansell*, 5 Ir. Ch. 351; *Ruby v. Riddalgh*, 7 De G. M. G. 104). The very recent case of *Williams v. Allen* (29 Beav. 292) had, however, decided the exact point, and behind that it was impossible to go. The representatives of George Barrowes the father should, therefore, be considered necessary parties, and fourteen days should be given to the petitioner, if so advised, to amend the petition.

RE WETHERALL'S TRUSTS—Jan. 23, 1864.

Judicial separation—Legacy—Settlement.

Where a legacy was bequeathed to a lady prior to her judicial separation from her husband, Held that,

in the absence of an affidavit showing that the existence of this legacy was known to the Judge of the Divorce Court, when considering the amount of the wife's alimony, the husband had no claim thereto. Held also that the principal should not be paid out to the wife, but should be settled on the wife and the children of the marriage.

THE petition prayed that a sum of £289 13s. 8d., lodged in Court, should be paid to the petitioner Jane Anne Tuthill, under these circumstances. The petitioner was married to William Tuthill, Esq., in 1837, and lived with him up to 1860. They then separated; and finally a divorce was obtained, on the ground of the husband's adultery in 1862; and a sum of £150 per annum was granted to the wife as alimony. This sum, the petitioner's affidavit stated, was paid out of her own estates. In December, 1860, a legacy of £300 had been bequeathed by Mrs. Wetherall to the petitioner, and this, after deducting probate and legacy duty, was by an order of the Court, of the 8th February, 1862, paid into Court to the credit of this matter. This sum the petitioner now sought to have paid out to her.

The Solicitor General (with him *R. Carson*) for petitioner.—This is one of those cases in which the Court will pay out the entire amount to the wife. Her fortune, on her marriage, was large; and there does not appear to have been any settlement. A divorce has been obtained on account of the husband's misconduct, and a very small sum has been granted to the wife as alimony.

Warren, Q.C. (with him *Todd*) for the husband. This is not a case where the Court will interfere to have the amount of a legacy paid to the wife. The whole matter has already come before a Court of competent jurisdiction. There the Judge of the Divorce Court, having all the circumstances before him, granted the wife whatever alimony he thought her entitled to. The matter might be different if this legacy had been granted to the wife subsequent to the judicial separation. But here the legacy had been granted no less than two years before.

Carson in reply.—There is no affidavit filed, on the part of the husband, showing that the existence of this legacy was brought under the notice of the Judge of the Divorce Court at all. Had it been brought to his notice, doubtless, the husband would have so stated by affidavit. If the judge, therefore, knew nothing of it, the same principle would apply as if the legacy had been given subsequent to the judicial separation.

THE MASTER OF THE ROLLS.—This is not a case in which the husband should have appeared at all. A case of greater misconduct than appears in these affidavits has rarely come under my judicial notice. I might have felt more difficulty here, if the existence of this legacy had been brought under the notice of the judge who decreed the judicial separation, but nothing of the kind appears. I have not been referred by the counsel for Mrs. Tuthill to any case, in which the entire amount has been paid out at once to the wife. That is not the usual course. The course which I always adopt is to make a settlement. I shall, therefore, follow the order made in the case of

Marshall v. Gibbons (4 Ir. Ch. 276) and direct the legacy to be set apart for the separate use of Jane Anne Tuthill, for life, and from and after her decease, for her children, as the court may direct.

Exchequer Chamber.

[Reported by William Woodlock, Esq., Barrister-at-law.]

[CORAM MONAHAN, C.J., AND BALL, KEOGH, CHRISTIAN, HAYES, AND FITZGERALD, JJ.]

DOYLE AND LAWLER v KINSLEY.—Nov. 10, 18.

A. was, under his marriage settlement, tenant for life of certain leasehold property held for a term of fifty-two years, with remainder to his wife for life, remainder to the children of the marriage absolutely. By deed reciting the settlement, that there were two children of the marriage, both infants, that there was a contract for purchase of the property, and that inasmuch as the children were incompetent to convey, A. had agreed to covenant for their execution of the deed on their reaching 21, the trustees of the settlement, A. and his wife, joined in conveying the leaseholds for the residue of the term to a purchaser according to their several interests; then all the conveying parties covenanted that notwithstanding any act done by them or any of them, they or some of them had good title to convey "for the residue of the term in manner aforesaid, according to the true intent of these presents." They also covenanted against incumbrances, and for further assurance; and finally, A. covenanted for the execution by the children of the marriage as they should attain 21. Held, that on the true construction of the entire deed the covenant for title was not absolute but qualified, and that there was not any breach of it in consequence of A. and his wife having only life estates.

THIS was an appeal from an order of the Court of Exchequer discharging a conditional order obtained under the following circumstances:—The summons and plaint complained that the plaintiffs were administrators of Francis Doyle, deceased, of Sandymount in the county of Dublin; and that by a certain indenture bearing date the 29th day of November, 1859, and made between Arthur Torkington and Frederick Sherry of the 1st part, the defendant and Martha Kinsley, his wife, of the 2nd part, Eliza Anne Kinsley, and Charles Kinsley, infants under the age of twenty-one years, of the 3rd part, and the said Francis Doyle of the 4th part, the said Arthur Torkington, and Frederick Sherry, and the defendant, for the considerations therein mentioned did grant, bargain, sell, assign, transfer, and make over, and the said Martha Kinsley did assign, dispose of, and make over to the said Francis Doyle, his executors, administrators, and assigns all that and those the house and cottage together with the garden adjoining thereto, once in the tenancy and possession of Julia O'Connor, and situate in the Strand Road at Sandymount, in the county of Dublin, together with the fixtures therein and all the improvements erected and made therein by the said

Henry Kinsley, and all and singular the rights, members, and appurtenances to the said premises, or any part thereof, belonging or appertaining, and therewith usually held and enjoyed, to hold to the said Francis Doyle, his executors, administrators, and assigns for the rest, residue, and remainder then to come and unexpired of a certain term of fifty-two years from the 29th day of September, 1855, for which said term of years the said premises were by a certain indenture of lease thereof, bearing date the 22nd day of November, 1855, demised by one Francis Salmon to the said Julia O'Connor, and as demised by the said indenture of lease. And the defendant, by the said first-mentioned indenture, covenanted with the said Francis Doyle, his executors, administrators, and assigns that at the time of the execution by the defendant of the said first-mentioned indenture the defendant and the said Martha Kinsley, Arthur Torkington, Frederick Sherry, Eliza Anne Kinsley, and Charles Kinsley, had in themselves, or that one of them had in himself or herself good right and absolute authority by the said first mentioned indenture to assign or otherwise assure the said dwelling-house and other the premises thereby assigned or made over, or intended so to be, with their appurtenances, unto the said Francis Doyle, his executors, administrators, and assigns, for all the residue which was then unexpired of the said term of fifty-two years in manner aforesaid; and all conditions were performed and fulfilled, and all things happened and were done and all times elapsed necessary to entitle the plaintiffs as such administrators as aforesaid to a performance of the said covenant of the defendant, and to maintain this action for the breach thereof hereinafter alleged; and nothing happened or was done which justified the defendant in committing the said breach, or to prevent the plaintiffs as such administrators as aforesaid from maintaining this action for the same; yet the plaintiffs averred that at the time of the execution by the defendant of the said first mentioned indenture, the defendant and the said Martha Kinsley, Arthur Torkington, Frederick Sherry, Eliza Anne Kinsley, and Charles Kinsley, had not in themselves, nor had any one of them in himself or herself, good right and absolute authority by the said first mentioned indenture to assign or otherwise assure the said dwelling-house and other the premises thereby assigned and made over, or intended so to be, with their appurtenances, unto the said Francis Doyle, his executors, administrators, and assigns, for all the residue which was then unexpired of the said term of fifty-two years in manner aforesaid, or for more than for so much of the said residue of the said term of fifty-two years as should expire during the lifetime of the defendant and of the said Martha Kinsley, and of the survivor of them, whereby after the death of the said Francis Doyle one Richard Frederick Waters, who had agreed with the plaintiffs, as such administrators as aforesaid, to purchase from them, and who but for the said breach of the said covenant by the defendant, would have purchased from them the said dwelling-house and other the premises by the said first mentioned indenture assigned and made over, or intended so to be, with their appurtenances, for the residue then unexpired of the said term of fifty-two years, refused to carry out the said agreement or to purchase the

said dwelling-house and premises, with their appurtenances, from the plaintiffs, and did not purchase the same; and the plaintiffs, as such administrators as aforesaid, had been prevented from selling the said dwelling-house and premises, with their appurtenances for so high a price as they otherwise would have obtained for the same, to the damage of the plaintiffs as such administrators as aforesaid of £500 sterling. To this the defendant pleaded, that notwithstanding any act, deed, matter, or thing, made, done, or permitted to be made or done to the contrary by the grantors in the said indenture of the 29th November, 1859, in the summons and plaint mentioned, the said Arthur Torkington, Frederick Sherry, the defendant, Martha Kinsley, Eliza Anne Kinsley, and Charles Kinsley, or some one or more of them had in himself or herself at the time of execution of said indenture by the defendant, good right and absolute authority to assign or otherwise assure said premises in summons and plaint mentioned, for the residue of said term of fifty-two years to the said Francis Doyle, his executors, administrators, and assigns, in manner in said indenture mentioned according to the true intent and meaning thereof. Issue was taken in the terms of this defence, and the case came on for trial before Fitzgerald, B., at the sittings after Trinity Term, 1862. At the trial it appeared that the subject of the deed of 1859 was a leasehold interest for fifty-two years from September, 1855, of certain premises at Sandymount. The lease bore date the 22nd November, 1855, and was assigned to the defendant by deed of the 9th of February, 1856. By settlement, dated the 1st October, 1857, made after the marriage of the defendant, but purporting to be made in pursuance of ante-nuptial articles, the defendant assigned the premises to Arthur Torkington and Frederick Sherry, in trust for himself for life, remainder to his wife, surviving, for life, remainder to the children of the marriage according to the wife's appointment, and in default equally. The premises were conveyed to Francis Doyle by the instrument of the 29th November, 1859, containing the covenants sued upon, which instrument is hereafter more fully set out. Francis Doyle died on the 15th May, 1861, intestate, and the plaintiffs took out administration to his estate. After his death they set up the leasehold premises by public auction, and they were sold on the 21st August, 1861, to one Waters for £600. Waters objected to the title, on the ground that the assignment of the 29th November, 1859, passed not the whole term granted by the lease of 1855, but only an interest defeasible on the death of the survivor of the defendant and his wife. The plaintiffs yielded to this objection, and served the defendant with notice that they would hold him responsible for the loss thereby occasioned. They subsequently put up the premises to be sold, subject to the objection, and they were sold for £410. It was admitted at the trial that the difference in value between an indefeasible interest for the residue of the term of fifty-two years on the 28th November, 1859, and the same term defeasible on the death of the defendant and his wife would be £150. The plaintiffs claimed this sum, and also the expenses occasioned by the abortive sale to Waters. They offered evidence of their expenses, which was received subject to objection, and proved

their having paid to the purchaser £1 10s. for interest on a deposit of £150 made on the sale and returned to him, also £8 1s. 8d. paid to the purchaser for costs of sale and investigation of title. The defendant contended that on the true construction of the covenant there were no breaches; and further, that even if there were a literal breach, the plaintiffs were only entitled to nominal damages; and that in any event the plaintiffs could not recover the two sums of £1 10s. and £8 1s. 8d., or either of them. The judge directed the jury to find for the plaintiffs damages to the amount of £159 11s. 8d., made up of the said sums of £150, £1 10s., and £8 1s. 8d., and reserved liberty for the defendant to have the verdict changed into a verdict for him if the Court should be of opinion that the judge ought to have so directed the jury, or to have a verdict for nominal damages entered if the Court should be of opinion that he ought to have so directed, or to have the verdict reduced by the two sums of £1 10s. and £8 1s. 8d., or either of them in case the Court should be of opinion that he ought to have so directed respectively, or should have directed the evidence relative to those sums or either of them. On the 5th November, 1862, the Court granted a conditional order to change the verdict had for the plaintiffs into a non-suit, or into a verdict for the defendant, or into a verdict for plaintiffs for nominal damages only; or that the verdict should be reduced by the two sums of £1 10s. and £8 1s. 8d., or either of them. The case came on to be argued in Hilary Term, 1863, when the Court allowed the cause shown against the above conditional order with costs, and directed that said order should be discharged. From that ruling the defendant appealed. The deed of the 29th November, 1859, was made between Arthur Torkington and Frederick Sherry of the 1st part; Henry Kinsley and Martha Kinsley, otherwise Smith, his wife, of the 2nd part; Eliza Anne Kinsley and Charles Kinsley, infants under the age of twenty-one years, by the said Henry Kinsley, their father and guardian, of the 3rd part; and Francis Doyle of the 4th part. It recited a lease of the 22nd November, 1852, by Francis Salmon to Julia O'Connor of the premises mentioned in the summons and plaint for fifty-two years, from the 29th September, 1855, at a rent of £51 a year. It further recited the death of Julia O'Connor and the assignment of the lease by her executors to the defendant, Henry Kinsley, and also, amongst other matters, a settlement to the effect already stated, bearing date the 1st October, 1857, made to carry out articles entered into previously to the marriage of the defendant and his wife, and of which Arthur Torkington and Frederick Sherry were the trustees. It then recited the fact of the marriage, and that "there is issue thereof only the said Eliza Anne Kinsley and Charles Kinsley, parties hereto, who are both infants under the age of twenty-one years;" and then it went on, "And whereas the said Francis Doyle has contracted with the said Henry Kinsley and Martha, his wife, for the absolute purchase of the interest in the said premises, together with the fixtures therein, and as now in the possession and occupation of the said Henry Kinsley and Martha, his wife, at or for the price or sum of £600, and upon the treaty for the said purchaser it was agreed that they, the said Ar-

thor Torkington and Frederick Sherry, trustees of the said indenture of settlement, should join in and be parties to these presents in manner herein-after expressed, and further, that inasmuch as said Eliza Anne Kinsley and Charles Kinsley are at present incompetent to assign their estate and interest in the said premises, that the said Henry Kinsley should enter into the covenant herein-after contained for the due execution of these presents by the said Eliza Anne Kinsley and Charles Kinsley on their attaining the age of 21 years. Now, this indenture witnesseth that in pursuance of the said agreement, and in consideration of the said sum of £600 paid by the said Francis Doyle to the said Henry Kinsley and Martha Kinsley, his wife, Arthur Torkington and Frederick Sherry on the perfection hereof, the receipt whereof is hereby acknowledged, they, the said Henry Kinsley, Arthur Torkington, and Frederick Sherry, do, by these presents, grant, bargain, sell, assign, transfer, and make over, and the said Martha Kinsley by this deed intended to be acknowledged by her according to the formalities prescribed by the Act of Parliament passed in the 4th and 5th years of the reign of his late Majesty King William the Fourth, &c., with the assent of her husband, the said Henry Kinsley, testified by his being a party to and executing these presents, doth assign, dispose of, and make over to the said Francis Doyle, his executors, administrators, and assigns, All That and Those ' the premises in question, "and all the estate, right, title, benefit, claim, and demand whatsoever, both at law and in equity, of them, the said Arthur Torkington, Frederick Sherry, Henry Kinsley, and Martha, his wife, Eliza Anne Kinsley, and Charles Kinsley, of, in, to, and out of the said premises and every part thereof, to have and to hold" the said premises "to the said Francis Doyle, his executors, administrators, and assigns, for the rest, residue and remainder of the said term of years yet to come and unexpired as demised and granted by the said herein-before recited original indenture of lease," subject to the payment of rent and performance of covenants; "And the said Henry Kinsley, for himself, and the said Martha Kinsley, his wife, and the said Arthur Torkington, Frederick Sherry, Eliza Anne Kinsley, and Charles Kinsley respectively, and their respective heirs, executors, and administrators, do hereby covenant and agree with the said Francis Doyle, his executors, administrators, and assigns, that notwithstanding any act, deed, matter, or thing whatever, made, done, or permitted to be made or done to the contrary by the said grantors or any or either of them, the said Henry Kinsley, and Martha, his wife, Arthur Torkington, Frederick Sherry, Eliza Anne Kinsley, and Charles Kinsley, now have in themselves, or one of them bath in himself or herself, good right and absolute authority by these presents to assign or otherwise assure the said dwelling-house and other the premises hereby assigned and made over, or intended so to be, with the appurtenances, unto the said Francis Doyle, his executors, administrators, and assigns, for all the residue which is now unexpired of the said term of fifty-two years in manner aforesaid, according to the true intent and meaning of these presents; and also that the said dwelling-house and premises are free and dis-

charged, or by the said Henry Kinsley and Martha, his wife, Arthur Torkington, Frederick Sherry, Eliza Anne Kinsley, and Charles Kinsley, their heirs, executors, or administrators, will be effectually kept indemnified from and against all former estates, rights, titles, charges, and incumbrances whatsoever, at any time or times heretofore created or occasioned by the said Henry Kinsley and Martha, his wife, Arthur Torkington, and Frederick Sherry, or by any person or persons claiming or to claim through, under, or by them or any of them; and that the said Henry Kinsley, Martha, his wife, Arthur Torkington, Frederick Sherry, Eliza Anne Kinsley, and Charles Kinsley, their executors or administrators, and every person whomsoever having or rightfully claiming or to claim any estate, right, title or interest, at law or in equity, into or out of the said premises or any part thereof, through, under, or in trust for him or them, will from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said Francis Doyle, his executors, administrators, and assigns, make, do, and execute and perfect every such lawful and reasonable act, deed, or assignment or assurance in the law whatsoever, for more effectually and satisfactorily assigning, conveying, or otherwise assuring the said premises hereby assigned, or intended so to be, with the appurtenances, unto the said Francis Doyle, his executors, administrators, and assigns, thenceforth for all the residue or remainder which shall be then unexpired of the said term of fifty-two years in manner aforesaid, according to the true intent and meaning of these presents, as by the said Francis Doyle, his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised or required; and the said Henry Kinsley doth hereby, for himself, his executors and administrators, covenant with the said Francis Doyle, his executors, administrators, and assigns, that the said Eliza Anne Kinsley and Charles Kinsley, and all and every other the issue of them, the said Henry Kinsley and Martha, his wife, who, if these presents had not been made, would have acquired a vested interest in the premises hereby assigned, under and by virtue of the said indenture of settlement, shall and will, within one calendar month next after the time they respectively would have attained such vested interest as aforesaid, or in case of their death in the meantime, then that all other person or persons who in that event would be entitled to the said premises if these presents had not been made, shall and will, at the request, costs, and charges of the said Francis Doyle, his executors, administrators, or assigns, execute these presents, or by such other assignment or assurance in the law as the said Francis Doyle, his appointees, executors, administrators, or assigns, or his or their counsel learned in the law shall advise and require, assign, convey, and assure the said premises to the said Francis Doyle, his executors, administrators, or assigns, or as he or they shall direct or require, free from all incumbrances whatsoever, to be made, done, or created by such person or persons as aforesaid; and that in the meantime it shall be lawful for the said Francis Doyle, his executors, administrators, or assigns, peaceably to hold and enjoy the said premises without any interruption of or by the said

Miss Anne Kinsley and Charles Kinsley, and other the person or persons claiming or deriving, or to claim or derive as aforesaid."

J. E. Walsh, Q.C., and Ryan, for the defendant.—There was no breach of covenant here. The covenant was not an absolute one, but only one that the defendant was entitled "in manner aforesaid," that is, as pointed out in the deed. The modern rule of construction is the true one,—that the intention of the parties is to be taken from the whole deed. Here the intention is manifest. The deed amounts to this: the husband gives the purchaser notice how he stands—that he and his wife convey their interests—that the trustees convey the legal estate—that he covenants for the children, who are infants, executing the deed when they reach their age, and then he covenants for good title "as aforesaid"—that is, subject to the blot which is apparent on the very face of the deed.—*Browning v. Wright* (2 Bos. & Pul. 13); *Ford v. Wilson* (8 Taunt., 543); *Stanner v. Forbes* (6 Ad. & Ell., 572); *Delmor v. McCabe* (8 Ir. Jur., N. S., 236). *Ewer v. Chamberlain* (2 Bulstr., 11.) is directly in the teeth of the modern authorities. It would be absurd to hold that the defendant here covenanted absolutely for good title, when on the face of the very deed containing the covenant it is plain that he had not a good title absolutely. *Johnson v. Procter* (Yelv., 175).

Serjeant Armstrong and Curtis for the plaintiffs.—The covenant is an absolute one, and there is no absurdity in holding it to be so. It may be that the party had a title paramount, or some latent power of sale. In *Browning v. Wright* the decision was merely that where there are a number of covenants, and the earlier one uses restrictive words, and then follows one not using the restrictive words, you may look to the whole deed to see if the restrictive words are to be imported into the later covenants. *Smith v. Compton* (5 B. & Ad. 189). The covenant may have been introduced for the purpose of guarding against the very defect which is apparent on the deed. The meaning is, that notwithstanding all that has gone before, the entire estate is covenanted to be granted, and the covenant is broken the moment the deed is executed.—*Platt on Covenants*; *Rolle's Abr. Condition, D. 420.*; *Ewer v. Chamberlain* (2 Bulstr. 11); *Sugden on Vendors and Purchasers*, 498. The verdict must stand for the full amount; we were entitled to recover the £1 10s. and the £8 1s. 8d.—*Robinson v. Harman* (1 Exch. 850); *Hodges v. Duckfield* (1 Bingh. N. C. 182).

Nov. 18.—*MONAHAN, C. J.*—This case comes before this Court on appeal from an order made by the Court of Exchequer. (His Lordship then stated the rule obtained in the Court of Exchequer and the order discharging it.) The facts of the case are these. It is an action for a breach of covenant, brought by the personal representative of the purchaser under a deed of 1859, in which the defendant, it is said, covenanted that he had good right to convey, and the summons and plaint complain of a breach by the defendant, stating that in fact he had not good right to convey, and that the plaintiff had thereby sustained damages. The defendant pleaded that he had good right to assign the premises according to the true intent and

meaning of the indenture of assignment; and really the question that arose in the case, though it arose on the question of fact, was a question of law as to what was the true construction of the deed on which the action was brought. The deed itself is set forth in the appendix to the case before us. It is a deed made on the 29th November, 1859. The parties to it are Arthur Torkington and Frederick Sherry of the first part; the defendant and his wife of the second part; their two children, who are stated to be infants, of the third part; and Francis Doyle, the purchaser, of the fourth part. It recites the settlement on the marriage of the defendant and his wife, the contract for purchase, and the infancy of the children, who, as I have mentioned, are in fact stated to be parties to the deed of the third part by their father and guardian. [His Lordship then stated the witnessing part of the deed, the covenant for right to convey, the covenant against incumbrances, and for further assurance, and the special covenant for the execution by the children.] At the trial it was alleged, and the facts were stated to be, that the property after the death of Doyle, the purchaser, was set up for sale by auction as if a title existed to it, and that the purchaser objected to complete his purchase on the ground that on the face of the conveyance to Doyle, though there was a covenant for execution by the children, that covenant was not binding on the children, and therefore, though the purchaser could not be disturbed during the lives of Kinsley and his wife, nor during the term, if Kinsley and his wife survived the children, still there was not a title made from the children not joining, and, there being a covenant that he had good right and title, that there was an apparent breach. The purchaser was discharged, and the property was set up again and sold for £150 less than at the original sale, and the plaintiff claimed the damages sustained by the apparent breach of covenant, which was a breach provided only that the plaintiff's construction is a good one. The case was fully argued in the Court of Exchequer, and the Barons of that Court came to the conclusion that this was an absolute covenant for title, and they did not conceive they had any power to cut it down, and they therefore allowed the cause shewn. Well, that is the matter brought before us on appeal; and I must say for myself and the other members of the Court, that we have given the case as much consideration as we could, and we have come to the conclusion that there was no breach, and that the verdict must be entered, according to the judgment of this Court, for the defendant. I shall now state, I hope clearly, the reasons which have induced us to that conclusion without any difference of opinion, and with the full sanction of our brother Fitzgerald, who is absent. Some cases were referred to by counsel before us and in the Court of Exchequer, for I believe no new light was thrown upon the argument here, and I understand from the judgment of the Chief Baron, which was read here, the grounds upon which he decided the case. Some cases were cited, but the law on the subject is collected in that which is a leading case on the subject of covenants for title,—that is the case of *Browning v. Wright*. In that case the facts were these: A party, A., conveyed certain property in fee-simple to B., and

he covenanted in the deed of conveyance that notwithstanding any act by him done to the contrary, he was lawfully and absolutely seised in fee simple, "and that he had good right, full power, and lawful and absolute authority to convey and assure the same to the plaintiff, his heirs and assigns, in manner aforesaid." The question there was this—It turned out that the grantor was not seised in fee-simple; the lands were claimed by other parties, to whom, to save himself from being dispossessed, the plaintiff had to pay rent, whereupon the action was brought for breach of covenant. It appeared by the deed that the first covenant in the case was, that "the said J. Wright, for and notwithstanding any act by him done to the contrary is lawfully and absolutely seised of the said piece or parcel of arable land hereby granted, of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee-simple, without any manner of condition, limitation, use, or trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat, or determine the same, and that he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said plaintiff, his heirs and assigns, in manner aforesaid." The breach of covenant alleged was, that he had not got power to convey, because in fact he had unknowingly purchased a bad title, and that the man who purchased from him was affected by a person claiming title paramount, and that the covenant was to be construed literally, because there is no doubt that if it were so, he had not good right, and the question was, whether they could import into that which was *per se* absolute the qualifying words in the other covenant, that he was absolutely seised, "notwithstanding any act by him done to the contrary." The case was argued by some of the most eminent men at the Bar, and they referred to all the cases, most of which are given by Lord Eldon in his judgment. Lord Eldon in this judgment refers first to what is and what was at that time the course of conveyancing. He says that the course, to his knowledge, and to that of every practitioner is, where a vendor had himself purchased from another, he was called upon only to covenant that he had done no act to alter the title or affect it himself; that it was the duty of the purchaser to ascertain whether there was a good title; that he had the abstract, and should at his peril make out whether the title was good or bad, but that according to the ordinary course all that the purchaser was entitled to was a covenant against acts done by the vendor himself. But though that is all that can be required, still a party may, by clear, express words, insist on getting other title, and Lord Eldon says that it is understood to be the case, where a party purchases a leasehold interest where he had no means of knowing the title of the owners, he generally insisted on getting an absolute covenant for the validity of the lease, but in the case before Lord Eldon it was fee simple property that he had to deal with, and there was an express covenant limited to acts done by the covenantor. The consideration for Lord Eldon was, whether he could import the words of limitation which were in one part of it into the other part of it, and the Court held he could, for this reason, that the warranty which preceded the covenant, and which was the same in fact, was expressly

limited against the vendor and his heirs, and the second covenant was for acts done by himself. There also it was said, it would be absurd to have limited covenants, three in number, if you put among the three one absolute, and which, the very moment the wax of the seal to the deed was dry, would give a right of action against the vendor. Therefore, from the meaning which was to be collected from the whole context, and from the insensible result that would follow from holding differently, he came to the conclusion that according to the true meaning of the deed, the covenant was a covenant limited in its character, though in its words general. He went into some speculation whether it might not be read as portion of the first covenant; but he did not make that the ground of his decision; the ground of decision was, that the deed was to be construed according to its intent; and in one portion of the judgment I shall take the liberty of referring to, there is a remark which is, I believe, the leading rule as to applying authorities to the construction of deeds. He says, "With respect to the cases which have been cited, it is to be observed that when a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner." In all these cases where actions are brought on covenants, as collected by Lord St. Leonards, at p. 605 of the last edition of his book on Vendors and Purchasers, the rule laid down in *Browning v. Wright* is looked upon as a canon of construction. But bearing in mind what the construction is, it will be for us to apply the canon here. Other cases were also cited, among the rest one which was strongly relied on, I mean the case in Yelverton, *Johnson v. Proctor* (Yelverton, 175). There, though the covenant was limited to acts by the party, and though the literal construction would enable the party to escape, the Court saw on the whole instrument the intention of the party was that it should not be so limited, and they did violence to the deed to carry out the intention. There was another case cited, that of *Chamberlain v. Ewer*, in Bulstrode, and without carefully considering the deed there it might appear for a moment to run counter to the decision we are pronouncing. That is the decision which settled the law of special occupancy to a certain extent. There there was a tenant for three lives who made a lease to the defendant for six years. The defendant made a lease at will to two others; the tenant for lives died, the two tenants at will being in possession; the tenant for years by deed reciting the absolute matters, and that the two tenants at will claimed only at will, and to his uses that the tenant for three lives had died, and that he, the defendant was now seised of the freehold for term of the other lives as an occupant, assigned, let over, bargained, and sold to the plaintiff all his estate, right, title, and interest in the land to have and to hold for the lives then in being, and he covenanted in the most clear and express language that he had such an estate in the land as would well warrant the sale so by him made, and that he had full power and good authority to do this; and did further covenant to make him afterwards such further

and better assurance as his counsel should advise *de termino prodicto*. Well, accordingly it turned out that the tenant at will who happened to be in possession became special occupant, and an action was brought for the breach of covenant. After a great deal of argument the judges decided that the special occupant was the tenant at will, not the tenant for years, and therefore, that there was a bad title to convey to a purchaser, and it appeared that that bad title was conveyed, and notwithstanding that, the Court decided that an action for breach was maintainable, but on the ground that that doubt which appeared on the face of the instrument was the thing the party had covenanted against, and that the party took on himself to covenant for a doubtful point of law, and therefore, the Court held that the covenant was broken. There is another case of *Margeson v. Wright* (7 Bingham 603). It was on a very different subject, namely, the sale of a lame horse. There an absolute warranty was given in writing that the horse was sound; and the purchaser who had got the warranty wanted damages, alleging that there was a breach of the warranty. There was no doubt if you were to take the warranty literally, that it was so, but it was held by the Court of Common Pleas, that there was some little difficulty in doing so, because the lameness was known to both parties, and they decided on granting a new trial—a verdict having originally been found for the plaintiff. There are other cases. The result to be drawn from all is that though a covenant is general in terms, if the Court comes to the conclusion that what the parties intended was a special covenant they will read it special; and on the other hand, though the covenant is special, if it be broken in substance though not in words they will give it an extended construction as in the case in *Yelverton*. That brings me to consider what the intent of the parties here was, and whether I can find enough in the words to say that the deed has the construction, that we are satisfied the parties intended. Well now, I have stated the facts in detail, and I will mention what they were, irrespective of the language of conveyancing. A leasehold property is settled, vested in two trustees for the husband for life, remainder to the wife for life, remainder to the children; but it appears on the face of the instrument that the children are under age, and there is a recital that they are incapable to convey, and therefore, that it is arranged that the father should covenant that they would convey. Now, all conveyancing counsel know that in a property circumstanced like this the course of the purchaser is two or three-fold. One duty of the gentleman before whom the title was laid was to say, "this is a bad title." Another thing would be to say, "if you are anxious for the property, do this: you can get the undisturbed possession of the property for the lives of the husband and wife, and you may get a covenant from the husband that when the child comes of age they will convey, and you cannot be disturbed during the lives of the husband and wife who are young people, and very probably you may get in that way a good title, and also you may say that the blot is to be taken into account in the amount of purchase-money to be paid." Another mode is this: "take a covenant unlimited

in terms as to quiet enjoyment there being a difference between this and the covenant for right to convey, as a covenant for quiet enjoyment cannot be sued on till disturbance." What now is the true construction of this instrument? In the first place it recites on the instrument itself that the infants are under age, and therefore incapable of conveying—a clear statement that they have a subsisting interest—and the contract is recited to be that in consequence of that there should be a covenant that they would convey, and also that any other children afterwards to be born should do the same. Then the contract is for the interest in the premises. I do not stop to say that that is not contract for the entire estate for the whole of the years. But what is the covenant here? That they have a right to convey "in manner aforesaid according to the true intent and meaning of these presents." What is the meaning of "as aforesaid"? Is it that he has power at this moment, the moment the wax is dry on the deed? To give that construction we should hold that this is not a purchase for the sum of £600, but for that sum *minus* such sum as a jury might the day after deduct from the purchase-money, deducted on account of the blot on the title; a most unnatural construction, because it involves the parties at once in a law-suit. It is not contested but that Mr. Doyle might maintain the action the moment the instrument was delivered to him. Therefore, we come to the conclusion that this was not the intention of the parties; that the parties covenanted to convey as they had power; namely, the trustees for the whole term and the husband and wife for their lives, and that the father covenanted for the children, so that if they did not execute the conveyance when they reached their age, then the purchaser would be entitled to recover from Mr. Kinsley sufficient damages to compensate him for the injury he sustained by reason of the breach. Upon these grounds we come to the conclusion that the intent was that that was the conveyance to be made, and therefore, that the verdict must be entered for the defendant. However, I believe, the course is that the Court being of a different opinion from the Court below the parties must abide their own costs in this Court of this appeal.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

BERNAL v. CROKER.—Nov. 5, 18, 23.

Bill of exchange—Plea of want of consideration—Policy of the Insolvent Law.

To an action against the acceptor of a bill of exchange by the indorsee the defendant pleaded that the bill was indorsed to the plaintiff to secure a sum due by the drawer of the bill before he was discharged as an insolvent, together with interest, &c., from which debt the drawer was duly discharged by virtue of the proceedings in the insolvency, of which the plaintiff had notice, &c., and also to secure a sum of £30 advanced by

plaintiff to defendant, and that save to the extent of the said sum of £30 (which the defendant brought into Court) there was no consideration for the acceptance by the defendant of the said bill of exchange. Held, upon demurrer, a bad plea.

THE summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £97 4s. 9d., for, that one Thomas Croker, on the 12th November, 1860, drew his bill of exchange, now over due, directed to the defendant, and required the defendant to pay to his (Thomas Croker's) order at the Bank of Ireland, George's-street, Limerick, £97 4s. 9d., three months after date, and the defendant accepted the said bill, and the said Thomas Croker indorsed the same to the plaintiff, and said bill was duly presented for payment at the Bank of Ireland, George's-street, Limerick, aforesaid, on the day it became due, and was dishonored; and said Thomas Croker did not nor did the defendant pay the same, and same still remained wholly due and unpaid. The defendant pleaded that the bill of exchange in the writ of summons and plaint mentioned was indorsed to the plaintiff to secure a sum of £39 8s. 3d., due by the Rev. Thomas Croker, the drawer of said bill, before he was duly discharged as an insolvent, together with interest upon such debt from the year 1855, in which year the said Thomas Croker was duly discharged as an insolvent, as aforesaid, up to the date of the passing of the said bill to the plaintiff, and from which debt the said Rev. Thomas Croker was duly discharged, by virtue of the proceedings in the said insolvency, of all which the plaintiff at the time of drawing and accepting the said bill had notice, and also to secure the sum of £30 advanced by plaintiff to defendant at the time of the acceptance of the said bill by the defendant, and the indorsement of same to plaintiff, and that save to the extent of the said sum of £30, there was no consideration for the acceptance by the defendant of the said bill, and that since the same became due, he had paid to the plaintiff the sum of £5 on foot of the same at the time and in the manner thereon indorsed, and that there was now due on foot of the said bill no greater sum than £30, which the defendant brought into Court. The plaintiff demurred to this plea, on the ground that it did not show the plaintiff to be a holder, without consideration, of the bill of exchange sued upon, and for that the holder of a bill of exchange for good consideration was entitled to recover the whole amount of such bill, even from an accommodation acceptor, and that a debt for which a debtor had been discharged under the Insolvent Act, was a consideration sufficient to support the indorsement of a bill of exchange, and for that where a bill of exchange was indorsed by an insolvent to secure a debt from which he had been discharged, under the provisions of the Act for the relief of insolvent debtors, the legal remedies upon said bill of exchange were not suspended by the 230th section of the Irish Bankrupt and Insolvent Act, 1857, in favour of any party thereto, save and except such insolvent, and for that the plaintiff being a holder of the said bill for good consideration, the adequacy of such consideration was not a question into which the Court would enter.

Daniel, in support of the demurrer.—The old debt due by Thomas Croker was a good consideration to support this bill of exchange—*Best v. Barker* (8 Price 533); *Rea v. McCabe* (Hayes's Rep. 484). In the former of these cases Lord Mansfield says, "Where the remedy is taken away, and not the debt, the debt is a debt in conscience, like the case of a debt barred by the Statute of Limitations, and it may be the ground of a future promise or security." Prior to the Bankrupt and Insolvent Act, 1857, the consideration would have been sufficient, and that Act will not protect this defendant—20 & 21 Vic. cap. 60, sec. 230. The rule to be observed in construing Acts of Parliament is laid down by Baron Parke in *Perry v. Skinner* (2 M. & W. 476); Byles on Bills, p. 226. *Flight v. Reed* (1 Hur. & Col. 703). It will not be argued that there was an illegality.

Jellett and Ryan, contra.—1. There was no consideration. An action against the insolvent on this bill of exchange could not be maintained. *Evans v. Williams* (1 Cr. & Mee. 30); followed in *Ashley v. Killick* (5 M. & W. 509); *Flight v. Reed* is not applicable; it would prove too much: it would prove that the insolvent himself could be sued. The judgment of the majority of the Court there was founded on the repeal of the usury laws, and the cases upon the Insolvent Act were not cited. [*Monahan, C.J.*—Could an action be brought against the defendant on the ground of the £30, because the usury laws are repealed?] It is not disputed that the debt of a third person is a consideration for a promissory note; but there is not such a debt here as would be a consideration. There must be not only a debt, but some person at the time liable for the debt. *Popplewell v. Wilson* (1 Strange 264). In *Nelson v. Serle* (4 M. & W. 795) Tindal, C.J., asks, "Have you any right to guess, that by any accident the defendant would take out administration in the course of the year?" There the Court was asked to speculate upon administration being taken out: so here the plaintiff asks the Court to speculate upon the insolvent having after acquired property which would be liable to discharge the old debt. The Court cannot speculate on this. The insolvent cannot be sued; therefore, no person can be sued; therefore, there is no forbearance or detriment, and therefore no consideration. The cases cited (with the exception of *Flight v. Reed*) were prior to the Bankrupt and Insolvent Act. 2. But even if there were a consideration, it is contrary to the policy of the Bankrupt Act to allow an action to be brought against any person upon this negotiable instrument. The policy of that Act could always be defeated, if the indorsee could sue the security, and then the security sue the insolvent. [*Monahan, C.J.*—If an insolvent acquired property and voluntarily paid a debt, could he recover the money back?] Scarcely, if he did it, knowing all the circumstances about it. The Act (sections 25, 26, 27, 28, 37) provides a machinery for recovering subsequently-acquired property, but the result in this instance would be that the same debt might have to be paid twice over. The defendant would have his remedy over on the ordinary principle of a surety suing his principal. The 230th section of the Act would not pro-

fect the insolvent. That allows the discharge to be pleaded to any action upon any new contract or security for payment of the old debt. But here it would be an action for money paid to the insolvent's use. The action could not be brought until the defendant had actually paid the money, and it would not be upon the contract or upon the new contract or security. [*Monahan, C. J.*—It would not be on the security, for that would be an acceptor suing a drawer, a thing which was never heard of. *Christian, J.*—The question is, if it would not be on the new contract.] It would not be on the contract; it would be long after the contract had its inception. [*Monahan, C. J.*—If the state of facts were this, that your client irrespective of insolvency accepted the bill to accommodate his father, and if the latter were to apply it by passing it to Bernal, the plaintiff, then it would seem to be very hard that if Bernal recovered against your client, that he could not recover against his father, the insolvent. I think it would be his right if he were not mixed up with Bernal; but if otherwise, I do not think it is so clear. Suppose he were to pass a bill direct to the insolvent, and that Bernal were entitled to recover against him, it may be that he would have no remedy.] *Lewis v. Kelly* (16 Law Times 8) though an Irish case is not to be found in any Irish report. There the plaintiff had withdrawn his opposition, to the insolvent's discharge on receiving a bill of exchange for the amount of his debt drawn by the insolvent and accepted by the defendant, and it was held, that the agreement being contrary to the policy of the insolvent law the plaintiff could not recover even against the acceptor, and Blackburne, C. J., says, "Our decision goes altogether on the ground of public policy." That case is in some respects stronger than this; but the policy of the Insolvent Act is to free the insolvent in every way. [*Christian, J.*—It is enough to satisfy the observation there that the bill was passed to induce a compromise.] Where the original contract is void for illegality, everything growing out of it is void also. [*Christian, J.*—Why should not the £30 be itself a consideration for the whole debt in the present state of the law—throwing the insolvency over altogether?] The defence states that the bill was endorsed to secure a sum due by the Rev. Thomas Croker before he was duly discharged as an insolvent. The indorsee of an accommodation bill who knows it to be such can recover only what he has paid—*Wissen v. Roberts* (1 Esp. 261); *Eastwood v. Kenyon* (11 A. & E. 438); *Davis v. Dodd* (4 Taunt. 602).

Daniel in reply.—The holder of an accommodation bill can recover, although he knows at the time of taking it, that it is an accommodation bill. [*Monahan, C. J.*—That is a first principle, but show that the indorsee of an accommodation bill can recover more than he has himself given for it.] It is said that the cases cited were previous to the Bankrupt Act, but the defendant must show something in the Act which makes the debt to be no consideration; which makes it illegal or void. In *Flight v. Reed* (1 Hurl. & Colman, 716), Chief Baron Pollock says: "There is, therefore, reasonable ground, as it seems to us, for this qualified proposition, viz.: that a man, by

express promise, may render himself liable to pay back money which he has received as a loan though some positive rule of law or statute intervened at the time to prevent the transaction from constituting a legal debt. There is likewise authority for it, there is a very able note to the case of *Wenell v. Adney*, explaining this at length." This disposes of the objection to the antiquity of these decisions. [*Monahan, C. J.*—When these cases were decided, if an insolvent promised to pay a debt, and a *fortiori* if he gave a security, he could be sued upon it; but it is argued that even in the year 1855, and before the Bankrupt Act of 1857, there was a provision preventing a security for such a debt, and that this makes the difference.] Where are there any words which say that the consideration is void so far as a third person is concerned? [*Christian, J.*—Is there any case establishing that a debt which is barred as against one person is a consideration with a third person?] I do not want to show that the acceptor got any consideration at all. This was an accommodation bill, but my contention is that there was consideration as between the holder and the drawer. Good and valuable are convertible terms, Chitty on Contracts, 6th Ed. p. 26. It is no defence to an action by an indorsee for value against an accommodation acceptor, that the plaintiff knew the defendant had received no value, Byles on Bills, 118; *Smith v. Knox* (3 Espinasse, 47). It rests upon the opposite side to show something which makes this not to be a good consideration. [*Monahan, C. J.*—It is said that a debt which could not be sued on is no consideration.] The defendant must show a distinction between a debt barred by the Statute of Limitations, and a debt discharged by insolvency. The latter is in the same position with those referred to in *Eastwood v. Kenyon* (11 A. & E. 447)—If the debtor wishes to forego an advantage given by an Act of Parliament, he may do so. It will not make the consideration void or illegal that the remedy is taken away. [*Christian, J.*—It may be difficult to see a consideration in a promise by a party when, neither on the original debt, nor on the renewal of it, could the principal be sued; but could you make out a consideration from the possibility of the insolvent being afterwards made to pay?] This acceptor was not merely a surety. [*Monahan, C. J.*—In *Bristow v. Brown** we followed cases in Chancery and held, that if the holder of an accommodation bill, knowing it to be such, gives time to the drawer, without notice to the acceptor, he discharges the acceptor.] If the amount of this bill were paid by the acceptor he could not sue the drawer because the 230th sec. of the Act would protect him; but the law is not to be strained in favour of a party who comes forward voluntarily to discharge his father's debt in consideration of £30 lent to him. The consideration as between the drawer and acceptor may be void and yet not illegal, so as to throw upon the holder the onus of showing what consideration he gave; *Fitch v. Jones* (5 El. & Bl. 238). Since the usury laws have been repealed, the £30 is sufficient to support a bill of exchange for £97—17 & 18 Vic. c. 90, Chitty on Contracts, 6th

* 7 Ir. Jurist N. S. 168.

Ed. p. 27. As to the policy of the Bankrupt Act, section 230 is so completely confined to the insolvent that it cannot be supposed to refer to other parties. There is not in this Act, as in the English Act, a section making a contract entered into to induce a creditor to forbear from opposing an insolvent illegal. 1. There was a good consideration as between the drawer and the plaintiff, and therefore the latter is entitled to sue. 2. The £30 was itself a consideration. [Christian, J.—As I understand the pleadings two considerations are alleged for the bill, one the £30, the other the undertaking by the insolvent; if the latter be invalid, does it follow that the former is so? If a party says, I will accept a bill for £97 for £30, and my reason for doing so is a debt due by my father, will this destroy the other portion of it? *Jones v. Waite* (5 Bingham's, N. C. 341.)

Jur. adv. vult.

Feb. 1, 1864.—MONAHAN, C.J.—It has been argued that this bill is to be taken to the extent of the old debt as an accommodation bill, and that an indorsee can recover from the acceptor only the amount given by him. No doubt the law is as has been stated, that the indorsee of an accommodation bill can recover only the amount which he has given. I am not clear that this bill was given for the accommodation of the drawer. It was drawn, probably as much, if not more, for the accommodation of the acceptor, but I will consider it as drawn for the accommodation of the drawer. In *Nelson v. Serle* (4 M. & W. 795), an action was brought on a promissory note, given by Mrs. Nelson for a debt due by her deceased husband. (His Lordship stated the plea in *Nelson v. Serle*). The Court of Exchequer held that she was liable on the note, but the Court of Exchequer Chamber held differently. The defendant's counsel in the present case, say that no person is liable; we do not accede to that argument. Upon the insolvent's discharge, he executed a warrant of attorney for all his debts which can be made to operate on subsequently acquired property, by the Insolvent Court. I am not aware of anything to prevent a discharged insolvent from requesting a third party to accept a bill for his accommodation. In ordinary cases the acceptor would be entitled to sue the drawer for not indemnifying him. After giving the matter the best consideration, we think the plaintiff is a holder for value and entitled to recover. I do not, myself, think the matter free from difficulty.

CHRISTIAN, J.—I will state, my view. (His Lordship repeated the pleadings). Though somewhat loose in their terms, I think they show that the plaintiff does not occupy the position of an ordinary indorsee. Drawing, accepting, and indorsing were the one transaction. This view disposes of much of the argument addressed to us; but, in my opinion, the defendant was not an accommodation acceptor at all. The drawer of such a bill should be not only liable, but primarily liable. This bill is payable three months after date. A promise *per se* to pay would be worthless if there were nothing more, and by taking the bill at three months' date, the plaintiff would give up nothing, and if this were all, the defendant's argument would be sustainable. But, nevertheless, upon a ground which I threw out during the argument,

and which was not argued as much as it might have been, I think the plaintiff entitled to recover. Sections 225, 226, 227, 228 of the Bankrupt and Insolvent Act provide for after acquired property being applied to the payment of the insolvent's debts. I do not see why the forbearance to proceed for three months should not be a consideration. It is no answer to say, that it does not appear the insolvent had any property. The relinquishment of the contingency is a consideration. *Nelson v. Serle* does not conflict with this. If Thomas Croker had become possessed of property, the plaintiff, by taking the acceptance, could not have proceeded for the three months. It has been objected that the policy of the insolvent law will be thus defeated, but that proceeds on the supposition that this bill was accepted for the accommodation of the drawer, and I have already said that it was not.

BALL, J.—Concurred.

KEOGH, J.—Had not been present during the argument.

Judgment for the Plaintiff.

NOTE.—The pleadings in this case were amended by the direction of the Court, prior to the judgment being given on the demurrer. As they originally stood, the summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £97 4s. 9d., for that one Thomas Croker, on the 12th November, 1860, drew his bill of Exchange, now over due, directed to the defendant, and required the defendant to pay to his, Thomas Croker's, order, at the Bank of Ireland, George's-street, Limerick, £97 4s. 9d. three months after date, and the defendant accepted the said bill, and the said Thomas Croker indorsed the same to the plaintiff, but did not pay the same. The defendant pleaded that the bill of exchange in the writ of summons and plaint mentioned was passed to secure, amongst other things, a sum of £89 8s. 3d. due by the Rev. Thomas Croker, before he was duly discharged as an insolvent, to the plaintiff, which debt duly appeared in the said insolvent's schedule, together with interest upon such debt, from the year 1855 up to the date of the passing of the said bill to the plaintiff, and from which debt the said Rev. Thomas Croker was duly discharged by virtue of the proceedings in the said insolvency, of all which the plaintiff, at the time of drawing and accepting the said bill had notice, and also to secure the sum of £30 advanced at the time of the passing of the said bill by the plaintiff to the defendant, and that, save to the extent of the said sum of £30, there was no consideration for the acceptance by the defendant of the said bill, and that since the same became due, he had paid to the plaintiff the sum of £5 on foot of the same, at the time, and in the manner thereon indorsed, and that there was now due on foot of said bill no greater sum than £30, which the defendant brought into Court.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

TALLON v. HASSARD.—Jan. 26.

Pleading—New assignment—Common Law Procedure Act, 1853, sec. 48.

When to an action for breach of promise of marriage the defendant pleaded, firstly, a denial of the promise; secondly, that at the time of the making of the contract alleged in summons and plaint, the defendant was an infant under the age of 21 years, to wit, of the age of 19 years; and that within a reasonable time after he had attained the age of 21

years, he avoided and annulled the said contract; thirdly, a rescission of the contract; leave was given to new assign, to the effect that the contract in said defence referred to, was not that upon which the plaintiff sued, but was a contract and agreement made after the defendant reached the age of 21 years.

THE action in this case was brought for breach of promise of marriage. The summons and plaint was as follows:—"The defendant is summoned to answer the complaint of the defendant, who complains that the plaintiff and defendant agreed to marry one another; and a reasonable time for such marriage has elapsed, and the plaintiff has been always ready and willing to marry the defendant, yet the defendant has neglected and refused to marry the plaintiff, to the plaintiff's damage of £1000." To this plaint the defendant took the following defence:—"That the plaintiff and defendant did not agree to marry one another as in summons and plaint is alleged. And for a further defence the defendant saith that at the time of the making of the contract alleged in summons and plaint the defendant was an infant, under the age of twenty-one years, to wit, of the age of nineteen years; and that within a reasonable time after he had attained the age of twenty-one years he avoided and annulled the said contract. And for a further defence the defendant saith that after the alleged promise in summons and plaint mentioned, and before any breach thereof, plaintiff and defendant agreed to rescind, and did actually rescind, the said contract, and therefore he defends the action." The present motion was on behalf of the plaintiff for liberty to new assign, to the effect that the contract in said defence referred to was not that upon which plaintiff sued, but that the contract for the breach of which the summons and plaint was brought, was a contract made after the defendant had attained the age of twenty one years.

Coffey, in support of the motion—Our only course is to new assign. The summons and plaint is not for the cause of action, which has been pleaded to, but for another and a different cause of action, namely, on a promise made after the coming of age of the defendant. Assuming that the plaintiff pleaded by way of replication that the cause of action specified in the plea is the cause of action in the plaint, then the issue raised thereon would be only a question of identity of the cause of action in *Rogers v. Custance* (1 Ad. & El., N.S., 77), which was an action in debt in the common form for work and labour; and the particulars of demand were for contract work and extra work; plea: that plaintiff and defendant by consent gave up a contract originally made between them for work, plaintiff agreeing to accept certain work which had been done under that contract at a reduced price; that by virtue of such agreement defendant became indebted to plaintiff in the amount mentioned in the declaration; and that defendant, in pursuance of that agreement, paid plaintiff, and he accepted the said amount. Replication thereto, traversing the payment and acceptance:—"It was there held that on these pleadings the plaintiff could not give evidence of any demand not a subject of the second agreement; and that to enable him to recover for extra work he should have new assigned."

On the trial the plaintiff under the new assignment is also bound to state and prove a cause of action within the terms of the declaration; for to travel out of this would be a departure—*Cheaseby v. Barnes* (10 East. 73). The necessity for new assignment arises from the embarrassing manner in which the defendant has framed his defence. The proper plea would have simply been one of infancy, i.e., that he was an infant at the time of the making of the contract; but, in addition, the defendant had introduced the embarrassing averment that he avoided the contract after he came of age. [On the subject of new assignments, *vid. L. Chitty Pl.*, 653, 665, 7th edition.]

Devitt, contra.—The contract of marriage entered into by an infant is not void absolutely, as his contracts in reference to trade would be, as contrary to public policy, the law discouraging infants from trading; it is only voidable. This was decided by the leading case—*Holt v. Clarencieux* (2 Strang. 937); also *Warwick v. Bruce* (2 Maule & Sel. 209), where Dampier, J., says, It is laid down that where the contract may be for the benefit of the infant or to his prejudice, the law so far protects him as to give him the opportunity of considering it when he comes of age, and it is good or voidable at his election; and the defence here is framed on the principle laid down in that judgment.

FITZGERALD, B.—As to the objection raised that the Common Law Procedure Act does away with new assignment, there is nothing whatever in the Act against so pleading. The 48th section expressly says there shall be no further pleading after the defence except a demurrer to the defence, or a replication to a defence of set-off or plea of matter occurring subsequently to the commencement of the action, unless by the special leave of the Court on an application to allow such further pleading, which shall only be allowed in case the real question or questions, whether of law or fact, between the parties cannot conveniently be raised and put in issue by the amendment of the previous pleadings. We are of opinion that justice cannot be done without permitting this new assignment; and it seems to us it could not be done by amending the plaint as it now stands, it appears better to allow the new assignment.

Costs to be costs in the cause.

STRATTON v. LAWLESS.

Wrongful seizure of goods and chattels of a third party under a writ of fi. fa.—Effect of endorsement of writ by execution creditor—Adoption of the wrongful act of the sheriff by subsequent ratification.

B. D. L. issued a writ of fi. fa. against one A. S. on judgment recovered against her, and he endorsed the writ with the endorsement "The defendant is a widow lady, and resides at No. 15 Messill parade, in the county of the city of Dublin, where she has goods and chattels. Signed, B. D. L." Under this writ the goods of A. S. were not seized, but those of E. S. were wrongfully taken; the goods

taken being, as appeared by the finding on an interpleader issue, the goods of E. S. Immediately on the seizure being made E. S. claimed the goods, of which R. D. L. had notice; nevertheless, the sheriff remained in possession of said goods for ten or eleven days after the making of said claim and notice thereof. The above facts having been deposed to in an action brought against R. D. L. by E. S. for breaking and entering her dwelling-house, and for taking therefrom the goods and chattels of the plaintiff, E. S., the judge, on the trial, told the jury, firstly, that there was no evidence of any authority given by the defendant previous to the seizure to seize any goods save those of A. S. Secondly, if the jury believed that the seizure of the goods in question was made for the use of the defendant, and that he subsequently sanctioned and adopted the seizure, of which, in his opinion, there was strong evidence to go to them, the defendant would be liable. The jury found for the plaintiff, damages £25. Previous to the finding liberty was reserved for the defendant to move for a non-suit, or that a verdict should be entered for the defendant if the Court should be of opinion "that there was no evidence that the trespass was done for the defendant's use, or that he subsequently sanctioned and adopted it." On cause being shown against making absolute the conditional order obtained by the defendant in pursuance of the said leave reserved in that behalf, the Court was of opinion, firstly, that the endorsement on the writ was in effect a direction to the sheriff to seize the goods of the plaintiff. Secondly, that the trespass was done for the defendant's use, and that he subsequently sanctioned and adopted it; and that therefore the verdict must be entered for the plaintiff. Cause shown allowed.

THE plaintiffs in this case appeared to show cause against a conditional order obtained by the defendant either to enter a non-suit, or that the verdict had for the plaintiff should be entered for the defendant in pursuance of the leave reserved by the learned judge at the trial. The case was tried after Michaelmas Term, 1863, before Fitzgerald, B. The plaint, which contained one paragraph, alleged that the defendants in January, 1860, broke and entered the plaintiff's dwelling-house and premises at Mespil-parade, Dublin, and took therefrom divers goods and chattels of the plaintiff, and *inter alia*, horned-cattle, furniture, &c., alleging a continuance on the premises; damages were laid at £200. The defendant pleaded that he did not commit the trespasses, or any of them, in summons and plaint; and the only issue the jury had to try was, whether the defendant committed the trespasses in plaint complained of. On the trial of the case there were four witnesses examined; the first was the plaintiff, Emma Stratton, who deposed that in January, 1860, she lived at Mespil parade; that her mother, Alicia Stratton, was then residing in North Wales; and that the plaintiff owed no money whatever to the defendant; but that nevertheless on the 23rd of January, 1860, a seizure was made by the defendant's procurement of plaintiff's goods at Mespil-parade. That a Mr. Young, of the firm of Young and Groves, came there and brought a

man with him, and made the seizure; and that the bailiffs continued in possession ten or eleven days. After the seizure the plaintiff made a declaration or affidavit as to her property in the goods seized. Counsel for the plaintiff produced on the trial a writ of *fi. fa.* at the suit of the present defendant against Alicia Stratton, tested 21st January, 1860, and returnable 24th January, 1860, on a judgment for £50 against said Alicia Stratton, the mother of the plaintiff. It was admitted that the writ, with the following endorsement was in the handwriting of the present defendant, and handed by him to the sheriff of the county of the city of Dublin. "The defendant is a widow lady, residing at number 15 Mespil-parade, where she has goods and chattels." After the seizure it was admitted by William Young, the bailiff, who was next examined, and who made the seizure, that the declaration of property made by the plaintiff, on the 23rd of January (which was produced) was sent to and received by the defendant on the same day. He continued in possession of the goods as bailiff after that date and up to the 4th February, 1860. The plaintiff's counsel then produced the summoning order of the Queen's Bench, 25th January, 1860; also, order for interpleader issue, 31st January, 1860; also, the interpleader's issue in the case of *Emma Stratton v. Richard D. Lawless*, and verdict for the plaintiff, from which it appeared the trial took place on the 10th May, 1860. The case for the plaintiff having closed, counsel for the defendant called for a non suit, on the ground that there was no evidence to affect the defendant. This the learned Baron declined to do. The defendant's counsel then intimated that he did not intend to examine any witnesses. Plaintiff's counsel then asked leave to examine the defendant, by whom the following evidence was given:—"I am the defendant; Mrs. Alicia Stratton owed me £50 on a bill. I delivered the writ to the sheriff, and endorsed it with my own handwriting. I did not say anything to the sheriff."—On cross examination the defendant said:—"I interfered in no way with the sheriff's execution of the writ beyond putting the endorsement on it.—I did not desire the sheriff to seize any goods in particular. I had not the slightest notion of what the property was, but I had heard that Mrs. Stratton, the present plaintiff's mother, had property there. I never heard that the plaintiff made any claim to the property at Mespil-parade until the day I got the declaration made by her." On his re-examination.—"I heard before the time of the seizure, Mrs. Alicia Stratton had goods at Mespil, and I wished them to be secured." The learned Judge told the jury "that in his opinion, there was no evidence of any authority given by the defendant previous to the seizure, to seize any goods, save those of Alicia Stratton; but if they believed the seizure of the goods in question was made for the use of the defendant, and that he subsequently sanctioned and adopted the seizure, of which there was in his opinion strong evidence, defendant would be liable." The jury found for the plaintiff damages £25. Previous to the finding, counsel for the plaintiff objected to that portion of the charge, "that there was no antecedent authority," and called for a direction that there was evidence of such authority, or to have the question left to the jury. Counsel for the

defendant, on the other hand, insisted for a direction for the defendant, on the grounds that there was no evidence of antecedent authority; and secondly, no evidence that the act was done for the defendant's use, or that he subsequently sanctioned it. Liberty was thereupon reserved for the defendant to move for a non-suit, or that a verdict should be entered for the defendant, if the Court should be of opinion "that there was no evidence, that the trespass was done for the defendant's use, or that he subsequently sanctioned and adopted it."

Heron, Q.C. (with *O'Driscoll*), for the plaintiff, showed cause against making the conditional order absolute—relied on *Rowles v. Senior* (8 Q. B. 677; *Wilson v. Tumman* (6 Man. & Gran. 244); *Wilson v. Barker* (Year Book, 7 Hen. 4, fo. 35).

Sidney (with *Purcell*), in support of the conditional order relied on—*Childers v. Wooler* (6 Jur. N. S. 444—29 L. J. Q. B. 129—8 W. R. 321—2 L. T. N. S. 49); *Woolen v. Wright* (1 Hurl. & Col. 560.)

Prior, C.B. (after stating the pleadings and facts as above).—In this case I am of opinion that the cause shewn must be allowed, and the verdict must stand. The defendant issued a writ of *fi. fa.* against one Alice Stratton on a judgment recovered against her, and he endorsed that writ with the endorsement that "the defendant is a widow lady, and resides at No. 15 Mes-pil Parade, in the county of the city of Dublin, where she has goods and chattels. Signed, R. D. Lawless." Under that writ the goods and chattels of Alice Stratton were not seized, but those of Emma Stratton were wrongfully taken, the goods taken being, as appears by the finding on the interpleader issue, the goods of Emma Stratton. Of the claim made by Emma Stratton, the defendant had notice on the 23rd day of January, and the sheriff had custody of them until the 4th of February following. My brother Fitzgerald was under the impression that the endorsement on the writ was not an authority to seize any goods save those of Alice Stratton, and he so told the jury on the trial. Upon looking at the authorities which were not cited at the trial, we are of opinion that there was evidence of authority to the extent of making the present defendant a party to the act of the sheriff. Perhaps there is a misapprehension as to the meaning of the term "authority." The sheriff is acting as the officer, and under the authority of the law, though acting as the agent of the defendant for the purpose of the seizure. Had the sheriff taken the goods of the plaintiff without the procurement of the defendant, then no action would lie; but if a party has shewn the goods of a stranger, and misleads the sheriff, then an action will lie against the party so misleading. In *Viner's Abridgment*, tit. *Trespass* (P.) 459, it is said, "If a man sues a plaintiff in a Court, and upon the attachment the bailiff takes the goods of a stranger, without shewing procurement of the plaintiff, trespass does not lie against the plaintiff, for he is no party to the tort (Br. Offices and Officer, pl. 8, cites an old case in the year books, 11 Hen. 490. But it is otherwise if he procure to take the goods. So, if in replevin the plaintiff shew the beasts of a stranger for his own beasts, and the sheriff takes the beasts, trespass lies against the plaintiff" (14 Hen. 4, 25). The law then is, that when the sheriff arrests a wrong person, or takes the goods of a

third person pointed out to him, the party pointing out the wrong person or the wrong goods, is liable. In *Rowles v. Senior* (8 Q. B., N. S., 677), G. recovered judgment in an action of debt against D., and employed his attorney (to whom he assigned the debt in repayment of advance), to sue out execution. The attorney, who lived at Cheltenham, caused a *fi. fa.* to be sued out, directed to the sheriff of Buckinghamshire to levy on D.'s goods; and the attorney's London agent endorsed on the writ, "The defendant resides at Wolverton, and is an innkeeper." D. was at the time residing with his mother-in-law at an inn, of which she was the proprietor, at Wolverton, and was assisting her in the management, but had no interest in the premises, or the goods upon them. The sheriff, in the execution of the *fi. fa.*, seized goods of the mother-in-law at her inn. She brought trespass against the attorney, and obtained a verdict upon issues joined on pleas of Not Guilty. On motion to enter a verdict for defendant, it was held that the verdict against the attorney was maintainable, the facts furnishing evidence that he had directed the sheriff to levy on the plaintiff's goods, and *Patteson, J.*, in delivering judgment in that case, says, "The only question is, whether defendant directed those goods to be seized which are the subject of the action; he was a stranger to the act of trespass itself; and the endorsement on the *fi. fa.* was not actually in his writing, but the circumstances are these, the debt for which the levy was made had been assigned to the defendant. He acted as attorney in suing out the process. A *fi. fa.* against the goods of D. was sent down from and endorsed by G.'s agent, with a description of D. as residing at Wolverton, and being an innkeeper. He did in fact reside at Wolverton, and at an inn, but the goods were the property of his mother-in-law. He may have more interest in the establishment than the plaintiff admits, but the question of property is decided by the verdict. Then the only question is, whether C. took a part in directing a levy upon the plaintiff's goods. I think it was rightly decided at the trial." *Jarman v. Hooper* (6 Man. & Gran. 827) was an action against the sheriff of Middlesex and A. for breaking and entering the dwelling-house of the plaintiffs. The sheriffs, in their third plea, justified entering the house under a writ of *fi. fa.* issued against the goods of the plaintiff by A. To this plea the plaintiff replied that the writ did not issue against the goods of the plaintiff. It appeared that A. had obtained judgment against Joseph Jarman, the son of the plaintiff, and thereupon issued a *fi. fa.* against Joseph Jarman without any further description, under which the goods of Joseph Jarman the elder were taken; and it was then held that A. was liable in trespass, notwithstanding he was not proved to have in any way interfered, beyond giving instruction to his attorney to sue Joseph Jarman the son. It is said by Lord Chief Justice Tindal, in giving judgment in *Wilson v. Tumman* (6 Man. & Gran. 244), "that if the defendant, Tumman, had directed the sheriff to take the goods of the present plaintiff under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such a previous direction would have made him a trespasser on the principle that all who procure a trespass to be done

are trespassers themselves, and the sheriff is not supposed to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff." No doubt, but the defendant was under the impression that the goods of Alicia Stratton were on the premises which he pointed out to the sheriff. His evidence was, that he heard that Mrs. Stratton (against whom he had the execution) had property at Mespil-parade; but that he interfered in no way with the writ beyond putting the endorsement on it. In the above case of *Rowles v. Senior*, the defendant had also endorsed on the writ "that the defendant resided at Wolverton, and was an inn-keeper." And Lord Denman said, in giving judgment, that by the endorsement the defendant in effect desired the sheriff to go to an inn at Wolverton, kept by D., to make the required levy. That he led the sheriff to believe that D. was the owner of the house in question, and that this amounted to a direction to seize the wrong goods. I think, then, that there was evidence of authority by the defendant to seize the goods of the plaintiff. The endorsement by Lawless, the defendant, on the writ was in effect a direction to the sheriff to seize the goods and chattels at No 15 Mespil parade, which was the goods and chattels of the plaintiff.

As to question of ratification, I think my brother Fitzgerald was right in telling the jury that there was strong evidence of subsequent ratification by the defendant. Had the seizure been made by the sheriff without any precedent authority from the defendant, and the sheriff assuming to act, not for himself, but for the defendant, that act would become the act of the principal, if subsequently ratified by him. Lord Chief Justice Tindal so lays down the rule in *Wilson v. Tuman*, "that an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his previous authority." Such was the precise distinction taken in the Year Book, 7 Hen. 4, fo. 35, it is said "if the bailiff took the heriot claiming the property in himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time, but if he took it at the time as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification of the lord made him bailiff at the time." The case before us here is distinguishable from *Woolen v. Wright* (1 Harl. & Colt., 560). There the question was, whether defendant was liable as a wrong-doer for the act of the sheriff in taking the plaintiff's goods. It there appeared by the evidence that the defendant having recovered a judgment against one Imann, issued a writ of *fi. fa.*, which was placed in the hands of the sheriff. Under the colour of that writ the sheriff seized the goods of the plaintiff; but the defendant there in no way interfered with the execution, but merely caused the process to issue, and trespass was held not to lie against the defendant.

The verdict must be entered for the plaintiff; we must therefore say, Cause shown must be allowed.

FITZGERALD, B.—I now think I was wrong in telling the jury that in my opinion there was no evidence of any authority given by the defendant previous to the seizure. But I am of opinion I was right in telling them that if they believed the defendant subsequently sanctioned and adopted the seizure, such subsequent act would make the defendant liable.

HUGHES, B., observed that the case of *Wilson v. Barker*, in the Year Book, 7 Hen. 4, was conclusive on the second point, namely, the subsequent ratification.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

IN THE GOODS OF ELIZABETH RANKIN.—Feb. 24.

Heir-at law also next of kin—Order to cite.

Where the heir at law of the deceased is also a next of kin, and it is desired to bind him by the proceedings as to the real estate, it is proper to apply to the Court for an order to allow him to be cited.

Dr. Townsend, on behalf of Robert Rankin, who was named as executor in the last will of the deceased, and which purported to bear date the 4th June, 1850 (but which was supposed to have been executed on the 4th June, 1854), applied for an order permitting a citation to issue against Joseph Cowan, the heir-at-law of the deceased, who died seized of certain real estates. Joseph Cowan happened to be also one of the next of kin, and could, without any leave of the Court, be cited in that character; but being also heir-at-law, it appeared from the 56th rule (contentions) that it was necessary to get the leave of the Court to do so. In *Emberley v. Trevanion* (29 L. J., Prob., 142), Sir C. Cresswell is reported to have said that where the heir was a defendant it was not necessary to cite him as heir, but in deference to the opinion of counsel he there made the order.

KEATINGE, J.—In my opinion it is proper to make the order giving you leave to cite the heir-at-law, and then the one citation may include him and all the other next of kin, reciting in it my order as regards the heir-at-law.

Order accordingly.

SMITH v. BRUNKER AND WIFE.

Consent—Costs—Compromise.

In a suit between the residuary legatee in a will (there being no executor named in it) and the next of kin touching the validity of that will, where, after a plea filed by the next of kin, the parties consented that the proceedings should cease, and the plaintiff (the residuary legatee) should have his costs in the cause out of the estate, and the defendants should pay their own costs, the Court refused to make that consent a rule of Court, as regarded the costs.

E. M. Kelly, for the plaintiff, who was residuary legatee in the will of the deceased, which was in dispute, applied to make a consent a rule of Court. The defendants were caveators as next of kin, and the plaintiff had as residuary legatee—there being no ex-

ecutor named in the will—propounded the will in dispute. The defendants had pleaded, alleging undue execution, mental incapacity, and undue influence. The consent provided that all proceedings in the suit should cease, and that letters of administration of the goods of the deceased, with her will annexed, should be granted to the plaintiff, and that he should have his costs in the suit out of the estate, and that the defendants should abide their own costs. The object of allowing the plaintiff his costs was that they might be allowed in the Court of Chancery.

KEATINGE, J.—I can't make that consent a rule of Court. The defendants thereby admit that they had no interest to impeach the will, and consequently had no power to consent to the plaintiff getting his costs; no one therefore consents to the plaintiff getting costs but himself; and I have no materials before me to enable me to form an opinion if it is a fit case in which to make an order that the plaintiff shall have his costs. All I can do is to make the consent a rule of Court so far as stopping further proceedings. If the parties choose to draw up another consent in that form I will make it a rule of Court, or the Registrar can also do so. *No rule.*

DOUCE v. REED.

Costs—Next of kin—Rule as to costs.

The rule of the Prerogative Court as to favoring next of kin, as to costs, still holds; and therefore in this case on account of the great age of the testator, and the peculiar position of the principal legatee, the Court thought the next of kin should be excused from paying costs, though they had pleaded incapacity and undue influence and withdrew from the case during its progress.

THE facts sufficiently appear from the judgment.

KEATINGE, J.—This was a suit to establish the will of one Thomas Morgan, bearing date the 29th May, 1863, and propounded by the defendant. The deceased lived for some months after the will was drawn. It was attested by the drawer, Henry Reed, and by the physician who attended the deceased, Dr. M'Evoy. The deceased was very aged—about eighty; but it appeared in evidence that he knew perfectly what he was doing at the time of the execution of the will. It also appeared that he did not live on affectionate terms with his next of kin, but was greatly attached to the family of the Walkers, one of whom was the principal object of his bounty. Miss Walker, at his request, lived in, and in fact acted as housekeeper to his establishment for several years prior and up to the time of his death. The defendants pleaded undue execution, want of capacity, and undue influence; and at the trial, when the case was too clear to be further resisted, but after all the expenses had been incurred, then an application is made by them—first, that they should be allowed their costs out of the estate; and failing in that, then that they should be excused from paying costs. In this case it is not necessary to go into the nice distinctions which are to be found in some of the cases on these points. Here the evidence in the cause puts the fairness of the transaction, and the capacity of the testator, and everything else necessary to give validity to the document, beyond all question. It is true that the testator was very advanced

in life; it is also true that about three or four weeks before the date of the will in dispute the doctor considered that the deceased was not then—to use his own words—*up to making a will*; but he quite recovered, and was at the time in question perfectly competent and knew what he was doing. Then the next of kin allowed the will to be proved in common form; they entered no caveat; they lived near the deceased, were well acquainted with the drawer of the will and the doctor—the other attesting witness—and had abundant opportunity to make enquiries, but not only did they not make such enquiries, but one of the next of kin wrote to the principal legatee congratulating her on the subject of the will; and then at the expiration of one month after probate they commence this suit. On account of the great age of the deceased, and on account of the principal legatee in the will having been his housekeeper and resident in his house, I think it is quite enough to excuse the next of kin from payment of costs; but on the other hand the facts in this case to which I have referred do not justify me in giving them costs. Next of kin are favored in this Court and were favored in the Prerogative Court in this respect; and it was painful to me that I could not approve of or follow some of Sir C. Creswell's judgments to the contrary; but I felt that I was bound by the decisions of the Prerogative Court, and I considered that neither he nor I had any authority to depart from or abandon those cases. I am therefore much gratified by the recent decision of Sir J. P. Wild in *Mitchel v. Gard* (33 L. J. Prob. 7), in which the next of kin are restored to their proper position, though I am not sure that it may not tend to encourage litigation. But I think it right to warn parties that though the old rule in this respect is restored, still a grave duty rests on the Court; and if parties choose to embark in an unsuccessful litigation without reasonable or proper grounds to justify them, the Court will not allow them their costs for so doing.

Counsel for the plaintiff—Dr. Ball, Q.C., M. Morris, Q.C., and E. Johnston.

Counsel for the defendant—Dr. Walsh, Q.C., Dr. Chatterton, Q.C., and Dr. Townsend.

CAMPBELL v. CAMPBELL.

New trial—Evidence of one witness, not credited, affects entire case—Second trial, grounds for, as regards inheritance.

Where an important witness in the case, who had ample opportunities of knowing the capacity and testamentary intentions of the testator, and had written letters at the time to the defendant detailing the facts, not consistent with the evidence which he gave at the trial, the judge directed the jury not to be content with only striking out his evidence if they disbelieved it, but that it reflected on the entire case of the defendant. Held a correct direction. Where there is no allegation of surprise, mistake, accident, or newly discovered evidence, a new trial is not considered requisite, even where the title to an inheritance is involved.

Whiteside, Q.C., moved on behalf of the defendant for a conditional order for a new trial of the case, on the grounds—first, that if the jury believed the evidence of a Mrs. Chapman and a Mr. M'Gowan, there was ample evidence of undue influence, and a verdict

should on that ground have been found for the defendant. Secondly, that even if the jury were not satisfied with the evidence of those two persons, or of either of them, it should not prejudice the jury against the other evidence in the case on which they ought to have found a verdict for the defendant, and that the verdict was against the weight of evidence; and also that no question was left to the jury, but that in fact his lordship's charge was an express direction. He also relied on the fact that one trial was not sufficient to bind the title to the inheritance.

The will and codicil in dispute were those of a Dr. Campbell, a native of Ireland, but who died resident at Portsea, in England. The will was dated the 5th Sept. 1862, and the codicil the 21st Feb. 1863. By the will he left to his wife, the plaintiff, absolutely, his personal property amounting to about £600; and his real estate, worth about £150 per annum, he devised to his brothers for life, with remainder to his nephew, John Campbell, in fee. By the codicil, after giving the real estate to his wife for life, he gave the remainder in fee to his nephew, James Young. An earlier will had been also made, dated the 27th Nov. 1862, which gave a life estate to the wife, and gave the remainder in everything to this James Young. The same solicitor had drawn all the instruments, but the witnesses to them were different. The testator died on or about the 27th February, 1863, three days after the making of the codicil. The plaintiff had propounded the will and codicil; and the defendant, a brother of the deceased, and one of his next of kin and his heir-at-law, in his plea impeached both documents, on the ground of mental incapacity, and more particularly of undue influence exercised on the deceased by the plaintiff. The principal witness for the plaintiff was the solicitor who drew the several documents from, as he deposed, the direct instructions of the deceased; and he and the several attesting witnesses, of whom some were the medical gentlemen in attendance on the deceased, deposed fully and positively to his perfect capacity and freedom from any importunity or undue influence. There was evidence also, both parol and documentary, to show that he disliked his brothers, and did not intend them or their children to be objects of his bounty; but that his nephew, James Young, who was on a visit with him shortly before his death, was his principal object of affection. For the defendant, the principal witnesses were a Mrs. Chapman, in whose house the deceased had lived, who deposed to conversations with the plaintiff on the subject of aiding her to get from the testator a will or codicil leaving the real estates to her, and that she declined to do so as the testator was living in her house; and that then the plaintiff, who had hitherto been living apart from the testator, caused him to be moved to her own house, in which the codicil was in fact executed. Another important witness was M'Gowan, who, if his evidence was believed, gave abundant evidence of the most undue influence on the part of the plaintiff, and her exclusion of the brothers of the deceased from the house. He had come on a visit and was in the house, and was fully aware of the fact, whatever they were. He had also written several letters from Portsea to the defendant and others of the family, detailing the result of his observations, and which were quite inconsistent with

his evidence. The defendant and others of the relatives were also examined in support of the defence. The learned judge, in his charge, directed the attention of the jury specially to the evidence of Mrs. Chapman and M'Gowan, and commented strongly on it; and especially told the jury that if they did not believe that of M'Gowan they would not deal fairly to the plaintiff, unless they considered the rest of the defendant's evidence in reference to and in connexion with it; but that if they believed his evidence, there was abundant evidence to sustain the defence. The jury found a verdict in favour of the validity of the will and codicil.

Counsel now contended that no question of fact had been left to the jury, and relied on the sudden change of intention as reflecting strongly on the transaction and the exclusion of the relations of the deceased—*Boyce v. Rossborough* (6 H. L. 2 & 49): counsel also referred to *Von Stentz v. Comyn* (12 Ir. E. R., 622),
Cur. adv. vult.

KEATINGE, J., having recapitulated the facts already stated, said that it struck him as very important that, by the earlier will of the 27th November, 1862, the testator, after giving his wife a life estate in both real and personal estates, then left all to James Young. It showed that James Young was the object of his bounty; and that the deceased was quite clear as to the intention of the codicil, and what the change was which it affected in the disposition of his property. The witnesses to the several transactions were different, though the attorney was the same, and the evidence of two physicians and a clergyman—all intimate with the testator—was before the jury, and it proved beyond all question a sound mind. It was said that he left no question to the jury, whereas he told them that there was abundant evidence of undue influence if they believed it; and he also told them that if they merely struck out M'Gowan's evidence they would not deal fairly towards the plaintiff. He thought then, and still, that was right. He considered that M'Gowan was sent over by the defendant and his family as a scout or a spy to watch and see how the proceedings went on; and they were fully apprized by him of the exact facts. If, then, the defendant chose to produce him in order to swear falsely, in his opinion it damaged the whole case. As regarded the deceased's intentions, it appeared also that after the execution of the will James Young had been at Portsea. The deceased, it appeared, was very fond and proud of him; and it was proved by a physician that the deceased often spoke of him. Then as to his brothers and their families, the deceased himself wrote to Mr. Wallace forbidding the Campbells from coming to see him. Mrs. Campbell, the plaintiff, had also written to the like effect; and Mrs. Reunie had proved that it was done by the deceased's desire and directions. As to the remaining ground, with regard to the right of the defendant to a second trial, that is quite displaced by the present Lord Justice Knight Bruce in the case of *Waters v. Waters* (2 De G. & Sin. 591), where there is no allegation of surprise, mistake, accident, or any subsequent discovery of a material kind. Under these circumstances he could not make the order now asked for, as the verdict was, to his mind, quite according to the evidence.

No rule.

Court of Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

COOKE v. THE MARQUIS OF DONEGAL.—Nov. 3, 1863.

*Bond—Annuity—Expectant heir—Post obit security—Amount recoverable on annuity bond.**The assignees of a post obit security take it with notice of all its incidents; and in order to establish the validity of the security they must show that a fair consideration was given for it.**A bond given to secure an annuity recited that G. H. C. had contracted and agreed with R. K. for the sale to him of a deferred annuity; and also recited that upon the treaty for the purchase of the annuity, it was agreed that the payment of it should be secured by the bond of G. H. C. in a sufficient penalty and by his warrant of attorney confessing judgment. Quære, in the absence of any further evidence of a contract to grant the annuity, could arrears of the annuity be recovered to a greater amount than the penalty of the bond?*

THE Marquis of Donegal, then Earl of Belfast, the respondent in this suit, having become involved in pecuniary embarrassment during the lifetime of his father, who was in possession of the family estates, entered into a series of bill and money transactions with Richard Keilly, a bill discounteer and money-lender in London. The Earl of Belfast having thus become indebted to Richard Keilly, entered into a certain bond or obligation in writing under his hand and seal, bearing date the 26th of August, 1840, in the sum of £3,200, which contained the following recitals and condition:—"Whereas the above bounden George Hamilton Chichester, Earl of Belfast, immediately before the execution of the above written bond or obligation was or stood justly and truly indebted unto the above named Richard Keilly in the full and first sum of £1,600 for moneys lent and advanced, paid, laid out, and expended by the said Richard Keilly unto or for the use and on the account of the said George Hamilton Chichester, Earl of Belfast, as he, the said George Hamilton Chichester, Earl of Belfast, doth hereby admit, declare, and acknowledge. And whereas the said George Hamilton Chichester, Earl of Belfast, hath contracted and agreed with the said Richard Keilly for the sale to him of a deferred annuity or clear yearly sum of £374 8s. of lawful money of Great Britain, to commence and become payable from and after the decease of the Most Noble George Augustus Chichester, Marquis of Donegal, the father of the said George Hamilton Chichester, Earl of Belfast, in case he, the said George Hamilton Chichester, Earl of Belfast, shall be then living, and to be thenceforth payable during the life of him, the said George Hamilton Chichester, Earl of Belfast, by equal half-yearly payments, free from taxes and all other deductions whatsoever, together with such proportions, part of such annuity, as hereunder mentioned, in consideration and in absolute satisfaction and discharge of the said debt or sum of £1,600 so due and owing from him the said George Hamilton Chichester, Earl of Belfast, to the said Richard Keilly as aforesaid; but such

annuity, nevertheless, to be subject to such provision or agreement for or in regard to the re-purchase thereof as is hereunder written or contained. And whereas upon the treaty for the purchase of the said annuity it was agreed that the payment thereof should be secured by the bond or obligation of the said George Hamilton Chichester, Earl of Belfast, in a sufficient penalty, and by his warrant of attorney for confessing a judgment thereon, and it was also agreed that the costs and expenses of and attending the contract for the said annuity, and for preparing and perfecting the securities for the same, and for enrolling a memorial thereof, should be borne and paid by the said George Hamilton Chichester, Earl of Belfast; and whereas, in pursuance and part performance of the said contract, and as the consideration for the same, the said Richard Keilly hath immediately before the execution of the above written bond or obligation, signed and given to the said George Hamilton Chichester, Earl of Belfast, a receipt in writing in full for the said debt or sum of £1,600, so due and owing to him from the said George Hamilton Chichester, Earl of Belfast, as aforesaid, and hath delivered up to him the said George Hamilton Chichester, Earl of Belfast, to be cancelled all securities held by him the said Richard Keilly for the same, as he, the said George Hamilton Chichester, Earl of Belfast, doth hereby admit and acknowledge, and in consideration thereof, he, the said George Hamilton Chichester, Earl of Belfast, hath executed the above written bond or obligation subject to such condition for making void the same as is hereunder written. Now, therefore, the condition of the above written bond or obligation is such that if the above bounden George Hamilton Chichester, Earl of Belfast, shall and do in the event of his surviving his father, the above-named Marquis of Donegal, well and truly pay or cause to be paid unto the above-named Richard Keilly, his executors, administrators, or assigns during the remainder of the natural life of him, the said George Hamilton Chichester, Earl of Belfast, one annuity or yearly sum of £374 8s. of lawful money of Great Britain, free from taxes and clear of all other deductions whatsoever by equal quarterly payments in every year; the first of such payments to begin and be made at the expiration of three calendar months from the decease of the said Marquis of Donegal, if he, the said George Hamilton Chichester, Earl of Belfast, shall be then living, and in case the said George Hamilton Chichester, Earl of Belfast, having survived his said father, shall die previously to or in the interval between any of the said quarterly days of payment, then also if the heirs, executors, or administrators of him, the said George Hamilton Chichester, Earl of Belfast, or any of them, shall and do within fourteen days after his decease, well and truly pay or cause to be paid unto the said Richard Keilly, his executors, administrators, or assigns a proportional part of the said annuity, for or in respect of the time which at the decease of the said George Hamilton Chichester, Earl of Belfast, shall have elapsed of the then current quarter of a year of the said annuity, then the above written bond or obligation shall be void and of no effect; and if the said George Hamilton Chichester, Earl of Belfast,

shall at any time, either in the lifetime of the said Marquis of Donegal, or afterwards, be desirous of re-purchasing the said annuity or yearly sum of £374 8s., and of such his intention shall give notice in writing unto the said Richard Keilly, his executors, administrators, or assigns, by the space of three calendar months, and shall at the end of such three calendar months pay unto the said Richard Keilly, his executors, administrators, or assigns, all and every sum and sums of money whatever, if any, that shall then be due for the arrears of the said annuity, together with a proportional part of the said annuity, in case the same shall then have become payable as above-mentioned for the time which shall then have elapsed after the then current quarter of a year of the said annuity, up to and inclusive of the day of re-purchasing the same as aforesaid, together with all costs, charges, and expenses, if any, which he, the said Richard Keilly, his executors, administrators, or assigns, shall have incurred or been put unto by reason or on account of the non-payment of the said annuity, (in case the same shall then have become payable) or any part thereof, and shall also pay to the said Richard Keilly, his executors, administrators, or assigns, such sum of lawful money of Great Britain, as next hereinafter mentioned, that is to say, in case such payments shall be so made at any time before the expiration of one year, from the date of the above written bond or obligation, then the sum of £1,864, and in case such payment shall be so made at any time after the expiration of such first year, and before the expiration of the second year, from the date of the above written bond or obligation, then the sum of £2,136, and in case such payments shall be so made after the expiration of such second year, and before the expiration of the third year from the date of the above written bond or obligation, then the sum of £2,440, and in case such payments shall be so made at any time after the expiration of such third year from the date of the above-mentioned bond or obligation, then the sum of £4,832, and shall make such payments without any deductions whatsoever, then and in such case, he, the said Richard Keilly, his executors, administrators, or assigns, shall and will accept the same as and in full for the absolute re-purchase of the said annuity or yearly sum of £374 8s., and then and in such case the same annuity shall cease and determine, and be no longer paid or payable, and the above written bond or obligation shall in such case also be void and of no effect."

The Marquis of Donegal, the father of the respondent, died on the 5th of October, 1844, leaving the respondent heir to his title and estates him surviving, and upon this the annuity covenanted for as above stated became payable.

By virtue of a warrant of attorney, bearing date the 26th of August, 1840, from the Earl of Belfast to Richard Keilly, judgment was entered up upon this bond in the Court of Queen's Bench, Ireland, as of Trinity Term, 1840, for the sum of £3,200 principal, and £2 1s. 11d. costs. By an indenture, dated the 13th of January, 1841, Richard Keilly assigned amongst other securities this bond of the 26th August, 1840, to the executors of the Rev. Robert H. Hele, and by another indenture, bearing date the 13th of November, 1841, the judgment

of Trinity Term, 1840, entered on the bond was assigned to the same parties by Richard Keilly, as securities for the payment of a sum of £6,604. By an indenture, dated the 28th of April, 1846, Richard Keilly assigned to James Mallock and Joseph Moore, *inter alia*, this bond and the annuity of £374 8s., thereby conditioned to be paid, and all redemption money to be paid for the same, and all the arrears of the annuity, and all surplus money that might arise or become payable in respect of it, and also the judgment of Trinity Term, 1841, in trust for James Mallock and Joseph Moore, as executors of John Houlditch, and in trust for John Theobald and Richard K. Lane, to secure the payment of certain sums of money due to them respectively by Mr. Keilly. By an indenture, bearing date the 12th of March, 1854, George Frere, the surviving executor of the Rev. Robert H. Hele, assigned the securities before mentioned to Robert Hildyard. On the 10th of March, 1856, the executors of John Theobald, the petitioners in the present matter, filed a cause petition in the Court of Chancery, in Ireland, against the Marquis of Donegal, for the purpose of raising the amount due and payable on foot of the judgment obtained by Richard Keilly against the Marquis of Donegal as of Trinity Term, 1840, and a certain other judgment not necessary to particularise. By a decretal order of Master Murphy in this matter, dated the 23rd of June, 1859, the judgment of Trinity Term, 1840, was declared to be well charged on the estates of the Marquis of Donegal, and the amount due to the petitioners on foot of it was thereby found to be £2,200, and it was ordered that the petitioners were entitled to have a receiver appointed over the life estate of the Marquis of Donegal. The Marquis of Donegal having given security to the executors of Robert Hildyard for the amount due to them on foot of these judgments, and also the sum to which they were entitled as assignees of Richard K. Lane, by leave of the Court brought in the whole amount of the penal sum of £3,200, recovered by the judgment of Trinity Term, 1840, and paid it over to William Crooke and William Patience, the petitioners. A supplemental petition was subsequently filed by the petitioners, praying that the Marquis of Donegal might be directed to bring in the arrears of the annuity, which amounted then to nearly £5,000, and Master Murphy, by a further decretal order of the 1st of June, 1861, found that the claims of Robert Hildyard's executors had been fully satisfied, and it was declared that the petitioners on behalf of themselves and the executors of John Houlditch and Richard K. Lane were entitled to an assignment to a trustee of all the other securities vested in Robert Hildyard's executors, and they were thereby ordered to bring in the bond for securing the annuity of £374 8s., and to assign the same to a trustee for the purpose of suing for the recovery thereof, and as to the arrears of the annuity, it was ordered and declared that the petitioners should be at liberty to proceed at law, or by a substantial suit in equity, to enforce the arrears so claimed to be due. By subsequent orders of the Master, dated the 15th of July, 1861, and the 10th of February, 1862, respectively, the petitioners were appointed trustees of all the securities vested in the

executors of Robert Hildyard, and also trustees of the deed of the 28th of April, 1846. A cause petition was accordingly filed on the 26th of March, 1862, whereby the petitioners prayed that an account might be taken of the sum due for arrears of the annuity, and that it might be declared that the petitioners were entitled to a specific performance of the agreement entered into by the respondent, the Marquis of Donegal, and Richard Keilly, and his assigns, and that the respondent might be ordered to pay to the petitioners the arrears of the annuity so ascertained to be due. The respondent by his affidavit in reply stated that at the time at which the bond was executed he was in embarrassed circumstances, and had frequent money dealings with Richard Keilly, who was well acquainted with the position of his affairs. That Richard Keilly made advances of money upon bills drawn by him and accepted by the respondent, (frequently in blank) and was in the habit of charging discount on such bills at a rate which was never less than £20 per cent. per annum. That previous to the execution of the bond of the 26th of August, 1840, Richard Keilly was the holder of a number of these bills, which were over-due and unpaid, and the consideration for the execution of the bond was the redelivery of these bills and the advance of a small sum of money, about £100, and that the statement of the consideration in the bond to the effect that the respondent was justly and truly indebted to Richard Keilly in the sum of £1,600, for monies lent, advanced, and paid by him for the use of the respondent, was a false and untrue recital. That the amount due at the time was not more than the principal sum of £800. That no contract or engagement of any kind with respect to the grant of the annuity or to the payment of or securing the same was ever entered into, except so far as appeared by the bond, and that in fact the bond was given as a means of satisfying the claim of Richard Keilly in respect of the annuity. That the respondent having elected to proceed on foot of the judgment of Trinity Term, 1840, could not now sue upon any supposed contract contained in the bond, and then even if such contract were considered to exist, a suit in respect to it was barred by the Statute of Limitations; and the respondent relied upon this as both a bar to the claim to the annuity, and to any arrears which accrued due six years before the filing of the petition.

Brewster, Q.C., (with him *Lowry, Q.C.*, and *W. C. King*) for the petitioner.—This is not the case of an ordinary money bond, on which no more than the penalty can be recovered. The contract to grant the annuity is not contained in the bond, but evidenced by it; and it is now a settled and well recognised principle that when there is an independent agreement, the relief granted will not be confined to the amount of the penalty. In *Jedins v. Agate* (3 Sim., 129), the Vice-Chancellor says:—"Upon looking into this case, it appears to me that whenever there is a distinct agreement that a thing shall be done, whether it be the conveyance of an estate, the relinquishment of a right, the payment of an annual sum, or the payment of a sum indefinite in amount (as in the case of *Wienholt v. Logan*), there, notwithstanding the agreement appears in the form of a bond with a pe-

nalty, the Court will consider that the recital in the condition of the bond is evidence of the agreement, and will not limit the relief it gives to the amount of the penalty." In *Jeffries v. Alexander* (8 H. of L. Ca. 594), at p. 657, Lord St. Leonards thus expresses himself—"Equity in the case of a bond to settle a certain sum of money, does not regard the penalty or the nature of the security, but it looks to the act which was intended to be performed, and, therefore, the condition of a bond has frequently been acted upon as an agreement for a settlement." The same doctrine is also to be found in *Logan v. Wienholt* (4 My. & Cr. 561). As to the other questions, the following authorities were cited—*Bannatyne v. Barrington* (8 Ir. Ch. Rep. 150; s.c., on appeal, 9 Ir. Ch. Rep. 406); *Ferguson v. Lomax* (2 Dr. & War. 120).

Serjeant Sullivan (with whom was *May*) for the respondents.—This is in substance a petition to enforce a most unconscionable bargain. It prays for a specific performance of a contract made between the respondent and Mr. Keilly for the payment of a deferred annuity. The Earl of Belfast, the respondent, being in deep embarrassment during his father's lifetime, fell into the hands of Mr. Keilly, a well-known money-lender and bill discounter, and after a number of dealings with him, was induced to enter into the bond in question. Now, it is a well-established and wholesome principle of Courts of Equity, that whoever deals with an expectant heir for a reversionary interest, must be prepared to show that a fair consideration was paid. Such is the doctrine laid down in *Bromley v. Smith* (26 Beav. 644), the marginal note to which is to the following effect: "The general rule is this—where a person deals with an expectant heir for his reversion, the burden of proof lies upon such person to prove the fairness of the transaction." Again, in *Salter v. Bradshaw* (28 L. J., N. S., Ch. 427; 26 Beav. 161; s.c., on appeal, 29 L. J., N. S., Ch. 18), the principles upon which this Court acts are stated in these words—"The purchase of a reversion cannot stand in equity unless the purchaser shows that he paid the full value for it."—*Talbot v. Staniforth* (1 John. & Hem. 484; 31 L. J., N. S., Ch. 197). In *Tottenham v. Greene* (32 L. J., N. S., Ch. 201), it is further laid down that the assignees of *post obit* security take it with notice of all its legal incidents, including the right of the reversioners to open settled accounts between himself and the person to whom he has given the security. The petitioners here, therefore, though they may not have had actual notice of the circumstances under which the bond was obtained, are affected with constructive notice, and although the bond contains a statement of the consideration for which the annuity was alleged to be granted, the respondent is not thereby concluded from denying that any such consideration was given. Treating this suit, then, as one for the specific performance of a contract to grant an annuity out of a reversionary interest, it is clear, upon the authorities, that the petition must be dismissed, for no proof has been adduced of the value given at the time for the annuity; and it is on the other hand evident, from the extravagant terms upon which the annuity was made redeemable, that this was a pro-

ceeding of great undervalue and extortion on the part of Mr. Keilly. As to the other questions involved in the case, it is plain that this is a bond to secure an annuity; the agreement to grant the annuity is part of the bond itself: there is, in fact, no contract outside of the bond, and, therefore, the case is perfectly distinguishable in principle from *Jewdine v. Agate* (3 Sim. 129), upon which so much stress has been laid on the other side. The decision in that case has no application to the present. There was there a distinct and independent agreement irrespective of the bond, the bond being only a collateral security. It was not a case of a money bond, or a bond to secure an annuity, nor was the obligation, as in this case, created simply by the bond itself. In 3 Jarm. Conveyancing (Sweet.) pp. 323 & 324, title Bond, the following passages are found:—"But in equity, where there is an agreement, and a penalty for the breach of it, the party bound cannot elect to pay the penalty, and so discharge himself of his agreement; but it is in the option of the other party whether he will enforce the contract or accept the penalty.....Mr. Justice Buller held that interest beyond the penalty of the bond might be recovered in a Court of Law in the shape of damages—*Lord Lonsdale v. Church* (2 T. R., 388); but that decision is now overruled, and the established principle is, when money is secured by bond, only the penalty is the debt, both at law and in equity.....The same principle is, of course, applicable to bonds given to secure annuities, the arrears of which cannot be recovered beyond the penalty." In *Butcher v. Churchill* (14 Vesey, 567), at page 575, Sir William Grant says—"The bond stands as a security either for the value, or the payments of the annuity, in this instance actually accrued. An annuity bond cannot, more than any other, go beyond the penalty; but to that extent the creditor has now a right to the penalty—*Crosse v. Bedingfield* (12 Sim. 35). What is this but an ordinary money bond? The respondent, in his answering affidavit, swears that there was no contract nor agreement of any kind to grant or secure an annuity except so far as is contained in the bond itself. The case is, in fact, reduced to this: if the contract to grant the annuity is contained in the bond, the petitioners should have sued on the penalty of the bond, which, however, they have already recovered; if, on the other hand, the contract is independent of the bond, the Court will not enforce it after the lapse of twenty years—*Cotterel v. Hooke* (1 Doug. 97). As to the remaining points of the case, this is plainly wholly an English transaction, and if any proceedings could have been taken they should have been instituted in England—*Bannatyne v. Barrington* (9 Ir. Ch. Rep. 406), *Ferguson v. Lomax* (2 Dr. & War. 120). The English Annuity Act, moreover, requires that the security itself shall set forth the true consideration, which shall be in money alone, and that a memorial shall be enrolled in the Court of Chancery containing, amongst other things, a statement of the consideration money for which the annuity has been granted. Now we find the memorial in the present case contains a misstatement of the consideration, which was, in reality, not the £1600 alleged to have been due to Mr. Keilly, but the redelivery of a number of bills and the advance of £100.

The security, therefore, is by the statute null and void. On a full consideration of the case, it will be seen that it has no merits, no equity, and no morality.

Lowry, Q.C., in reply.—This security is well registered under the English Annuity Act, although it is not necessary that it should be, for it is an agreement to grant an annuity; and it has been decided by *Nield v. Smith* (14 Vesey, 491), that such is not within the scope of the Annuity Statute. It is also settled that a court of equity will enforce specifically an agreement to grant an annuity—*Swift v. Swift* (3 Ir. Eq. Rep.; 267); *In re Samuel Lock* (2 Dowl. & Ryl. 603); *Saltoun v. Houston* (1 Bing. 433). We are not suing on the bond but on the contract, evidenced by the recital in this bond.

THE LORD CHANCELLOR.—Have you given any evidence as to the value of this annuity? None whatsoever. You have taken this security subject to all its equities and incidents; and knowing the circumstances under which it had been obtained, it lay upon you to prove that a fair *bona fide* consideration was given for it by Mr. Keilly. Not having done so, I must only look to the facts already in evidence. Here is an annuity, for which, if redeemed at the end of the first year, a large sum is to be given; if two years elapse, the purchase-money is to be doubled; at the end of the third year it is further increased; and so it continues to be augmented until it has reached a sum which is plainly far beyond the selling value of the annuity. This is a *post obit* transaction, and therefore it is right that everything in reference to it should be free from any taint of suspicion. But the case seems to be reduced to this:—If this is taken as a grant of an annuity it is void, the memorial enrolled being defective in not stating the true consideration. There is, as in the bond, a statement of a consideration of £1,600, the truth of which is entirely negated by the evidence of the respondent, and there is not a word about the bills or the advance of £100. If again it be considered as an agreement to pay an annuity, the Court will not now grant the relief sought. The petition therefore must be dismissed, with costs.

Exchequer Chamber.

[Reported by William Woodlock, Esq., Barrister-at-law.]

[CORAM LEFROY, C.J., MONAHAN, C. J., and BALL O'BRIEN, CHRISTIAN, HAYES, KEOGH, and FITZGERALD, JJ.]

BERRE v. FLEMING—Nov. 7.

Turbary—Bog—Statute of Limitations—Landlord and Tenant.

A reservation of turbary is not repugnant to a grant of bog.

A reservation of turbary is only a reservation of a profit a prendre, and the Statute of Limitations, 3 & 4 Wm. 4, c. 27, does not apply in such a case.

ERROR from the Court of Exchequer. The first paragraph of the summons and plaint stated that John Taaffe, being seised in fee-simple of the lands of Ma-

kenagh, in the county of Sligo, by deed bearing date the 22nd December, 1820, granted and conveyed them unto James Fleming and Harloe Fleming, their heirs and assigns, as the same were formerly held by Michael Feehy, "saving and reserving unto the said John Taaffe, his heirs and assigns, all woods, underwoods, timber and other trees under and above ground, but not the soil on which the same then were or thereafter should be growing; and all mines, minerals, turbary, patent privileges, and royalties, of what nature and kind soever; with full and free liberty at all times to cut, fell, grub up, raise up, manufacture, and carry away the same; and also to cope in and preserve all woods and underwoods that then were or thereafter might be growing on the said premises; together with full and free liberty at all times to make any roads, causeways, walks, and watercourses, ditches, drains, or fences, that might be found necessary," to have and to hold the said demised premises, with the appurtenances, except as thereinbefore reserved, to James and Harloe Fleming, their heirs and assigns for ever, at the yearly rent of £85, late currency; that by various mesne assignments, the above rent, and also the said turbary, and all rights and privileges created and reserved by the deed of 1820, were now vested in the plaintiff; and that the defendants, Richard Fleming and Edward Frazer, who were in possession each of one-third of the lands in question, had by their servants and undertenants, "dug up and carried away a large quantity, that is to say, 150 kishes of turf, on and being part of the turf bog on the said lands, so by said indenture of the 22nd of December, 1820, granted, and thereby wrongfully interfered with the turbary saved and reserved by the same deed, and which turbary was then as aforesaid lawfully vested in, and of right belonged to the plaintiff as his exclusive property." The second paragraph pleaded the deed of the 22nd December, 1820, as a conveyance of the lands by Taaffe to James and Harloe Fleming, their heirs and assigns, subject to the rent of £85, and as a re-grant by them to Taaffe of the turbary, averring the same grievance as in the first paragraph. The third paragraph averred that James and Harloe Fleming, being seised in fee of the lands, by the deed of the 22nd December 1820, granted to John Taaffe, his heirs and assigns for ever, the exclusive right of turbary in and upon the lands, that by mesne assignments that exclusive right became vested in the plaintiff; and that after he became entitled to such exclusive right of turbary the defendants having notice of the premises, wrongfully interfered with and interrupted such right by digging and cutting on, off, and from the said turf-bogs which were and are part of said lands, large quantities of turf, sods, and turf, and carrying away the same whereby the plaintiff's said right had been and was injured and lessened in value. The fourth paragraph was for trover by the defendants of 500 loads of turf, the property of the plaintiff. The first defence (which was pleaded on equitable grounds) to the first paragraph, stated that by deed dated the 3rd May, 1791, one Sir Thomas Dundas, in substantially the same terms as those used in the deed of the 22nd December, 1820, conveyed the lands in question at the same rent and with the same reservation to one

Knott and his heirs; that Dundas, by deed dated the 24th March, 1810, conveyed all his interest in the lands to John Taaffe, the grantor in the deed of 1820 and his heirs; that Knott died in 1815, and that all his interest under the deed of 1791, vested in Wm. Fleming and Judith his wife; but that such interest was not a legal one; that disputes arose between Taaffe and the Flemings as to the turbary on the lands, in consequence of which, and in consequence of the Flemings having dug and carried away turf, Taaffe, on the 16th of June, 1815, filed a bill against the Flemings, praying, amongst other things, an injunction to restrain them from cutting, digging, or carrying away any of the said turbary; and further praying, if his exclusive right to the said turbary should be denied or disputed, then that such exclusive right to the turbary might be established in such manner, as to the Court should seem fit; and further praying an interim injunction against waste; that the Flemings filed their answer to the bill, and thereby denied the exclusive right of turbary claimed, and that they further, on the 23rd February, 1816, filed a cross bill against Taaffe, praying, amongst other things, that Taaffe might be decreed to execute to them a legal conveyance of the lands pursuant to the deed of 1791, and according to the terms, true intent, and meaning thereof; and that the respective rights of the plaintiffs and defendant might be declared by the Court; that Taaffe filed his answer respecting the claim to exclusive turbary, and that both causes were heard in the month of November, 1816; and that on the 29th November, a decretal order was pronounced, which, however, was never made up, but is still in minutes, directing both bills to be retained, with liberty to Taaffe to bring an ejectment or other action as he might be advised for recovery of such part or parts of the premises as he claimed to be entitled to, and directing the Flemings to take defence, so that the action should be tried at the then next assizes for the Co. Sligo; and that Taaffe should admit on such trial that a legal estate passed under the deed of May, 1791; that pursuant to the order Taaffe brought an ejectment in the Court of King's Bench, to recover possession of part of the said lands, and *inter alia*, 280 acres of bog; that defence was taken and the ejectment was tried against William Fleming, Judith having died in the meantime; that at the trial, the judge directed a verdict for the defendant in the action, on the ground that the soil passed by the deed of May, 1791; that the Court of King's Bench, *in banco*, affirmed the ruling of the judge; and a final judgment was entered for the defendant in Trinity Term, 1818; that in the same year, 1816, Taaffe brought an action on the case against William Fleming to recover damages for his having been prevented by the said William Fleming from cutting, saving, and carrying away turf from the said land, and for converting to his own use large quantities of turf on the said lands, belonging to Taaffe; that Fleming pleaded to such action the general issue, and that at the trial Taaffe was nonsuited, and a judgment of nonsuit was entered in Trinity Term, 1817; that Wm. Fleming having died, the Chancery causes were revived by James Fleming and Harloe Fleming, the grantees in the deed of 1820, and were finally heard

in the month of January, 1820; that on the 28th January, 1820, a decree was pronounced which, however was not made up, "but is still in minutes, as the parties thereto agreed, and did act on the minutes, and submitted thereto;" and the said decree is recited in the deed of the 22nd November, 1820; that by such decree the bill of Taaffe was dismissed with costs; and in the cross cause the Flemings were declared entitled to the possession of the premises in the pleadings mentioned, and to a conveyance thereof pursuant to the true intent and meaning of the indenture of the 3rd May, 1791; that Taaffe was declared entitled to his costs in the cross cause, and was directed on payment of such costs to execute a conveyance accordingly, with a reference to the Master to settle a conveyance if the parties differed; that in pursuance of that decree the deed of December, 1820, which is as to the lands and reservation in the very terms of the deed of 1791, was executed; that the judgments at law, and the decrees above stated, were in full force and effect, and that by the said judgments, and the said last-mentioned decree, the very question raised by the first paragraph of the plaint was decided. The second defence to the first paragraph stated that the indenture of the 22nd December, 1820, in the said first paragraph mentioned, was not fully set forth because the said indenture, after reciting the said indenture of the 3rd of May, 1791, and after further reciting said indenture of the 24th day of March, 1810, and that said last-mentioned indenture recited that the said Thomas Lord Dundas had caused part of his lands, including the lands thereafter mentioned, to be put up to sale by public auction, on the 13th of November, 1809, and succeeding days, at the Royal Exchange, in the City of Dublin, at which time and place the said John Taaffe, and several other persons attended and bid for same, and then and there the said John Taaffe bid for all that part of the towns and lands of Maghenagh, containing 517a., 2r., 26p., arable pasture, bog and mountain, or thereabouts, statutes, &c., and said last mentioned indenture recited that the said John Taaffe was declared the purchaser thereof, the said indenture of the 22nd December, 1820, proceeded to recite that by said indenture of the 24th of March, 1810, the said Sir Thomas Dundas, for the considerations therein mentioned, did grant, &c., unto the said John Taaffe, and to his heirs and assigns, all that and those the lands, &c., of Makenagh, therein mentioned to contain 517a., 2r., and 26p., arable, pasture, and mountain, or thereabouts, and all the estate, &c.; and the said indenture of the 22nd December, 1820, after further reciting that the said Harloe Knott, the lessee named in the said lease of the 3rd May, 1791, afterwards died in or about the month of January, 1811, and that by the decree of His Majesty's High Court of Chancery in Ireland bearing date the 28th January, 1820, made in a certain cause depending in said Court, wherein the said James Fleming and Harloe Fleming, parties thereto, were plaintiffs, and the said John Taaffe, also party thereto, was defendant, it was ordered, adjudged, and decreed by the Right Honorable the Lord High Chancellor of Ireland, that the said James Fleming and Harloe Fleming, plaintiffs in said cause, were entitled to the possession of the said pre-

mises in the pleadings in said cause mentioned, being the said lands of Makenagh hereinbefore mentioned, and to a legal conveyance thereof, pursuant to the true intent and meaning of the said indenture of the 3rd of May, 1791, in the pleadings in said cause also mentioned, and that the said John Taaffe, the defendant in the said cause, was entitled to his costs incurred in said cause, and that the said John Taaffe should accordingly on payment of said costs, execute such conveyance to the said James Fleming and Harloe Fleming, and if the said parties should differ as to the form of such conveyance, it was thereby ordered to be referred to William Henn, Esq., one of the Masters in said Court, to settle and approve of a fit and proper draft of such conveyance, to be executed by the said parties, said indenture of the 22nd December, 1820, witnessed that the said John Taaffe in pursuance and obedience of said decree, and for and in consideration of the yearly rents and covenants thereafter reserved, granted unto the said James Fleming and Harloe Fleming, and to their heirs and assigns, all that and those the said town and lands of Makenagh, &c., saving and reserving unto the said John Taaffe, his heirs and assigns, all woods, underwoods, timber, and other trees, under and above ground, but not the same on which the same then were or thereafter should be growing, and all mines, minerals, turbary, patent privileges, and royalties of what nature or kind soever, with full and free liberty at all times to cut, fell, grub, raise up, manufacture, and carry away the same, and to couse in and preserve all woods or underwoods that then or thereafter might be growing on the said premises, together with full and free liberty at all times to make any roads, causeways, or water-courses, ditches, drains, or fences that might be found necessary, and also full liberty of hawking, hunting, fishing, fowling, and sporting, at all times in and through the said premises, for himself, and other persons deputed by him, to have and to hold, &c., unto the said James Fleming and Harloe Fleming, their heirs and assigns, from thenceforth, for ever after, unto the said John Taaffe, his heirs and assigns, the yearly rent of £85, to be paid and payable by two equal and even payments, that is to say, on every 25th of March and 29th of September for ever, by reason of which grant and conveyance, defendants averred that all the bog and turbary in and upon the said town and lands of Makenagh, passed to and became vested in the said James Fleming and Harloe Fleming, their heirs and assigns, and that the saving and reserving of all turbary in said paragraph mentioned, is repugnant and inconsistent with said grant and conveyance, and therefore null and void to all intents and purposes. As a third defence to the first paragraph, the defendants said that the said James Fleming and Harloe Fleming, and those claiming under them, including defendants, had been in the exclusive, undisturbed, and adverse possession of all the bog and turbary in and upon the said town and lands of Makenagh, ever since the 22nd of December, 1820, and defendants relied upon an Act passed in a session holden in the 3rd and 4th years of the reign of his late Majesty, King William the 4th, and entitled, "An Act for the limitation of actions and suits relating to real property, and for simplifying the re-

medes for trying the rights thereto," in bar of the plaintiff's demand and cause of action, as set forth in the said first paragraph. As a second defence to the second paragraph, the defendants pleaded the Statute of Limitations in the same terms as in the defence just stated; and in the same way they pleaded the same statute as a second defence to the third paragraph. To all these defences the plaintiff demurred. The grounds of demurrer to the first defence to the first paragraph were stated to be, because it did not appear from the said defence that the question which was now raised by this action was already decided as therein alleged; because it manifestly appeared on the said defence itself, that no such question was ever decided; because no estoppel against the plaintiff was shewn; because the said defences did not show that the defendant was entitled to a perpetual injunction to restrain or prevent the plaintiff from proceeding against the defendants for the matter stated in said first paragraph; because the indenture bearing date the 22nd day of December, 1820, in the said first paragraph mentioned, was attempted to be construed by matters which could not control or limit its construction and effect; because the said defence was not pleaded either by way of traverse or confession and avoidance; and because the said defence disclosed no grounds of equitable defence to the matters stated in and by said first paragraph. The grounds of demurrer to the second defence to the first paragraph were stated to be, because the said defence did not show any inconsistency or repugnancy between the grant of the bog and the reservation of all turbary thereon; and because it appeared by the said defence that the right of turbary was simply reserved, and that there was no inconsistency or repugnancy in the granting of the bog, and reserving all turbary therein. The grounds of demurrer to the third defence to the first paragraph were stated to be, because the Act of Parliament in the said defence mentioned had no application to turbary being an easement; because the defendants had acquired no right to the turbary by reason of their possession of the said bog against the plaintiff, the defendant holding said bog under the said indenture of the 22nd December, 1820, and paying rent therefor to the plaintiff thereunder; because the defendants were precluded from setting up any right to said turbary adverse to the plaintiff while holding the said bog under said indenture of the 22nd December, 1820, and paying rent therefor to the plaintiff; and because the statute in said defence mentioned afforded no ground of defence against the right of the plaintiff to said turbary. The grounds of demurrer stated to the second defence to the second paragraph, were the same as those stated to the third defence to the first paragraph. The grounds of demurrer stated to the second defence to the third paragraph were, because the said Act of Parliament in the said defence mentioned had no application to a mere right of turbary, being an easement; and because the alleged adverse possession of the easement, or right referred to, afforded no grounds whatever for resisting the plaintiff in the exercise of the said easement, or right which admittedly became vested in the plaintiff. Upon the argument of the demurrer, the Court of Exchequer gave judgment for the plaintiff, whereupon the defendant brought error.

M'Donogh, Q.C., and *Ince* for the appeal.—The plaintiff is estopped by the decree in the equity suit. [*Fitzgerald, J.*—The reservation of turbary in the deed of 1820 is inconsistent with the statement as to the effect of the decree.] [*Christian, J.*—How can the decree be pleaded as a defence to a subsequent deed?] If the subject matter is the same, it is no matter whether the instruments are different. The reservation of the "all turbary" amounted to a reservation of the soil which had been granted, and that reservation was repugnant and void. The grant of the exclusive use of a thing is in fact a grant of the thing itself. If the thing itself is what was reserved then the Statute of Limitations will apply—*Wickham v. Hawker* (7 M. & W. 63); *Purcell v. Powell* (3 C.B., 625); *Sheppard's Touchstone*, 78: 4 Bythewood, 315; *Cheatham v. Williams* (4 East., 475); *Moore v. Orr* (4 Ir. C.L.R. 567, affirmed, 8 Ir. C.L.R., 347).

Serjeant Sullivan and *William Smith* (with them *Serjeant Armstrong*) in support of the decision below. The argument on the other side rests on the fallacy that "turbary" in the deed of 1820, and in the summons and plaint must mean soil and bog. It only means the right of taking the profit; the argument on the other side amounts to this, that under no circumstances could a landlord reserve a *profit a prendre* against his grantees—Co. Litt. 4 b, and 20 a, show that this is only a reservation of a *profit a prendre*—So *Wickham v. Hawker* (ubi. supra); *Graham v. Ewart* (11 Ex. 326; s.c. on appeal, 7 H. of L. 332), ejectment would not lie for such rights; *Croker v. Fothergill* (2 B. and Ald. 661). The right to take minerals is often reserved, which is a right to take the soil—*Parkhurst v. Smith* (Willes, 367); *Irons v. Douglas* (3 Ir. Eq. R. 601). The decision in equity here does not determine any right. There is a well-understood difference between "bog" and a right to cut turf—*Boyle v. Olpherts* (Longf. & Towns. 320); *Massy v. Gubbins* (Longf. & Towns. 88); if this is only a *profit a prendre* the stat. 3 & 4 Wm. 4, c. 27, does not apply; *M'Donnel v. M'Ginty* (10 Ir. L. R. 314); *Lord Courtown v. Ward* (1 Sch. & Lefr., 8); *Major v. Barton* (4 Ir. C.L.R. 28); *Perkins's Profitable Book*, s. 702; *Kitchener on Copyholds*.

Ince replied.

LEFROY, C.J.—In this case we are of opinion to affirm the judgment of the Court of Exchequer; and I should say for myself that I should be quite satisfied to rest my judgment on the clear and able judgment pronounced by Baron Fitzgerald; and any view which I could take would only go in affirmance of the view which he has taken of the case. First, with respect to the construction of the grant under which the question arises. It was a grant of so many acres, roods, and perches of arable, pasture, bog, and so forth, "saving and reserving thereout all mines, minerals, woods, and turbary." There is no question that there is no repugnancy in the reservation of mines and minerals out of land which is granted. Although the mines and minerals are granted in the land, and are part of the land, yet it cannot be contended that there is such a repugnancy as makes a reservation of the mines and minerals void on that ground. What is the grant of bog reserving the turbary along with the

reservation of mines and minerals, together with a right to enter, and take, and carry away? What is the nature of bog? Land covered with a thing called turf. That is granted as part of the soil. Why, then, should it be repugnant to reserve out of that species of land which contains on it turf—and that is the nature of bog—why should it be repugnant to the grant of bog to reserve out of it the right to cut turf, leaving to the tenants, what? First, the enjoyment of which bog is capable in its natural state. It is capable of use for feeding cattle; it is capable of enjoyment for rearing particular species of wild fowl, and to be used in the royalty of shooting and fowling, and so forth. What greater repugnancy is there, therefore, in the reservation of a particular use to be had of the bog in respect to taking profit from it of a species of mineral which lies upon its surface than where there is a demise of minerals as part of the land, the grant of which does not make it repugnant to reserve the minerals? So it is not repugnant to a grant of land to reserve the right of turbary in respect of it, leaving that which is the most essential part of the grant, that portion of land in which the bog is placed, which is well known to be of the most profitable land. There are counties in Ireland where there is bog on the surface of land, and under it a *substratum* of a species of manure of a very valuable kind; and I know a county in which that *substratum*, which is a species of marl, is carefully reserved; and could there be any objection to that reservation, it being matter of great profit in the county to which I allude? Therefore, I say, as to the grand objection of repugnancy there is no ground for it. And if not, then the question is, what is the nature of the reservation? It is *a profit a prendre*, which gives a right of entry to be exercised, but the property may be enjoyed in the meantime; and therefore, according to the passage in Sheppard's Touchstone, when the reservation is of a nature that does not prevent the enjoyment of anything in the grant, which does not prevent the enjoyment of the principal thing, then the grant is valid of the principal thing, and the reservation is good also. But, on the whole, it appears to me that the best construction—the construction most calculated to give effect to the obvious intention of the parties in this case—is that it should be considered as a *profit a prendre*, and that therefore being an incorporeal hereditament of that kind, the Statute of Limitations does not apply; but I should also say for myself that so long as a tenant enjoys a right or privilege, so long as he holds under that instrument he cannot set up or insist on an adverse right to his landlord. The deed itself, so long as it subsists, is the measure of right of both parties; and the tenant cannot set up an adverse right against his landlord. I remember a case where the defence of the Statute of Limitations arose. Lord Redesdale held that where the tenant pays rent to another person than his landlord, unless the landlord has notice of it after the right has accrued to him of proceeding for the forfeiture, the Statute of Limitations does not apply. He decided that in the case of *Hovenden v. Lord Annesley*, where the question arose, and the party attempted to set up a title adverse to his landlord; and he held that unless rent was actually paid to another party, and

withheld from the landlord who had notice thereof and took no proceedings, the plea of the Statute of Limitations did not arise.* Under those circumstances I should say that this is a case in which there is every ground for sustaining the judgment of the Court of Exchequer. A question has been made as to the meaning of the word *turbary*. We have been referred to a book of authority from which it appears that a right to cut turf, as that book states in a reference to another book, is a proper definition of the word, and Baron Pennefather states the same as his view of the meaning of the word. The opinion of the Court, therefore, is, that the judgment of the Court below must be affirmed.

Judgment affirmed, with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

GOODFELLOW v. HUNTER—ASSIGNEES OF HUNTER v. GOODFELLOW.—16th November.

Right of a party in an action directed by the Court to rely on distinct and inconsistent titles.

A executed a bond and warrant of attorney to B, upon which judgment was obtained, and subsequently, a conditional order under the Garnishee clauses of the Common Law Procedure Act, 1856, to attach a debt due by C to A. Upon motion to make absolute this order the assignees of A who had in the meanwhile become an insolvent intervened, and the Court made the order absolute; but directed the money to remain in Court to abide the result of a motion by the assignees to set aside the judgment. Upon this motion the Court directed the assignees to bring an action against B, and directed B to admit the receipt of the money. Upon the trial of the action B failed to sustain the judgment, and set up a deed of prior date, assigning to her the same debt as had been sought to be attached. The jury being unable to agree, upon a renewal of the motion by the assignees to set aside the judgment, and an application to have the money in Court paid to them, Held, (Christian, J. dissentiente) that there was nothing in the previous proceedings nor in the order of the Court directing the action to prevent B from relying upon a security different from that which was the foundation of the garnishee proceedings.

Held (per Christian, J) that the case was analogous to that of an interpleader order; that B had been put to her election, and having made her election and failed to sustain the security on which she elected to rely, that the assignees were entitled to the fund in Court.

On the 25th of May, 1861, Edward Hunter, who, as it afterwards appeared was then unable to meet his engagements executed to Miss Goodfellow a bond and

* Vide 2 Sc. & Lefr. p. 625.

warrant for £850, upon which judgment was obtained. Upon the 28th of the same month, Miss Goodfellow obtained from Christian, J., in chamber, upon the usual affidavit, a conditional order attaching a debt of £75 sworn to be due to Edward Hunter by James Hunter, his father. Upon the 31st of May, Edward Hunter was arrested at the suit of some other creditor, and upon the 24th of June he filed his petition in the Insolvent Court. Upon the 27th of June, James Hunter filed an affidavit as cause against the order of the 28th May, being made absolute, and there being a stay of execution in the security given by him to the insolvent, the proceedings remained in abeyance for a year. On the 4th of July, 1862, upon motion by Miss Goodfellow to make absolute the conditional order, and cause against it being shown by the assignees of the insolvent, and the garnishee, Edward Hunter, admitting his liability, and bringing into Court the 75*l.*, it was ordered by Keogh, J., that the cause shown by the assignees should be disallowed, and the order be made absolute, but that the money should remain in Court to abide the result of a motion to set aside the judgment. On the 30th of October accordingly, the assignees served upon Miss Goodfellow notice of a motion to set aside the judgment obtained by her, which came on to be heard on the 8th of November following. The counsel for the assignees contended that the warrant of attorney was null and void, both by the 333rd and 334th sections of the Irish Bankrupt and Insolvent Act, because it was given within two months of filing a petition of insolvency for an antecedent debt, the insolvent being unable to meet his engagements at the time, and also because the warrant, or a copy of it, was not filed with the proper officer within twenty one days after its execution. It appeared upon the argument that Miss Goodfellow had a deed of date prior to the warrant of attorney executed by the insolvent, Hunter, and assigning to her, amongst other things, the very debt sought to be recovered by the garnishee proceedings. The Court made the following order:—"Saturday, November 8, 1862.—It is ordered that this motion do stand, and let either party be at liberty to apply to bring on said motion. Let the plaintiffs (the assignees) commence an action in this Court against Miss Goodfellow for the recovery of the sum of £75 money had and received, and for the purposes thereof, let Miss Goodfellow admit the receipt of this money." Upon the trial of the action thus directed before Monahan, C. J., the case made by Miss Goodfellow under her bond and warrant failed entirely, and she then set up her deed. The counsel for the assignees objected that Miss Goodfellow was estopped from doing this; but the Chief Justice withdrawing from the jury everything relating to the bond and warrant, and the judgment, left to them certain questions upon the *bona fides* of the deed. They were unable to agree, and there was no verdict. An affidavit was subsequently made by somebody that 11 of the jurors had agreed to find in favour of the validity of the deed.

On the 11th of June, 1863, *Macdonogh, Q.C.*, for the assignees renewed the motion of the 8th November, 1862, and it was directed to stand until next Term. Accordingly,

November 16.—*Macdonogh, Q.C.*, (with whom

was *Kernan, Q.C.*) moved that the judgment and the garnishee order obtained upon it be set aside, and that the sum of money lodged in Court be handed over to the assignees. If the Court was wrong in what it did before, that is no reason for its being wrong again.—*Britten v. Hughes* (5 Bingham, 464). But in this instance the Court was not wrong. It cannot arrogate to itself the jurisdiction of the Court of Bankruptcy. This motion is founded upon the trial directed by the order of the 8th November, 1862. A proceeding is instituted in this Court over which it has jurisdiction, and it has no jurisdiction outside of that. The opposite side clung to the judgment through the greater part of the trial, and then set up this pocket instrument which they relied on as an assignment of the debt. Why send the parties to another trial, when the Insolvent Court can deal with this instrument? [*Monahan, C. J.*—We directed an action to be brought for money had and received. *Christian, J.*—The scope of your argument is, that the Court had no right to send an issue to be tried, and that may be open to you.] The meaning of the order of the 8th November was not to grant a wild issue over which there would be no jurisdiction. The garnishee order ought never to have been made. The debt was vested in Miss Goodfellow, not in Hunter.—*Hirsch v. Coates* (18 C B., 757). The order of the 4th of July, 1862, was right in *omnibus*, but the affidavit of Miss Goodfellow, in which she swears that James Hunter is indebted to the insolvent in this sum, estops her from setting up the deed. [*Keogh, J.*—If the Court had no jurisdiction to make the order they did, the money ought to be in the pocket of James Hunter. *Monahan, C. J.*—How can we hand over the money to the assignees, without determining whether the deed gives it to her or not? It is another matter whether this deed be fraudulent. Assuming that the deed is executed *bona fide*, that Miss Goodfellow obtains a judgment for the same debt, and that the execution is set aside upon the ground that she had no right to take the second step, is there any authority that there is any estoppel?] If a party induces the Court to act upon an affidavit, he is estopped by it. If there were no authority, I would ask the Court to make one. Admissions made in the course of judicial proceedings are, on motives of policy and justice, deemed to be conclusive.—*Taylor on Evidence*, s. 744; *Sheriff v. Cadell* (2 Espinasse, 616).

Serjeant Armstrong and Clarke, Q.C., contra.—On the 8th of November, 1862, the judgment was sought to be set aside, first upon one ground, and then upon another, and the answer given to the 334th section was, that the law differed in England and Ireland, that publicity was the object of the Irish statute, the policy of which was satisfied. Whether this man was in a situation to meet his engagements in the language of the 333rd section, we contended was a matter which could not be tried upon affidavits. The deed was referred to, and insisted on as an answer to the application by the assignees. The argument made now was made then, viz., how is the deed to be listened to in the teeth of the affidavit, which stated that old Hunter was then indebted to the son in this sum? There is no estoppel in the case. The affidavit is strong matter of observation, and that is all, and can

be submitted to only one tribunal, a jury. [*Monahan, C. J.*—The notion of the majority of the Court was that, be the matter right or wrong, a jury was the proper mode of determining the right to this money, and that if you established your title as regarded the 333rd section, and that the other side were driven to the 334th section, and that there was a doubt, it might be made the subject of a new trial motion or of an appeal. But the deed being impeached for fraud. I thought a jury was the proper tribunal to try that.] The deed was not a pocket instrument; it was mentioned at the trial, in the opening statement of the counsel for the assignees. The case was not then regarded as one of fraud or perjury, but as the case of a person who had the equitable estate endeavouring to get the legal arm of the Court. It would be a cruel thing to visit this woman with the doctrine of estoppel. The assignees knew what the allegations in the affidavit were. [*Christian, J.*—She came in discrediting this deed, and the other parties met her upon the ground she chose, and would it not be a very extraordinary thing for them to set up this deed which she came into Court discrediting?] The assignees, by standing by, submitted to the jurisdiction of the Court. The judgment debtor and the judgment creditor are the parties in a garnishee order, and the assignees intervene and submit to the jurisdiction of the Court. The argument on the other side is this, that by the falsehood of the affidavit, which is a strong term to apply to it, the garnishee order is rendered wrong. If it be so, that is no reason why the assignees are to get the money. It ought to go back to James Hunter. If a third person came in now claiming the same money, the Court would not give it to the assignees, but would direct an action to be brought by them or by the party, and the money to remain in Court. It is idle to talk of perjury. What could Miss Goodfellow know of the case of *Hirsch v. Coates* in 18 C. B., which the counsel for the assignees has found out? [*Monahan, C. J.*—The assignees have no right to the money unless they can get it on foot of the insolvency proceedings, and the question is, if the deed be good or not. We have no right to pay the money out to anyone, unless we can protect the person who brought it in.]

Kernan, Q. C., in reply.—The object of this motion is twofold—1. To set aside the garnishee order. 2. To have the money paid to the assignees. The order of the 28th of May, 1861, must be set aside. It was made by Christian J., under the garnishee clauses. The requisite to found that jurisdiction is a judgment which must exist, must be a valid judgment, not only as against the defendant, but as against those who represent the defendant's estate. It was stated before Christian, J., that the judgment was obtained in the ordinary way, but circumstances supervened which entitled the assignees to come in and have that garnishee order set aside, and the judgment with it. The jurisdiction which attached at the time of the making of that order is removed. If a bond and warrant be given within two months of filing a petition of insolvency and for an antecedent debt, and when the party is in embarrassed circumstances, the 333rd section makes it null and void. We are now as if we were here on the 8th November, 1862, with this additional circum-

stance, that what we could not then ask the Court to decide as a fact, we now have admitted. The insolvent was in embarrassed circumstances when he gave that bond and warrant, and it was given for an antecedent debt. [*Monahan, C. J.*—You have clearly established that Miss Goodfellow cannot rely on her garnishee order. You may assume that if there was nothing else in dispute, that they have failed to sustain that order.] The Court has no jurisdiction but to give the money over to the assignees. [*Monahan, C. J.*—They being no parties to the garnishee order.] There is no other jurisdiction. Where is the writ? A writ is the beginning of process. The Court has no jurisdiction but the one statutable one. No general jurisdiction, no inherent jurisdiction of the Court brought this money in. The Court are now satisfied the circumstances do not exist which induced them to have it brought in. Is there anything in the statute which says that an equitable jurisdiction shall attach when the other jurisdiction is gone? The garnishee order and the judgment are both gone. The only case here is *Goodfellow v. Hunter*, and that case no longer exists. [Counsel referred to sections 65 and 67 of the Common Law Procedure Act, 1856] [*Monahan, C. J.*—That contemplates the case only as between the judgment creditor, the judgment debtor, and the garnishee.] And therefore the Court has nothing to do with third parties or fourth parties. What is the meaning of the garnishee being discharged, although the order be set aside? The garnishee is now discharged as against us, and could plead tomorrow against us, what has been done in this Court. It is said, why not give the money back to him? But he is discharged. Miss Goodfellow ought to be bound by what she has done according to the doctrine of *Pickard v. Sears*. She has done what put us to a disadvantage. If the Court had no right to direct a question between A. B. and C. D. to be tried, then they were wrong, but they did not do a wrong thing. The money was paid in to abide the result of the proceedings to set aside the judgment. The money is stamped with that character. We have set it aside. The order of the 8th of November did nothing but put in a train of inquiry what ought to be inquired into. [*Monahan, C. J.*—Do you say that as a matter of fact the rights under the deed were not tried?] I never consented to it, and as a matter of fact I do not recollect it. It was forced upon us, and we are not to be the worse of it. The deed is never mentioned in the affidavit used before Keogh J. It is asked, how can the action be got rid of? but it is forgotten that it is an action brought by order of the Court. If a Court of Chancery or of law directs an issue to satisfy its conscience about a matter of fact, has it not control over that action? [*Christian, J.*—I see much greater obstacles than I did in the way of your motion being granted. You came in as well as the judgment debtor to show cause against the conditional order being made absolute. You should have asked the order on that occasion to stand over to abide the motion to set aside the judgment; but you did not do this; but Judge Keogh made an absolute order, and then the Court naturally thought that the way was to direct a proceeding by which the rights of all parties might be put forward, so allowing Miss Goodfellow to

rely on every right she might have, and the assignees to rely on every right they might have. Your argument that the garnishee is discharged, is just what shows that the money is derelict. You probably all agreed with Judge Keogh in what he did. He made an absolute order, and then he put a stop on the order he had just made, by directing the money to remain until the motion to set aside the judgment was disposed of.] There is no doubt that we represent the interest of the insolvent. We are entitled to all his assets and effects, and have a right as against the party by whom the charging order was got, if got improperly. The Court have no right to look outside of the garnishment proceedings.

Cur. adv. vult.

Nov. 21.—MONAHAN, C. J.—The existence of this deed was a matter brought before the Court upon the discussion of the motion of the 8th November. It occurred partly in open Court, and partly during our discussions on the Bench, that the assignees pressed the matter to be sent over to the Bankrupt Court. And it was stated that they had no objection that Judge Lynch should entertain Miss Goodfellow's claim. On behalf of Miss Goodfellow that was objected to, and it was said she would rather have the opinion of a jury; and some, at all events, of the members of the Bench, thought that it was the right of the party to have a jury, and particularly where the matter originated in a Court of Law, provided only that it was a question which ought to be tried at all. Judge Christian thought it would be a saving of expense to the parties to have it tried before Judge Lynch, and that he could investigate both law and fact. Ultimately, we made the order that the motion should stand, and the consideration of the costs thereof be reserved. Then comes the material part of the order, "Let the plaintiffs commence an action in this Court against Miss Goodfellow for the recovery of the sum of 75*l.*, and let Miss Goodfellow admit the receipt of the money." The first question is, what is the true construction of that order? There are no special questions directed. There is not an issue directed to try the validity of that bond and warrant. It should then have been, was Hunter unable to meet his engagements at the time of executing it? It is not that. It is a Common Law action that was directed to determine whose is the money now in Court, which, for that purpose, Miss Goodfellow admitted she had received. Accordingly, the case came on for trial before me. It occupied more than a day, and at a very early stage of the case, I, having availed myself of the knowledge I had, thought that the other question would arise when the judgment failed. The judgment being void, it followed that Miss Goodfellow had no title under the garnishee proceedings. Then came the question, had she any right under the deed? The plaintiffs also proved to my satisfaction that Hunter was not able to meet his engagements at the time of executing the bond and warrant. Mr. Maodonogh objected, and said that I should not go into the question of the deed, and that there was an estoppel. I never formed a clearer opinion than that in a common law action brought by the assignees, the judgment having been set aside, there was nothing by way

of estoppel to prevent this woman from relying on her deed. At first it was omitted to be proved that notice of the execution of the deed had been given to old Hunter, but ultimately evidence of this was given, and I withdrew everything relating to the bond and warrant from the jury, and left to them the question if this was an honest and *bona fide* deed? Neither myself, nor the counsel, nor the jurors entertained any doubt but that there was ample consideration for the deed. Still, there was the question, if it was executed *bona fide*. There was no objection to the mode in which I left the question to the jury. There was also a question left to them as to the notice to James Hunter. The jury were unable to agree, and were discharged. I attach no importance to the affidavit, stating that eleven of the jurors were of one opinion. Now in that state of facts the present motion is brought forward. I do not stop to inquire about the portion to set aside the judgment and the garnishee proceedings, because I should see no objection to that being perhaps granted; but this is ancillary to paying the money over; but it is argued we ought not to have allowed Miss Goodfellow to put forward the deed at the trial, and Mr. Kernan argued that if we set aside the garnishee proceedings, we are *functi officio*, and must pay the money, and pay it to the assignees of the insolvent. What is the true construction of this Act of Parliament, the Common Law Procedure Act, 1856? [His Lordship read the 63rd section.] It is necessary to call attention to the word *ex parte*. That is an *ex parte* order, of which nobody gets notice, and which effectually attaches the debt due by the garnishee on whom it is served, and is conditional as to payment on a day named in the order. Then the 65th section has the words, "if the garnishee does not forthwith pay into Court," &c.; it is not "pay to the plaintiff," but "pay into Court." He is not allowed to enter into any question as between the other two parties, his creditor and his creditor's creditor. Then comes the very strongest section, and an important one, in the view which I and the majority of the Court take, the 67th, which says the garnishee shall be discharged, "although such proceeding may be set aside or the judgment reversed." What sort of debts can be taken thus? In *Hirsch v. Coates*, this was held to apply not merely to legal debts but equitable debts also, but only to what beneficial interest the party had in them. Suppose this debt had been assigned to a third person, and had been assigned not absolutely, but as a security for a given sum of money. Then this case shows the garnishee proceedings might still stand, because there would still be something to be operated on by the garnishee proceedings. And the Court there held that the judge's order to attach was right enough, but they set aside the order to pay a small portion of the sum. To whom is the Court to pay this money now that it is in Court? The assignees are no parties to the garnishee proceedings; but nobody doubts their right to come in and say the money is theirs. So may any one. If so, the Court cannot pay the money out to any one unless they are satisfied that the party is legally and beneficially entitled. That is not new; it is as old as the Court itself. Take the case of three executions, one out of this Court, one out of the

Queen's Bench, and one out of the Court of Exchequer. Execution issues, which a creditor who holds another judgment thinks fraudulent, as suppose with directions not to be executed until another execution is issued. That party has a right to bring an action against the sheriff for a false return. If the money has been brought into Court, it used to be a common proceeding to direct the other execution creditor to bring an action for money had and received, and in that trial determine the question of fraud. It appears to me as of course that if two parties claim money in Court, we must determine the right. The property did not pass to the assignees by the insolvency, as Hunter had not a beneficial interest. Unless by the fact of taking these garnishee proceedings this woman has estopped herself, she is entitled to go back on her deed. What is there to estop her? The legal estate is still in Hunter. If so it is so for her benefit. She gets a judgment to secure the same debt. She makes an affidavit. She does not state her own assignment. There is no perjury or falsehood in that. Neither in my opinion is there any estoppel. In the old Term Reports are many cases which say that property in mortgage can't be disposed of in execution. We think the true construction of the order made, and the order we now should make, if that order was not made, was to put in a common law train of inquiry the question whose is this money. If Miss Goodfellow is estopped, that can be put forward as a defence in an action. It can be put upon the record, not for an *ex parte* decision, which is not subject to appeal, but in such a way as can be corrected if erroneous; but let us not take upon ourselves on an interlocutory motion, from which there is no appeal, to decide that this money should go to the assignees. This is the opinion of the majority of the Court and the order will be—No rule on the present motion without prejudice to renewing the motion when by an action the question is tried.

CHRISTIAN, J.—It is with no small amount of misgiving that I differ from the majority of the Court. My grounds will best appear by a review of the proceedings. On the 25th of May, 1861, Miss Goodfellow was in this position. She had two assurances, under one or the other of which she might make available this debt due by the one Hunter to the other Hunter. She had the deed, which I have never seen, but from what I have heard it seems the debt was assigned by it to secure an antecedent debt with others. That was one of the assurances; the other was the judgment, which, upon the 25th May, 1861, was entered upon a warrant of attorney. On one or other she might have got possession of this debt. If the first was valid, the other was out of the question. On the other hand, if for any reason the deed was invalid, then the judgment by means of the garnishee clauses, offered her the means of attaching it. She was plainly put to her election. She had better than any one else the means of knowing which she ought to stand by. She knew whether the deed would bear the light, and with that knowledge she and her advisers deliberately elected to proceed under the garnishee clauses. She did not bring forward her claim to attach any surplus remaining of that debt, but to attach the debt. She said as distinctly as if in so many words, "the deed is null and void so far as regards that debt;" for it could not

be still due if already assigned. Without saying there was perjury, the debt could not be a debt due to Hunter if the deed had assigned it. The only parties as yet were the three ordinary garnishee parties—the judgment creditor, the judgment debtor, the garnishee. Within less than two months, Edward Hunter presented his petition to the Insolvent Court. On the 27th June, 1861, James Hunter filed an affidavit as cause. I don't know what it was; for whatever reason the proceedings were in abeyance (I believe a stay of execution) for a year. Then Miss Goodfellow moves to make absolute the conditional order. The garnishee appears in Court; the assignees move to set aside the garnishee order, not then the judgment. In that state of things the order of the 4th July was made, every portion of which is material. Did Miss Goodfellow then revert to her title upon the deed? No; but still stood by the judgment. The order proceeds: "It is ordered by the Right Hon. Judge Keogh that the cause be disallowed, and the order be made absolute." This is the second time Miss Goodfellow gets a judicial proceeding. The Court had staring in its face the proceedings of the assignees, and could not pay the money as it would have done to Miss G. As there was no proceeding yet to set aside the judgment, the Court directed the money to be kept in Court to abide the result of a motion to set it aside. [His Lordship read the order.] In my humble opinion, the only possible interpretation which can be put upon that order is, that the Court ordered the money to be kept to abide the motion to be made by the assignees. No other question was then before the Court but the claim of Miss G. and the claim of the assignees. It would have been a very idle and ridiculous proceeding for the assignees to go set up the other title, the title under the deed. It is said they knew of it. Miss G. did not set it up. The Court had before it only the two. If one or other claim had been disposed of, the Court would at once have ordered the money to be paid over. It therefore plainly stayed its hand, abiding the motion then directed to be brought forward. An order on this construction in strict accordance with the jurisdiction the Court was then exercising, but which if construed as a wide invitation to bring forth any case in the world, would be an erroneous proceeding. Upon the 8th November, 1862, the motion directed by the order came before the Court, and that is the very motion a renewal of which is now before us. What ought the Court to have done then? Whatever it was, we have the right and the obligation to do now. What ought the Court to have done? 1st, we ought to have set aside the judgment and the charging order. Whether we should have let Miss G. then rely on the deed is a different question. I am clearly of opinion we ought to have set aside the judgment, why?—because we had staring us in the face the section which says unless the warrant of attorney be filed in the Court within 21 days, it shall be null and void. That staring us in the face, it was unnecessary to consider the other. I recollect a long discussion on the 333rd section. I confess I thought for a while the Insolvent Court would have been more fit for the question then argued; but why were we embarrassing ourselves with the 333rd section at all if the other had been

pressed upon us? We ought to have set aside the judgment, and we ought to do so now. What would have been the next step? In my humble opinion, we ought to have followed this up by paying the money over to the assignees. The Court had not jurisdiction to do otherwise. I consider this money was in a position analogous to goods in the hands of the sheriff. A garnishee proceeding is only a new execution. In an interpleader proceeding, if it be ascertained that the foundation on which the plaintiff claims fails, it is the duty of the Court to hand the property to the party to whom it would go but for the interpleader proceedings. The money could not have been given back to the garnishee, because he was discharged. The only persons to whom it could have been given, remitting the parties as near as possible to the position they would have been in if the erroneous proceeding had not been taken, were the assignees. This is analogous to the case of a *fiat facias*. Suppose this a bill of sale of goods to Miss G. Suppose she obtains a warrant and judgment, and issues a writ of *fi. fa.*, treating the goods as his not hers, and in the meantime H. becomes insolvent, and the sheriff obtains an interpleader order to determine whether the goods are the property of the execution creditor, an order directing the execution creditor to bring an action, would the Court try upon that the validity of the bill of sale? Clearly not; it would try nothing but the validity of the execution. But to make it more analogous, suppose she held out to the last to her execution, and is beaten, and that on this the assignees come to claim the money, would the Court allow Miss G. to say—it is true the proceedings directed have proved the nullity of my judgment, but I have another title, and will send the parties upon a new career of litigation? No; the argument of Miss Goodfellow's counsel appears to me to assume that the office of the Court is to determine in a plenary way the property in this fund. It is not any such thing. The analogy is complete. The garnishee order is the execution. The order of the 4th July is the interpleader order. I have a case which I will refer to, though the facts do not make it an authority—*Shingle v. Holt* (7 H. and N. 65); a woman claimed goods which were seized by the sheriff, and the usual order was obtained. On the trial it appeared that the woman was a married woman, who left her husband, and was living with the execution debtor. The defendant's counsel submitted that the goods belonged to the plaintiff's husband. The judge says I am not here to try questions of property but the question of the validity of the execution. There was a motion to enter a verdict for the defendant on the ground that the goods were the plaintiff's husband's. The court said No; if the parties had objected this they should have got him made a party. Baron Bramwell says, "the issue was framed in the ordinary way, to try whether the goods were the goods of the plaintiff as against the execution creditor, and a verdict was found for the plaintiff. The defendant now asks that a verdict may be entered for him on the ground that something, which the plaintiffs did not go down to try, shows that the plaintiff's title was defective." This exemplifies what the nature of this proceeding is. When the case was before us on the 8th November, we ought to have set

aside without more ado this judgment, and in further execution have handed over the money to the assignees. It is not necessary to say if the Court was seized of this fund in a plenary way, how the Court would treat a third person. If it were necessary, I have great difficulty in seeing that Miss G. was in the same position as a third person. She had made a claim. She had claimed in a particular right till judgment is given against her, and then turns round upon her other title. A party has no right to deal out his titles one after another legal and equitable. Suppose the deed had been found against, and the assignees had come to claim the money, could Miss G. be heard to say, "I have my real title in reserve. I tried the judgment, and I failed on that; I tried the deed, and I failed on that. These were mere experiments. I will now bring forward my real title, and I ask to have the validity of that ascertained." Whether, therefore, there be an estoppel, she ought to have been held once for all to make her case, and held to abide by it; but that is not necessary to consider, because I rely on the strict analogy of an interpleader order. I am of opinion that we ought to have set aside both the judgment and the order. It is said we can't do that because of what has happened since the order of the 8th November. I don't see that at all. The order was of some use on what we didn't want, the 333rd section; but on the 334th section the Court had ample grounds for setting aside the judgment. Are we bound to persevere for ever in a course of error—to force these parties to drink to the dregs the cup of litigation we have mixed for them? What, it is said, ought to be done about the costs of the action? Both parties were more or less in the wrong, if my opinion be wrong, but if I am right, the Court was itself wrong, and we ought not to have made the order directing that action. We ought to direct a *set processus* on the action, and give the costs of it to neither party.

KEOGH, J.—I will just say this, which may have escaped general attention, that the order of the 8th November, 1862, which has been questioned, was made by the entire of the Court.

No Rule.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

FITZGERALD v. THOMPSON—Jan. 18.

Pleading—Amendment—Action for fraudulent concealment—Misrepresentation.

A count in the summons and plaint which complained "that the defendant was possessed of a grey mare called Polly, which, as defendant well knew, was unsound, and the said defendant, by the fraudulently concealing from the plaintiff that the said mare was unsound, induced the plaintiff to buy the said mare for £59, which the plaintiff paid the defendant, whereby the plaintiff lost the said £59." Ordered to be amended by inserting between the words "un-

sound" and "induced," the words following. "and representing to him that it was sound."

THIS was an application to set aside as vague and uncertain the first count of the summons and plaint, which was as follows, "Victoria, &c.,—Blenerhasset David Thompson, the defendant, is summoned to answer the complaint of Frederick Lattin Fitzgerald, who complains that the defendant is indebted to the plaintiff in the sum of £60, for that the defendant was possessed of a grey mare called Polly which, as defendant well knew, was unsound, and said defendant, by then *fraudulently concealing* from the plaintiff that the said mare was unsound, induced the plaintiff to buy said mare for £59, which the plaintiff paid the defendant, whereby the plaintiff lost the said £59." There was a second count "for that the said defendant, by warranting a certain other mare to be then sound, sold the said mare to the said plaintiff, yet the said mare was not sound, whereby said mare became of no use to the plaintiff, and he incurred trouble and expense in causing it to be examined, and in keeping it, and in endeavouring to induce the said defendant to receive it back, and the said plaintiff afterwards re-sold the said mare for a less sum than he paid the said defendant for it, and incurred expense of said re-sale therefore," &c., dated 7th December, 1863. The defendant having been served with the above plaint, applied as follows by notice to plaintiff's attorney—"Take notice that, inasmuch as the defendant is ignorant what are the circumstances relied on by the plaintiff, as constituting the fraud in the first count of the plaint, I hereby require you, on or before Thursday next, to furnish us with the particulars of the said circumstances: dated 15th December, 1863." To this the plaintiff replied that, on the 21st of December, "the fraud of which the plaintiff complains of is, that the defendant knowing, and having before him conclusive evidence that the mare was unsound, and of which the plaintiff was ignorant, *represented* to the plaintiff that the mare was sound, and effected the sale to him on that *representation*. The application now made to the Court was, that the first count of the plaint be set aside as embarrassing, same being vague and uncertain and contrary to the Common Law Procedure Act 1853, as not stating the fact constituting the ground of complaint, and, further, because the particulars furnished on the 21st December last contradict and are inconsistent with the ground of complaint in the said first count, the particulars complaining of active misrepresentation, the plaint of fraudulent concealment, and further that if a false representation be, as it appears to be from the said particulars, the ground of suit, it should have been so averred in the plaint, in order that there might be an issue knit on the pleadings, and it does not state with sufficient clearness what the fraudulent concealment was so to raise the question between the parties. And further, that there was no ground for departing from the common and well known form of pleading in actions for false representation.

Doussé, Q.C., in support of the motion.—The first count is for fraudulent concealment, while the complaint, in the particulars furnished on the 21st December, is for active misrepresentation; the particulars

of the facts which constitute the misrepresentation should be set forth—*Reddock v. Kavenagh* (3 I. C. L. 584)—the mere selling of an unsound horse does not give the person to whom it is sold a right of action against the vendor—*Hill v. Ball* (2 Exch. Rep. 299); there the declaration stated that the defendant was possessed of a glandered horse, and knowing the horse to be affected with that disease, caused the horse to be sold by auction, and the plaintiff, believing the horse to be sound, became the purchaser, and paid, therefor, a certain sum, and said horse was put into a stable and infected another horse of the plaintiff's which soon after died, and it was held the declaration disclosed no cause of action, and Bramwell, B., there says, The rule "*caveat emptor*" as reasonably applies to the sale of an unsound horse as to any other sale. This is not a count for fraudulent misrepresentation, and it fails as a count for fraudulent concealment, for the count is vague and uncertain, it does not specify what description the concealment was of—was it active concealment or passive? The count should have stated that the defendant representing to the plaintiff that the horse was sound, *induced the plaintiff to buy same*, this it omitted to do; the plaintiffs have exactly followed an erroneous precedent given in the first edition of Bullen and Leake, p. 196, which has been altered in the second edition, p. 291.

Wall, Q.C., and *Forbes Johnson, contra*.—The gravamen of the action is for misrepresentation and the concealment of an unsoundness; Bramwell, B., in delivering judgment in *Horsefall v. Thomas* (10 Weekly Rep. 652), says it is an old rule of law *caveat emptor*, but if there be a flaw latent in the article sold which cannot be known or discovered by any inspection on the part of the purchaser, the vendor is bound to disclose it, though it is otherwise if patent.—If there be no cause of action disclosed in the count objected to, the course should have been to demur. [*Hughes, B.*—Have you any objection to state it in the manner given in the second edition of Bullen and Leake, p. 291?] None whatever, on the terms of the defendant paying the costs.

HUGHES, B.—The whole thing arose from the pleader following the precedent given at page 196 of the first edition of Bullen and Leake. Amend the count as follows, "that the defendant was possessed of a horse, which, as the defendant then well knew, was diseased, and the defendant, by then fraudulently concealing from the plaintiff that the said horse was diseased, *and representing to him that it was sound*, induced the plaintiff to buy the said horse for £57, which the plaintiff paid to the defendant," &c.; this will make it accord with the precedent given in the last edition of Bullen and Leake.

Costs to be costs in the cause.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

GAMBLE AND WIFE v. JOHN ROBINSON AND OTHERS.—
20th and 24th February.

Costs—Executors and residuary legatees in a former will failing to set aside a later will—Executors put forward in support of legacies for charities—Costs of next of kin, also, legatees—Costs of trial—Court fees—Refreshers to counsel.

Where executors and residuary legatees under an earlier will impeached a later one, on the grounds of incapacity of the testatrix, and undue influence and fraud practised upon her, and not only failed to sustain those pleas, but were themselves by the evidence plainly guilty of fraud and contrivance in the preparation of the earlier will, they were condemned in the costs of the suit, though they were put forward to sustain charitable gifts in that will. Next of kin being also legatees under such fraudulent will, and not impeaching it, but impeaching the last will, which was decreed for—refused costs. But next of kin, not being legatees in and impeaching such will, allowed the costs of the pleadings, &c. But under the circumstances, the Court considering it unnecessary for their protection to appear, none of the next of kin were allowed the costs of the trial of the issue.

Where final judgment is postponed after argument, additional court fees on the day of the delivering of judgment are necessary, and also refreshers to counsel.

THIS case came before the Court now for final judgment. The plaintiffs had propounded a will of the deceased, Miss Anne Drummond, dated the 9th September, 1862, and a codicil to it, dated the 20th September, 1862. The defendant, in his plea, propounded a will of the deceased, dated the 21st day of January, 1863. Several next of kin had been cited and had appeared, and had in their pleadings impeached both the will and codicil, relied on by the plaintiff, and also the will alleged by the defendant. The substance of these wills and of several other wills of the deceased, as well as the pleadings will be found sufficiently detailed in the judgment of the Court. The case had been tried during Term before the Court and a special jury, when a verdict was found in favour of the validity of the will alleged by the defendant, *i. e.*, the last will.

The Solicitor-General (Whiteside, Q.C., and Dr. Townsend, with him) now applied for the costs of the suit against the plaintiffs, on account of the charges of fraud made in their pleas against the defendant Robinson, in which they had not only entirely failed, but the case appeared at the hearing to be one of gross fraud on the part of the plaintiffs. In such cases the costs are always given against the unsuccessful party. Múchel v. Gard (33 L. J. Prob. 7); Clayton v. Davis (33 L. J. Prob. 28); Summerhill v. Clements (32 L. J. Prob. 33 & note).

Dr. Ball, Q.C., (Serjeant Sullivan, Q.C., and

Walker with him) for the plaintiff.—We don't ask for costs, but we say that the plaintiffs should not be made to pay any. The plaintiff, Mrs. Gamble, was residuary legatee in the will which they put forward, and she was also a legatee for £1,000 in the will alleged by the defendant. The defendant admitted the validity of the will and codicil alleged by the plaintiffs, who, in reality were put forward by the persons interested in the charities, who, not being corporations could not intervene; besides, the sudden departure from the will of September, 1862, and the last will being a death-bed will, were grounds for excusing the plaintiffs from costs.

Dr. Walshe, Q.C., and Exham, Q.C., for the several next of kin asked for costs: some of the next of kin had by pleading impeached both the wills relied on by the plaintiffs and the defendant, and others (Logan and wife) had only impeached the last. Múchel v. Gard (vide supra).

Cur. adv. vult.

24th February.—KEATINGE, J.—It appeared that the deceased, Miss Anne Drummond, was a very old lady, aged about eighty-six. Her brother, the late Alderman Drummond, had died in March, 1862. By his will he left a sum of £20,000, for the purpose of establishing a school for the orphan daughters of soldiers and the residue of this estate he left to his sister, Miss Anne Drummond for life, with a power of appointment as she should choose by will; and his will also contained some legacies which were not to be paid until after his sister's death. This will also appointed John Robinson and James Robinson his executors. The property to which Miss Drummond thus became entitled was estimated to be about £8,000 or £9,000, but the exact amount is not material. Between Alderman Drummond's death and January, 1863, the deceased had made four wills; one in June, 1862; one in August, 1862; and the two now in issue in this cause. By the first, the one in June, 1862, (which is lost) she left several legacies, and appointed Messrs. James and John Robinson executors and residuary legatees. That will was prepared by Mr. James Robinson, Q.C., who was a very intimate friend of Alderman Drummond. The second will dated the 12th August, 1862, was also prepared by Mr. James Robinson from her instructions, and was duly executed. She told him on both occasions, that neither of such wills was intended by her as a final disposition of her property, and she often said, that she intended a good residue for him and his brother John. The will of the 12th August, 1862, contained more legacies than the former one, and gave the residue to James and John Robinson, and appointed them also executors. James Robinson was present at the time of the execution of both of those wills. At the time of the making of the second will, James Robinson was about going abroad, and in conversation with Miss Drummond, he recommended her to employ Mr. Keys, a solicitor, an old friend of the Alderman, if she wanted a new will or codicil. Those wills, though not in issue in this cause, are, in my judgment, all important. It is said that on 9th of September, 1862, when James Robinson had gone abroad, the deceased executed a will in which the

names of either James Robinson or of John Robinson do not appear, either as executors or legatees, and that will is propounded by the plaintiffs, Mrs. Gamble being named in it as the executrix and residuary legatee. The will propounded by the defendant of the 21st January, 1863, being later in date must be established, unless the plaintiffs prove that the later one ought not to prevail; if they do not, the will of the 9th September, 1862, must fall to the ground. The plaintiffs as executors have a *locus standi* in this Court to require proof in solemn form of the last will, and accordingly the issue was directed to try the validity of that will, and that issue having been found against the plaintiffs, the general rule would seem to follow, viz.: that they should pay the costs of the suit, unless there is something special to exempt them. Executors in an earlier will have not the same protection in this Court as regards costs, as next of kin; still, cases have frequently occurred where executors named in an earlier will, which has been condemned, have not only not been condemned in costs, but have been allowed costs. These were all cases where the transaction was fair, or in the infirmities or frauds of which the executors had no concern, where they had no personal interest, and where it was impossible for them without further inquiry to say, whether the later will should prevail or not, and where the Court could not without a trial come to a satisfactory conclusion as to the document which should regulate the succession to the property. In this case it appears to me, on the few facts that I shall notice, that unless the Court is prepared to give the costs of the suit against the plaintiffs, it cannot in any case give costs to executors against parties, who seek to establish an earlier will. If the will of September, 1862, and its codicil were the fairest transactions that ever existed, the deceased, if of a competent mind, and fairly dealt with, had a perfect right to alter them, and make any disposition she pleased, however inconsistent with the earlier documents. Looking at the wills of June and August, 1862, and of January, 1863, I find one pervading object in them all, viz.: to make the Robinsons her executors and residuary legatees. Then, how did the will of the 6th September, 1862, come to be executed? James Robinson went abroad soon after the execution of the will of August, 1862, and the legacy of £20,000 given by Alderman Drummond to found an institution for the orphan daughters of soldiers, was the subject of a Chancery suit, instituted in order to establish the validity of and to carry into effect that charitable gift. The opinion of eminent counsel had been taken on the validity of that bequest, and his opinion was that it was perfectly valid, and Miss Drummond frequently expressed her anxiety that it should be carried out. If that gift were not valid, the amount of it would sink into the residue, and Miss Drummond would have had power to dispose, not of £8,000 or £9,000, but of £28,000 or £29,000. As gross and scandalous a fraud as I ever knew, was perpetrated in this case, by parties who, the moment that James Robinson's back was turned, misrepresented to the deceased, that the legacy of £20,000 was invalid, that the opinion of counsel that it was valid was only obtained in order to enable

James Robinson to tell her that it was valid, and that his object was by misrepresenting to and misleading her as to the amount of her property, so, to become with his brother the owners of the legacy of £20,000, in addition to or as part of the residue. The direct effect of that misrepresentation was to exclude altogether the Robinsons from the will of September, 1862; they are named in it neither as executors nor residuary legatees. I regret to say that the will of September, 1862, was prepared from written instructions in the handwriting of a clergyman well known, and I believe, greatly respected, but now in his grave; and I am willing to suppose, that if he were now here, some light might be thrown on this transaction, and that we could separate him from the fraud which was practised. But whoever the parties were who were concerned in that transaction, it was founded on a fraudulent misrepresentation; so much so, that even if the last will of January, 1863, were not in existence, and had never been executed, the Robinsons would have a perfect case under the will of August, 1862, and would be in a condition to get probate of it. I am unwilling to go into all the particulars of the management and contrivance, by means whereof the will of September, 1862, was obtained from the deceased; it is not necessary for me to do so, dealing, as I am now, only with the question of costs; but it is indispensable to notice, that in the entire transaction we have fraud—secret correspondence between Mrs. Gamble and the attorney who was employed to draw the will, suggestions as to it being executed at the office or town lodgings of the country attorney, as it would not be safe to have it done in the deceased's house, as Dr. Nolan who was the attending physician was absent on a foreign tour, and who, I collect could have been got, as they thought, with another gentleman, to witness the document; but Dr. Nolan was on a foreign tour; suggestions also that it was unsafe for Mrs. Gamble to leave the house. In fact the will was executed at the town lodgings of the country attorney, who drew it, and every step in the transaction was clandestine. This clandestinity as to the execution of this will is a very remarkable feature. In every step, there was concealment and secrecy, private communications, and letters backwards and forwards. In some, Mrs. Gamble refers to the legacies to the next of kin; they were to have been originally £200—then £300, and Mrs. Gamble suggests to the attorney that she would prefer that they should get £500, and they accordingly get £500. Further, a sum of £500 is given to a Mr. Shaw, whom the deceased knew not, and who is appointed trustee and executor, and to whom the will is, when executed, given. On Mr. James Robinson's return from abroad, he called on Miss Drummond, when Mrs. Gamble and the Rev. Dr. Fleury were present. This was after the execution of the will and codicil. He was received very coolly and he asked what was the meaning of it: to which Mrs. Gamble replied, that Miss Drummond wanted information about the amount of her property. That led to inquiry, and the result was that very soon Miss Drummond's eyes were opened, and she saw the fraud that had been practised upon her, and the Robinsons, and she determined to make a new will. Now, it is important to notice, that Dr.

Fleury had got the possession of both the will and codicil of September, 1862, and also of the will of August, 1862—her former wills the deceased herself kept; but when applied to, Dr. Fleury did not give up those documents. That was an extraordinary way of dealing with a person who was, by the party's own confession, quite competent to make a will; however, she wishes to make a new will, and wishes James Robinson to undertake it. Fortunately, for him, he declined to have anything to do with it, and he now comes into Court with a title under the will of January, 1863, in the preparation of which he took no part or concern whatever, save that when he peremptorily declined to draw it, the deceased asked him to recommend her an attorney, and he then recommended Mr. Mostyn, a gentleman of the highest respectability—the solicitor to the treasury—but he declined also, as it was inconsistent with his office to transact any private business, and he mentioned Mr. Jones, and Mr. Jones was employed. He received his instructions from the deceased, in which Mr. Robinson was in no way concerned, he was not present, and heard nothing of them until after the will was executed. That will was executed with all due formality, and a clearer case than that made in support of it, it is difficult to imagine. The question then is, if it be, or ought to be a question, are the plaintiffs to go off without paying the costs of this unnecessary litigation—a litigation rendered necessary by their own fraud? But it is said, that they are not the real plaintiffs, but that the persons interested in the charities mentioned in Dr. Fleury's will, are the plaintiffs. They had no *locus standi* here, not being corporations, nor trustees, though I do not mean to say, that their interests could not have been properly protected by the Attorney-General or otherwise; but instead of such a plain and simple course, they thought fit to put forward the Gambles, the residuary legatees, to contest the suit, indemnifying them. I do not think that innocent legatees, in a case based on fraud, would have a right to come in here in support of and claiming the benefit of a fraudulent document, without exposing themselves to costs. But in this case I know of no parties before me, but the Gambles, who are participators in the fraudulent transaction which led to the institution of this suit, and therefore, I have no hesitation whatever in saying that this is a case in which the Court is particularly called on to give costs of the suit against the plaintiffs, and I accordingly give them. My decree will be to establish the will of the 21st January, 1863, and to direct that the plaintiffs do pay to Mr. John Robinson the costs of the suit.

As to the costs of the next of kin, the order directing the issue, provided that the several next of kin—naming them—should be at liberty to appear on the trial of the issue by counsel and attorney, but the Court reserved specially the consideration of the costs attending thereon. All these next of kin—save one—are legatees in the fraudulent will to the extent of £500. These legatees all join together in traversing the will of January, 1863, just as the plaintiffs did by their replication, alleging undue execution, unsoundness of mind, undue influence and fraud; but they in no way impeached the will of September, 1862; this

will is disputed by Logan and wife alone; they take nothing under it. That is very remarkable, and yet they all appear by one attorney. In my opinion it was quite unnecessary for them to appear on the trial at all, and to test that opinion, it is only necessary to look at the peculiar nature of the suit and the provisions of the two wills, and the circumstances under which the suit was instituted by the Gambles, or in their name on behalf of the charities. Looking at the provisions of the two wills, the rights created under them whether genuine or not, it would have been impossible that there could have been any compromise or arrangement of this suit to the prejudice of the next of kin. They did not give any special assistance on the trial; they had no special evidence which was unknown to the plaintiffs, and I do not think that I am at liberty to give costs against the fund, unless I am satisfied that it was a case in which the parties really believed that it was essential for the protection of their interests, that they should be separately represented. In this case I am not so satisfied. I therefore do not think that any of these parties are entitled to the costs of appearing on the trial of the issue, and that being so, the question then arises—are they entitled to the costs of the other proceedings and pleadings in this suit. As to the legatees who, being also next of kin, impeached the will of January, 1863, but did not attack that of September, 1862, I think that I cannot look on them in any other light than as legatees, who came in as intervenients to assist the plaintiffs, and therefore are not entitled to costs. With respect to the Logans, they though appearing by the same solicitor, are I think entitled to costs, not including the costs of the trial of the issue. They have in pleading impeached both wills as they had, as next of kin, a right to do, and they stand here solely as next of kin, and are therefore entitled to their costs properly and necessarily incurred.

Decree accordingly.

NOTE.—The judge on this case being called on—which had stood over for judgment—required additional fees to be paid by the plaintiffs and defendant for the day, intimating that a similar rule applied to them as to refreshers to counsel; which they were also entitled to on a case standing for judgment.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[JUDGE HARGREAVE.]

ESTATE OF ARTHUR USSHER AND JOHN USSHER, OWNERS
AND PETITIONERS.—February 16, 1864.

Compensation—Yearly tenancies.

Where a purchaser elects not to be discharged but to apply for compensation, he must be content with the amount of his actual loss, and cannot complain of misrepresentation of value, which is only ground for discharge. In cases of over statements of rents payable under tenancies from year to year, the

Court, taking into account the tenant's power to quit, allows a year and a half rent computed on the over statement.

Serjeant Sullivan (Exham, Q.C. with him) on behalf of William Henry Parker, the purchaser of lot No. 3 on the rental in this matter, moved for an order that out of the funds in Court in this matter, the said William H. Parker might be declared entitled to compensation on the following grounds, viz., that the rent stated to be payable by Michael Cunningham, one of the tenants on the said lot was £149 12s. 4d. when the rent in fact payable was only £109 17s. 6d.; that the rent stated to be payable by Thomas Baldwin, another tenant on said lot, was £58 16s., where, in fact, said rent was only £47 1s. besides poor rate; that the rent of James Callaghan, another tenant on said lot, was incorrectly stated, being set out as £68 9s. 8d. when, in fact, it should have been only £58 14s.; that damage had been done to the mansion-house of Janeville, the roofs, slates, timbers, window sashes, and frames, doors, door frames, bricks, and flagging having been removed therefrom, also from the stable and out-offices; the house, in fact having been left a mere shell; that there was no boundary to distinguish between the portion in said lot held in fee-farm from the lands adjoining, as provided by the Court in the original head lease thereof of the 9th of June, 1793. Parker was declared the purchaser of lot No. 3 on the rental at the sale on the 13th day of November last, for the sum of £2700, which sum was duly lodged; after said sale the purchaser went to see the lands, and upon talking with the tenants thereon he was informed by Michael Cunningham, one of the tenants, that his yearly rent was only £109 17s. 6d. Cunningham was set out in the rental as tenant from year to year, at the yearly rent of £147 19s. 4d., and tithe-rent charge payable by tenant, in addition £1 13s., making together the sum of £149 12s. 4d. Purchaser examined the rent receipts given to Cunningham by the agent of the owners during the last ten years, by which it appeared that Cunningham paid £120 a year, which included £10 2s. 6d. for another holding not included in the premises sold, and that an allowance of £39 14s. 10d. a-year was made to him, thereby making it appear that the yearly rent of the said Cunningham was £159 14s. 10d., including said sum of £10 2s. 6d., when in reality the yearly rent received was only £120. Previously to, and at the time of said purchase, purchaser had not any knowledge or notice that the said rent was any other than that stated in said rental, and he bought on the faith of the rental, and he then believed that the tenant held at the rent stated, and his calculations as to the amount of purchase-money were based upon the statements on the rental. Upon lot No. 3 stood the mansion-house of Janeville, which, with the yard, offices, &c., were valued at £30 a-year, and in the descriptive particulars on the rental it was thus described: "The demesne, house of Janeville, with the out-offices, garden, &c., is now in the owner's hands," and further, "Janeville House is of large dimensions, somewhat out of order, attached to which there is a good yard and offices." Purchaser having heard that the house was not in good repair, and that some of the materials

belonging to it had been removed, as he was informed, by the authority of John Usher, the owner, he instructed his solicitor, Mr. Matthew Parker, who, in his presence, at the time of the sale, stated in Court, that he understood that there was no such thing as the mansion-house of Janeville as stated in the rental; that only the walls of a house remained, whereupon the Court having called upon the solicitor having carriage (Charles Maunsell), he stated that he was never on the lands but took the description from the agent, which he assumed was correct, but that the owner, Mr. Usher, was in Court, and he knew all about it, whereupon Mr. Usher stated, in open Court, before the sale, that the house was there certainly, out of repair, and that only some of the roof had fallen in and had been removed. Having heard this statement purchaser bid and became the purchaser, and after the sale went to see the mansion house, and found that the roofing, slates, timbers, floors, windows, sashes, frames, doors and door frames, bricks, bins in wine cellars, and cut stone flagging of servants' hall had been wholly removed from the mansion house, and nothing left but the bare walls. Upon reading the head lease, under which portion of the premises sold are held, for the purpose of preparing the conveyance, purchaser found that the lessee therein was bound by covenant to keep the bounds of the premises well distinguished from the lands adjoining, and it appeared that there were not any bounds between the said lands and other lands adjoining same; nor did the purchaser know the bounds save by the measurements on the rental, and he was advised, that he might be called upon at any time to build a proper boundary fence. He, therefore, submitted a proper boundary fence should be made at the expense of the estate, and that under all the circumstances, he was entitled out of the purchase money to compensation on account of the foregoing matters.

Flanagan, Q.C., contra.—The owners offered to discharge the purchaser on 13th, January, 1864, by the following notice:—

"SIR—Having been informed that you intend applying to the Court for compensation in respect of alleged abatements of rent heretofore made to some of the tenants on that part of the lands of Torculan purchased by you in this matter, we hereby inform you that such allowances or annual returns in rent as have heretofore been made, either by the late Arthur Usher, or since his decease, by the said John Usher to the tenants on said lands were of a temporary and not a permanent nature, as appears by the receipts given for said rent. We further inform you, that if you are dissatisfied with your said purchase, the said John Usher is ready and willing, and hereby offers to relieve you therefrom, and to have your purchase money refunded, together with interest and your costs, properly and necessarily incurred, and we require you to inform us in writing, within one week from the date hereof, whether or not you purpose making such application for compensation, or require to be discharged from your said purchase on the terms aforesaid, and we require you in the meantime to stay all proceedings towards the preparation or taking out of your conveyance of said lands and this notice will be made use of on any application you may make to the

Court in respect of such allowances.—DUCKETT and GORDON, Solicitors for said John Usher.

"To William Parker, Esq., Solicitor to the purchaser."

No answer was given to this notice, but the purchaser took out his conveyance on the 3rd of February, and on the 6th served notice of motion for compensation. The purchaser knew the state of the property, and everything connected with it except the facts as to the abatement of the rents.

JUDGE HARGREAVE.—When a purchaser elects not to be discharged, but to apply for compensation, he must be content with the amount of his actual loss, and cannot complain of misrepresentation of value which is only ground for discharge. In cases of tenancies from year to year, the Court, taking into account the tenants' power to quit, allows a year and a-half rent, computed on the over-statement, that in the present case amounts to about £90. The next ground of compensation is the state of Janeville House. It was stated at the time of sale to be in ruin, but having regard to its actual condition, it ought not to have been left on the rental valued at £30 a-year. I think Mr. Parker is entitled to some compensation for the actual waste and destruction committed on the house by Mr. Usher's direction, and under the circumstances, and having regard to what the purchaser knew on the subject when he bought, I think £25 ample compensation in respect of this ground. The question of boundary cannot be made a subject of compensation, for it is incapable of being estimated, but the vendors must give all the aid and information in their power to enable the purchaser to find the boundary.

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF ALLAN GARDNER BROWN AND JOHN BLACKIE, OWNERS; EX PARTE ARCHIBALD BORTHWICK; CONTINUED IN THE NAME OF JAMES HOWDEN, AS PETITIONER.

Discharge of purchaser—Mistake—Excessive price.

One moiety of a fee-farm rent was put up for sale, but the purchaser misunderstood the description in the rental, and whilst bidding considered he was bidding for the whole rent and not a half only. The Court having regard to the fact that the sum bid was manifestly excessive, discharged the purchaser upon the terms of his lodging in Court a sum sufficient to meet the expenses of another sale, and undertaking to lodge any further sum the Court might require and paying the owners costs of the motion.

IV. Andrews, counsel on behalf of Nicholas Oakman and Mary Jane Oakman, spinster, for whom the said Nicholas Oakman was declared purchaser of lot No. 2 in the rental of the premises which were set up for sale before the Hon. Judge Hargreave on Friday, the 29th January, 1864, on the 5th day of February applied for an order that the sale made of lot 2 to said

Nicholas Oakman in trust for said Mary Jane Oakman on said 29th day of January inst., at the sum of £800 might be rescinded, and that the said Nicholas Oakman and Mary Jane Oakman might be discharged from said purchase. Oakman it appeared attended at the sale of the premises described in the rental as follows:—One moiety or perpetual yearly rent of £59 10s. 6d. created by fee-farm grant, dated 6th February, 1864, from Alan Gardner Brown and Charles Grainger to James Whisker. After having made several previous biddings for lot No. 2, he bid the sum of £800 therefor and was declared the purchaser. He misunderstood the description; and up to and at the time he was declared purchaser thereof he believed he was bidding for the rent of £59 10s. 6d., and that on becoming the purchaser he would be entitled to that rent and not to the rent of £29 15s. 3d. only.

W. Boyd, contra, for the owner. — The sum given is undoubtedly somewhat more than the value, but the description in the rental was perfectly clear and free from ambiguity, the half of the rent for sale, viz., £29 15s. 3d., being figured in the rent column. The Court cannot relieve a purchaser from the consequences of his own stupidity.

Rule.—*Let the purchaser be discharged upon the terms of his lodging in court the sum of £20 to meet the expenses of a re-sale, and paying the costs of this motion.*

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF MARY ANNE KELLY, OWNER; CHARLES BERGIN, PETITIONER.

Practice.—Solicitor's lien.

Lien for costs claimed by solicitor, upon deeds lodged in court, it not being intended to proceed with the petition for sale of lands.—Notice of motion served by the solicitor for an order directing the keeper of the deeds to hand them back. Held:—that the proper course would have been to have served notice of motion for an order declaring the solicitor entitled to a lien, and for liberty to file a claim setting forth the particulars to be vouched before the examiner; and in the event of the sum found to be due not being paid, for an order to continue and take the carriage of the proceedings.

Purcell appeared in support of the following notice of motion:—"Take notice that counsel on behalf of Thomas Hamilton, solicitor, will, on Wednesday next, or the first opportunity, apply to the Honorable Judge Hargreave that the keeper of the deeds may be directed to hand back to said Thomas Hamilton the deeds and maps lodged by him (subject to his lien thereon for costs) pursuant to notice for that purpose served upon him, or for such other order as the Court shall, under the circumstances, be pleased to make, and for the costs of such application, grounded on the affidavit of said Thomas Hamilton, the documents therein mentioned, and referred to, the several notices and proceedings in this matter, the nature of the case, and reasons to be

offered. Dated this 13th day of February, 1864. Jeremiah Perry, solicitor for said Thomas Hamilton, 11 Bachelor's-walk.—To Lawrence Mooney, Esq., solicitor, having carriage of proceedings, 4 Bachelor's-walk; and Thomas Fell White, Esq., solicitor for owners, 13 Upper Ormond-quay." The following was the notice referred to:—"Inasmuch as I understand that it is not intended to proceed to a sale in this matter, and inasmuch as my client, Mr. Thomas Hamilton, solicitor, has, pursuant to notice from the solicitor having the carriage of the proceedings, lodged in court certain title deeds and maps relating to the said owner's estate (named in the order for sale in this matter) subject to his lien thereon for costs, I hereby require you to inform me at or before the hour of three o'clock to-morrow afternoon, whether you admit or dispute his said lien on said deeds, and whether it is your intention, in case you admit his said lien, to sign a requisition for taxation of his said costs, and to give him an undertaking for payment of such sum as shall be found due to him on said taxation, or if you shall dispute his said lien I require you within the time aforesaid to inform me whether you will sign a consent that same shall be determined in such manner as the judge in this matter may direct. And in case you refuse or neglect to comply with the requirements of this notice I shall make such application, of which you shall have notice, to said court in relation thereto as I may be advised, and shall make use of this notice thereon. Dated this 9th day of February, 1864. Jeremiah Perry, solicitor for said Thomas Hamilton, No. 11 Bachelor's-walk, Dublin. To Laurence Mooney, Esq., solicitor, having carriage of the proceedings, 4 Bachelor's-walk, Dublin; and Thomas Fell White, Esq., solicitor for owner, 11 Upper Ormond quay, Dublin." It appeared that in or about the year 1842 Hamilton was employed professionally as an attorney and solicitor by the late William Kelly, and by his son, the late Thomas Kelly, both late of Maddenstown, in the county of Kildare, Esqrs. (the father and brother of the owner in this matter), in the transacting of various matters of legal business for them respectively. That whilst he was so engaged he received from said William Kelly and Thomas Kelly the deeds which he had lodged in court (pursuant to notice for that purpose served), and that same had remained in his custody after the decease of said William Kelly whilst he was engaged in the business of said Thomas Kelly, and up to the time of his lodging same as aforesaid in court. That whilst he was employed on behalf of said William Kelly as aforesaid he became entitled to a considerable sum of money for costs. Hamilton now claimed a lien for the entire amount of costs due, having lately learned that the petitioner's debt had been discharged prior to the notice calling on him to lodge the deeds in court, and that it was not intended to proceed with the petition for sale.

Palles, contra, disputed the retainer.

[By leave of the court counsel on both sides consented to treat the notice of motion for an order to get back the deeds as a motion to establish the lien.] The case being argued on the affidavits filed, the following order was made:—

Declare Hamilton to have established a lien for

costs incurred upon the retainer of Thomas Kelly, and let him file a claim setting forth particulars within three weeks, and vouch it before the examiner. If the amount not paid by the owner, Hamilton to be at liberty to serve notice of application for leave to take the carriage of the proceedings. Question of costs reserved.

Court of Admiralty.

[Reported by William Chamney, Esq. Barrister-at-law.]

"THE MARYANNE"

Derelict salvage—Special agreement as to seamen's services—Ditto as to masters' services—The Merchant Shipping Act, 17 & 18 Vic., cap. 104, section 182.

Special agreements with the owners by the masters of a tug-steamers to a percentage on the earnings of the tug, and by seamen to increased wages, for foregoing all claims for salvage will not be upheld by the Court of Admiralty, as being repugnant to general principle and prejudicial to the public interest, and as the effect of such agreements would be to take away from the actual salvors the motives to all enterprise and energy.

In this case, in which the derelict barque and cargo which sold for £27,000 was saved from total destruction, but saved without risk to life or limb, the court considering it a case of meritorious salvage, although not of first class merit, awarded to the salvors a sum of £1,080, or "two-fifths" of the value.

The court in distributing a sum awarded for salvage, will award very liberal remuneration to a steam vessel specially built for and devoted to salvage services, inasmuch as she is not employed in general trade for the conveyance of goods and passengers, and depends entirely on her chances for public encouragement and support.

THIS was a cause of derelict salvage, instituted by the New Steam Tug Company, limited, on behalf of themselves as owners of the Steam Tug Resolute, 374 tons burthen, and 200 horse power, and on behalf of the master and crew against the barque, Maryanne of Falmouth, 796 tons burthen, and cargo, for salvage services rendered by their tug, who found her derelict in the Atlantic Ocean, and brought her and her cargo safely into the harbour of Cork. The property had become vested by operation of law in the Alliance Marine Insurance Company, as underwriters on ship and freight, and in the Glasgow Underwriters' and Underwriters' Association of Dublin as the underwriters on cargo. The case had been closed at both sides, and stood for judgment. But an application was by permission specially made in support of the claims of the master and crew of the steam tug to be considered entitled to a salvage reward, notwithstanding the evidence in the cause, that the crew by a special agreement as to the amount of

their wages, and the master, by another special agreement on his part, to a certain per centage on the earnings of the steam tug, had bound themselves to forego all salvage claims.

Doctors Townsend, Chatterton, Q.C., and Mr. William O'Brien, for the promoventes.

Doctor Gibbon, for the derelict; and *Doctor Elrington*, for the master and crew.

JUDGE KELLY.—The Court of Admiralty in cases of salvage, has uniformly refused to admit such agreements as are here relied on as barring the rights of the master or seamen to salvage, and held that it would be repugnant to general principle, and prejudicial to the public interest, if such a proposition could be legally maintained in cases of that description, as the effect of it would be to take away from actual salvors the motives to all enterprise and energy. The case of masters of vessels is still under the protection of these equitable decisions; that of the seamen, however has since obtained an additional guarantee, as by the Merchant Shipping Act, sec. 182, it was expressly enacted that every stipulation on the part of a seaman to abandon any right he might have in the nature of salvage shall be wholly inoperative. Their claim in the present case must be therefore admitted. This is, confessedly, a case of salvage rendered to the barque *Maryanne* and her cargo, found abandoned at sea, and brought to port in safety by the salvors. The *Resolute*, a steam tug, and her crew, who performed the service, are the property and in the employment of a company in Liverpool, who, seeking a new field of enterprise, have embarked capital to a large amount in building and equipping this and other vessels of a similar description, for the purpose of towing large vessels many miles out to or in from sea, and with the still more laudable purpose of going out to search for wrecks and vessels in order to bring them into port. The steam tug which in the present case has performed this latter office is stated in the evidence to be 374 tons burthen, and as fitted up with disconnecting engines of 200 horse-power, but really effective to 500 horse-power, with two distinct engines to work her windlass, with the whole of her deck aft left altogether clear for the operations of her towage, and furnished with Manilla hawsers of superior strength and manufacture, and cost a sum of £13,000. Seeking neither for freight or passengers, and devoted exclusively to the useful purposes for which she had been so skilfully and powerfully constructed, this tug, having coaled and victualled at Cork, sailed from that port on the 7th of January last into the Atlantic in search of derelicts, her orders from Liverpool having been to that effect. Beating about without success until the 9th, she spoke a schooner, who informed her that a vessel without sails had been seen by her to the south-west. The tug, altering her course accordingly, at length, after the lapse of two days more, sighted the vessel on the morning of the 11th, about twenty miles off, one point on her port bow. On coming up the master of the tug boarded her, and found her to be the *Maryanne*, a fine barque, 796 tons, timber laden, and totally abandoned. She was sunk to the water's edge, her main deck, with most of her upper beams, broken, her bulwarks amidships, and

stanchions washed away, her rudder gone, her mast, rigging, and spars all standing, but the sails blown away from the yards, her chain cables on board, but foul and in confusion, and her papers, instruments and valuables taken away. She was full of water, the sea rolling over her deck, and her cargo of timber, which was full to the deck, was kept down alone by a few beams which were still unbroken, and which barely held the ship together. There was neither binnacle, wheel, or cabin furniture. The master ordering the engines of the steam tug to be disconnected and the tug to be brought to the starboard bow of the derelict, a hawser was hove in by means of a hauling line, and made fast round the foremast, there being apprehension that if it had been made fast round the windlass the strain would have pulled the bows out of her. The derelict being thus secured, the master returned to the tug and the towage began, it being then about midday of the 11th of January, and the distance to Cork harbour, which he was anxious to make, about 325 miles. The hawser parted near midnight, but being made fast next morning by a shackle to a chain cable of the derelict, the service was carried on without interruption, day and night, until the evening of the 15th, when the harbour was reached, and on the next day she was brought up and anchored in safety in the upper part of the harbour. It was then ascertained that the *Maryanne* had sailed from Quebec, on the 13th November previous with a cargo of timber, bound for Grangemouth; but having met with storms and been disabled by the disasters which ensued, her master and crew, on the 11th of December, took to their boats, and abandoning her to her fate, arrived themselves safely in Cork, from which they afterwards departed on other ventures—and she meanwhile floating about (her cargo being a buoyant one), was ultimately found by the salvors in this case, on the 11th of January, a complete wreck, just two months after her leaving her port of departure. It appeared in the evidence in another branch of this case that the several insurances which had been effected on ship, cargo, and vessel, had been paid by the several underwriters concerned, as in a case of total abandonment, and that thus acquiring their interest, these parties now are defending this suit—a suit instituted on the part of the salvors in order to be awarded remuneration for their services. It is to be observed that a necessity having arisen to sell the ship and cargo, in order to ascertain their actual value, that has been done, and the net amount of sales now lodged in Court abiding the decision in the case, is a sum of £2,700. It is conceded that the property which realised this sum was derelict, and was paid for by the underwriters as for a total loss; and it is also conceded that but for the salvors it would have been a total loss for ever. The general rule of the Court of awarding to salvors in such cases a proportion varying from one-third to one-half of the value of the property is appealed to, the right of the Court, however, to bend that rule so as to meet the various degrees of merit in each case, being admitted by both sides. Under such circumstances, it is right to observe that this was a perfectly voluntary service; that it was one also predetermined upon by a steam tug of most superior build and equipment,

constructed for such occasions altogether, with a crew engaged and paid and victualled for the express purpose, who cruised during a course of ten days in the western Atlantic, in a north latitude of 49 deg., 22 min., in the month of January, at a distance from land between three and four hundred miles, and succeeded after a continuous labour by towage for four days and nights unceasingly in bringing into a harbour of safety a vessel of double her own burthen, and with a water-soaked cargo, although of great value. It is right also to observe that this was done, notwithstanding the impediment arising to the towing vessel by the derelict being without a rudder, and thereby she escaped the heavy gale which commenced to blow the very evening she entered the port, and which, had she encountered six hours earlier out at sea, must have caused her destruction, kept together as she was by a few beams only, and with nearly 300 tons of weighty ballast in her hold. Again, on the other hand, it must be borne in mind that, whilst the service was being performed, the weather was moderate, the sea flowing in a long swell, no risk to life or limb, the steam tug's men on board their own vessel every night as usual, the days of actual labour four only, and the distance actually travelled less than four hundred miles. With these views and counterviews the Court is of opinion that the salvage, although decidedly not of the first-class of merit, is nevertheless meritorious, and considers it just to all parties to award two-fifths of the value—being the sum of £1,080—as remuneration to the salvors. The question of the distribution of this sum is now to be determined, and here the peculiar circumstances of this case become as prominent as they are novel. In the early history of salvage the exertions of the salvor, as they constituted almost the entire service, so they monopolised the entire reward. Presently, as skill in navigating and using boats, as well as damage incurred in the use of them, by degrees put forward their claims for a share, courts of salvage began to consider them as in some, but in a very minute degree, entitled. Then, and lately too, came the stage, when a learned judge said, "We all know that formerly claims of owners of vessels to participate in salvage did not receive very favourable attention; but since then things are much changed—steamers are able to render important salvage services, in which the ship herself is the chief agent, and I, therefore, have departed from the former practice, and given adequate rewards to the owners of such vessels." This Court may, using these expressions, say with reference to the present case, "things have much changed since then;" for this is not the case of a steam vessel employed on owner's business with freight or passengers, risking the market for that freight, or the insurance on that voyage, should the master at his own peril deviate to help a vessel in distress, and that, too, but half provided for the purpose; but the case of a steam tug, built and equipped in all points for such a purpose, and for nothing else—that her market, that her insurance, that her voyage, that the end and aim of her whole adventure, and of her owner's enterprise, is to render salvage services. Under such circumstances, the steam tug becomes not the chief actor only, but, as to utility, almost the exclusive one. The

crew, for the first time, rank only in the subordinate place. It becomes then the duty of this Court, as in the case referred to, to depart from the former practice, and to take care that the rewards given to the owners of such a vessel be adequate. The Court, therefore, out of the amount awarded, apportioned to this steam tug company the sum of £800; the remainder it distributes as follows amongst the master, engineer, and crew, considering it right, however, to premise, that although their conduct was negatively correct, they during the progress of their service by no means exhibited that skill and adroitness which was incumbent on them, and also called for under the circumstances:—To the master, £80; chief engineer, £70; chief mate, £30; second engineer, £30; Morris, a seaman, who showed most zeal, £12; two seamen, £8 each, £16; five firemen, £8 each, £40; boy £2; total, £280. The salvors are to have their costs.

Proctor for the promovents—Mr. Hamerton.
Proctor for the impugnant—Mr. M'Loughlin.

[ERRATUM.—In the head note of this case, for "27,000," as the price of the ship and cargo, read "£2,700."]

Exchequer Chamber.

[Reported by William Woodcock, Esq., Barrister-at-law.]

SPLENTS v. LEFEVRE AND OTHERS.—Nov. 13, 14, 18.

Evidence—Agency—Representations—Bible.

A Bible containing entries of births, &c., which were not shown to have come to the knowledge of any deceased members of the family, held not admissible in evidence.

An agent of an insurance company having authority to solicit insurances and receive proposals, held to be a general agent whose representations would bind the company.

Letters written by such an agent to the company, and from the company to him, held inadmissible against the representative of a party who had effected an insurance with the company.

THIS was an appeal brought by the plaintiff against the order of the Court of Exchequer, bearing date the 20th of June, 1863, allowing the cases shown by the defendants against the conditional order for a new trial obtained by the plaintiff, and bearing date the 6th November, 1862, whereby it was ordered that the verdict had for the defendant at the Summer Assizes for the county of Cork in 1862, should be set aside, and a new trial had on the ground of misdirection of the learned judge at the trial, and for the reception of illegal evidence at the said trial. The summons and plaint stated that by a policy of insurance, bearing date the 5th March, 1863, and made by the defendants, the trustees of the Promoter Life Assurance and Annuity Company, and sealed with the seal of the defendants respectively, and by them delivered as their deed, after reciting that Robert Splents, of

Tralee, in the county of Kerry, hotel keeper, had proposed to effect an insurance with the said Promoter Life Assurance and Annuity Company in the sum of £100 on the life of Rose Helen Meredith, for the whole continuance thereof, and had caused to be delivered into the office of said company a declaration or statement, bearing date the 5th day of March, 1859, signed by the said Robert Splents, setting forth the age and state of health of the said Rose Helen Meredith, as in said policy mentioned; and that the said Robert Splents was interested in the life of said Rose Helen Meredith to the amount of £100, and that it had been agreed that such declaration should be the basis of the contract between the said Robert Splents and said company; and that the said Robert Splents had paid to the said company the sum of £5 8s. 4d. as the premium in consideration of the insurance of £100 on the life of said Rose Helen Meredith for the space of one year, commencing on the said 5th day of March, 1859, and terminating on the 4th day of March, 1860, both inclusive, it was declared and agreed by the said policy that if the said Rose Helen Meredith should die before the said 5th day of March, 1860, or if the said Robert Splents, his executors, administrators, or assigns should, in the event of the said Rose Helen Meredith living beyond the said 5th day of March, 1860, pay to the said company during the remainder of the life of said Rose Helen Meredith the yearly premium of £5 8s. 4d. on or before the 5th day of March, 1860, and in every subsequent year, the funds and property of the company should be subject and liable, according to the provisions of the said company's deed of settlement, to pay unto the said Robert Splents, his executors, administrators, or assigns, within three calendar months after due proof should have been received at the office of said company of the death of said Rose Helen Meredith, the sum of £100; provided always, that in case the said Rose Helen Meredith should die upon the high seas, unless in passing to and from the Continent of Europe in decked or steam vessels, or to and from any part of the United Kingdom, without previous license from the board of directors for that purpose, or if anything averred in the declaration or attestation thereinbefore mentioned to have been made should be untrue, or if the referees were found to have knowingly given false testimonials, the said policy should be null and void; and all moneys which should have been paid on account of said insurance should be forfeited to the said company. Provided further, that the persons executing said policy, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall not in any of the cases thereinbefore mentioned be liable to the said Robert Splents, his executors, administrators, or assigns, to a greater extent than the funds or property of the company which, at the time of recovering upon said policy, should be in his or their hands or power, either alone or jointly with any other person or persons, and not for the time being required to pay or satisfy the trust expenses or any prior claims or demands upon the company; nor should the shareholders at large of the company be answerable beyond so much of their respective shares, not subject to prior claims or demands in the capital of the company as might for the

time being remain due from them respectively; nor should the said Robert Splents, his executors, administrators, or assigns have any claim whatever upon other the holders of policies in the said company; and the said Robert Splents afterwards duly made his last will and testament, and thereby appointed the plaintiff to be his executrix and afterwards died; and the said will was duly proved by the plaintiff in the principal registry of her Majesty's Court of Probate in Ireland, and the said plaintiff is now the executrix of the said Robert Splents; and the said plaintiff said that at the time of the making of said policy the said Robert Splents was interested in the life of the said Rose Helen Meredith to the said amount of £100; and that after the death of the said Robert Splents, and while the said policy remained in full force, the said Rose Helen Meredith died, and all conditions were fulfilled, and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action, and nothing happened or was done to prevent her from maintaining the same; yet the plaintiff had not been paid the said sum of £100 out of the capital, stock, and funds of the said company, and the same was wholly due and unpaid. And the plaintiff prayed judgment against the said defendants to recover the said sum of £100 and her costs of suit. To this the defendants pleaded that the declaration or statement in the policy of insurance and writ of summons and plaint respectively mentioned, and which was by the said policy made the basis of the contract between the said Robert Splents in said plaint mentioned and the said company, was a certain proposal in the words and figures following, that is to say,—“Life of another. Promoter Life Assurance and Annuity Company. I, Robert Splents, of Tralee, in the county of Kerry, hotel-keeper, being desirous of effecting an insurance with the trustees for the Promoter Life Assurance and Annuity Company in the sum of £100, without bonus, on the life of Mrs. Rose Helen Meredith, born at Tewkesbury, England, and now residing at Dicksgrrove, Castleisland, in the county of Kerry, for the whole term of life, do hereby undertake that her age does not exceed fifty-six years; that she has had the small-pox or cow-pox; that her habits are sober and temperate; that she has never had the gout nor asthma, nor any fit or fits, nor suffered a spitting of blood; that she is not afflicted with any complaint, affection, or disorder which tends to shorten life; and that I have an interest in the life of the said Rose Helen Meredith to the full amount of £100 sterling. And I do hereby agree that this undertaking shall be the basis of the contract between me and the said company, and that if any untrue averment be contained herein, or if the referees have knowingly given false testimonials, all moneys which shall have been paid to the said company on account of the said assurance shall be forfeited, and that the policy shall be null and void; and I do also agree that I will abide by the provisions contained in the deed for the settlement of the said company, bearing date the 5th day of July, 1826, which relate to the privilege of voting for auditors, and to the liabilities of the shareholders and officers of the institution: and likewise that I will acquit from all responsibility the other holders of policies in the said company. Dated

this 5th day of March, 1859. Robert Splents, Tralee. Witness, Thomas Kenna, Tralee." And the defendants averred that all conditions precedent had not been performed and fulfilled; nor had everything happened or been done necessary to entitle the plaintiff to receive the said sum of £100, because the defendants said that the statements contained in the said declaration were not true in the particular hereinafter mentioned, that is to say, that the age of the said Rose Helen Meredith at the time of the signing of the said declaration exceeded fifty-six years. To this the plaintiff replied, first, that the age of the said Rose Helen Meredith in the said defence mentioned did not, at the time of the signing of the declaration therein mentioned, exceed fifty-six years. Secondly, that the defendants ought not to be admitted or received to plead the said defence, or to make the allegation therein contained, because the plaintiff said that before and at the time of the making and signing of the declaration in the said defence mentioned, and of the execution of the said policy, the said testator, Robert Splents, had been and was in communication with the defendants in reference thereto respectively; and that during and all through such communications the said defendants meaning and intending that the said Robert Splents should, in the matter of the said declaration and policy, and of his contract with them, act upon the representation and belief respectively hereinafter mentioned, did, by their conduct and statements, represent to the said Robert Splents and cause him to believe, and the said Robert Splents accordingly did believe and acted in the said premises on the belief that the age of the said Rose Helen Meredith did not, at the time of the signing of the said declaration, exceed fifty-six years. Thirdly, a replication in the same terms as the last, but pleaded upon equitable grounds. Fourthly, that the defendants, after the making of the said declaration and policy, and during the life of the said Rose Helen Meredith, became acquainted with and knew the fact that the age of the said Rose Helen Meredith exceeded fifty-six years at the said time of signing and making the said declaration; but, nevertheless, they did not on becoming acquainted with the said fact, or at any time afterwards during the life of the said Rose Helen Meredith, disaffirm or avoid the said policy, but affirmed and elected to hold it to the same, and in the lifetime of the said Rose Helen Meredith, and while so aware that her age exceeded fifty-six years, that is to say, on the 7th day of March, 1861, received the premium which then accrued due on the said policy. Upon these replications issue was taken, and the cause came on to be tried at the Summer Assizes, 1862, for the county of Cork, before Keogh, J., and a special jury. After proof of the policy the first witness called by the plaintiff was Thomas Kenna, who proved that he was accountant of the bank of Tralee, and that he was acting as agent for the defendants in 1858 and 1859; he was acting for them for three years; knew Mrs. Meredith and Mr. Splents. In February, 1859, had an interview with Mr. Splents; went to his house in Tralee; asked him to effect an insurance on the life of Mrs. Meredith. He said he would. At a subsequent interview told him that witness had all the information necessary, and that he need not take any

further trouble. It was true that he had information. Mr. Splents never gave witness any information as to Mrs. Meredith. The proposal was filled up by witness, with the exception of Mr. Splent's name; it was so filled up by witness without any information from Splents; believed at the time the facts to be truly stated; Splents signed the proposal in his house; witness brought it to him ready for signature. The proposal dated 5th March, 1859; the policy bearing the same date; receipts for premiums dated the 5th March, 1860, and the 5th March, 1861, were put in, subject to objection by the defendants' counsel. On cross-examination this witness stated that he applied to the company to admit the age, but they refused to do. The proposal contained a declaration that the age was fifty-six years; he filling up the proposal was acting as agent for Splents; was anxious to get the age admitted for Splents; got a letter from the company's secretary on the 17th April, 1861; declined to inform the parties concerned that the company had repudiated the policy. Several letters which had passed between witness and the company, two especially of the 24th February, 1859, and the 12th March, 1859, were produced, objected to by plaintiff's counsel and received, subject to objection, at the defendants' peril. The plaintiff proved payment of the premium by her on the 5th March, 1861, after the death of her father, Mr. Splents. On behalf of the defendants the first witness called was Michael Seward, who proved that he was the acting secretary of the company; he recollected the papers in this case being forwarded to London. The course of dealing with the agent at Tralee was,—the agent was to procure insurances; to have forms filled up with full particulars and to send up the proposals with the evidence and certificate as to health; they are submitted to the board; and it is by their act, and theirs alone, that any contract is entered on. Kenna had no authority from the company to make any representation as to the age of Mrs. Meredith; had not any authority to dispense with any conditions of the company; had no authority to accept any contract; the proposal was forwarded and accepted, and the communications made through witness alone; Kenna had not any authority to waive a forfeiture of the policy of insurance; recollected when the insurance was forwarded in March, 1861; had no knowledge then that Mrs. Meredith's age exceeded fifty-six; received Mr. Huggard's letters and enclosures sent to the company; first learned the true age on the 6th July, 1861; so far as witness knew, the company had not any knowledge of it; the premiums were placed to the credit of suspense account on the 16th April, 1861, and letter of 9th July written; compared copies of baptismal certificates (of Mrs. Meredith) at Tewkesbury, Gloucester, on the register; they were signed in his presence, and also the certificate of marriage; the person who signed was vicar of Tewkesbury, and Mr. Rain was vicar of Chasely. The entire of this examination was objected to by plaintiff's counsel, and received subject to objection. On cross-examination the witness stated that eight directors of the company formed the board; there was a formality dispensed with as to health; proof of age was never dispensed with; the company in this case got the papers from the North British Insurance Com-

pany at the time when the proposal came up; witness then handed in the letter of Mr. Huggard afterwards referred to with its enclosures, and also certificates of baptism and of marriage of Mrs. Meredith, which were objected to by plaintiff's counsel and received subject to objection. The next witness was a Mr. Richard Helps, a solicitor, residing at Gloucester, who deposed that he knew Mrs. Rose Helen Meredith, and prepared her marriage settlement in 1837; knew the Rev. H. Herbert, who was seventy years of age, and infirm. Mr. Herbert was married to Magdalene Buckle, a sister of Mrs. Meredith. Witness then, subject to objection, produced a Bible belonging to Mr. Herbert, who gave it to witness. Witness proved handwriting of Mr. Herbert in the Bible, which, with an entry in it, was offered in evidence; objected to, and received subject to objection. The entry (which was in a handwriting not proved) was an entry of the birth of Rose Helen Buckle (Mrs. Meredith) on the 31st January, 1799. The reading of this entry was objected to by plaintiff's counsel, but it was received subject to the objection. Thereupon the defendants closed their case. The letter of the 24th February, 1859, from Kenna to Saward, above referred to, which had been objected to by the plaintiff's counsel, was as follows:—"Tralee, 24th February, 1859. *Re Meredith.* Dear Sir,—You will receive herewith proposal on the life of Mrs. Rose Helen Meredith made by Mr. Sweeny, one of the most respectable builders, for £200. Mrs. Meredith has been examined and reported on by Dr. Fitzmaurice, referee to the North British Insurance Company, and one of the dispensary physicians for this district, in most respectable practice, and accepted by that company within the last month at ordinary rate of premium. I beg you will be good enough to borrow their medical report for the present proposal, as, in consequence of Mrs. Meredith being so seldom in Tralee, a great difficulty exists in her being examined by Dr. Crump; your referee, unless by a special visit to her house, a distance of over twelve miles from here. I may mention that the life was accepted some time previously by the Royal of Liverpool at ordinary rate, the papers for which you can obtain as usual. I have also to observe, in reference to these insurances, that Mrs. Meredith's late husband was possessed of a fine estate at the time of his death, about two years since, and to which Mrs. Meredith administered; he owed a good deal of money by way of mortgage and otherwise; and as a cover, in some measure, till the debts are paid off, several of the creditors have effected insurances; first, in the Royal of Liverpool, and again in the North British Office; for the latter office the latest medical examination took place. I hold another proposal for £100, made by a creditor of Mrs. Meredith's late husband, which I shall forward should the present be accepted. I may add that Mrs. Meredith's eldest son will be of age in a couple of years, which will thus relieve her in a great measure of her present responsibility. You can rely upon the statements made by both referees from their intimate knowledge of Mrs. Meredith and their respectability. Begging the favour of your usual care to this proposal—Yours faithfully, THOMAS KENNA." The letter of the 5th March from Mr. Kenna to Mr. Saward, was as follows:—"Tralee, 5th March, 1859. Dear

Sir,—Referring to your letter of 2nd instant, I now beg to enclose proposal £100, non-bonus rate, on the life of Mrs. Meredith, and will thank you to forward policies at your earliest convenience, and oblige. I think 'tis possible I could get one other proposal on the same life, which, if offered, I shall send for consideration. Proof age having been given to the Royal of Liverpool, be good enough to admit it on the same proof which you will obtain on application." The letter of the 12th March, 1859, was from Mr. Saward to Mr. Kenna, and was as follows:—"Dear Sir,—I have applied to the London and Liverpool for the proof of Mrs. Meredith's age, and find it is in Liverpool, where we cannot get at it. The parties, therefore, must supply it in some other way. I shall not send off the policies, which are nearly ready, until I hear from you again.—M. SAWARD, Secretary." The letter of the 17th April, 1861, from Mr. Saward to Mr. Kenna, apprised him that the board declined to accept unconditionally the premium which had been then forwarded on Mrs. Meredith's life, and that it had ordered the money for the present to be carried to a suspense account in the books of the company. There was then a letter of the 22nd May, 1861, from the Dublin solicitor of the company to Mr. Kenna, stating that the company had decided on repudiating amongst others the policy on Mrs. Meredith. To the same effect was a letter of the 23rd May, 1861, from Mr. Saward to Mr. Kenna, returning the money which had been forwarded for the last premium. The letter from Mr. Huggard to Mr. Saward of the 15th September, 1861, forwarded a draft for £6 18s. 6d., amount of premium, and formal proofs of the death of Mrs. Meredith. At the close of the case, counsel on behalf of the plaintiff asked the judge to tell the jury that there being no repudiation communicated until after the death of Mrs. Meredith, and the money for premiums being held from the 28th March until the 9th July, it was evidence of election by the company to abide by the policy; and further, to tell the jury that it was not competent for the jury to carry the premiums to a suspense account, and that their doing so was evidence of an appropriation by the company to the purpose for which it was paid; and that if they did so they were bound by their election; and that if the jury believed that Splents, in his lifetime, was induced to sign the proposal, and thereby alter his position by the representation of Kenna, the company were estopped from relying on the statement in the proposal, that if anything in it is untrue, the policy is void. The judge charged the jury, and having called their attention to the issues, left to them the agency of Kenna for the company; and he told them that if he was agent, the company were bound by his acts; but he also called their attention to the statement of Kenna that he was acting for Splents in filling up the proposal; and he left the fourth issue to them upon the evidence as to knowledge before the last payment was made. The jury found for the defendants. As stated above, the plaintiff obtained a conditional order for a new trial, against which the defendants shewed cause, and the Court being equally divided, the ruling was that the cause shown should be allowed without costs. Against this ruling the plaintiff now appealed.

Barry, Q.C., Heron, Q.C., and Hickson, for the

plaintiff.—The letters were all inadmissible; they were all communications between Kenna and the company, not communicated to Splents, and therefore not evidence against him, and especially with reference to the letters as to forfeiting the policy and putting the premiums to a suspense account, they were not admissible. Would the assertion of a landlord to his agent three months after he had received rent, be evidence of his intention in receiving it? Then as to the Bible, we say that also was inadmissible. The entry in it has not been traced to the knowledge of any deceased member of Mrs. Meredith's family; Mr. Herbert, who made the entry, is living. Besides, this is not a matter of pedigree.—Taylor on Evidence, sec. 585.

Chatterton, Q.C., and Jellett, for the defendants, argued that the letters and the Bible had both been properly received in evidence. Some of the letters were admissible on foot of the replication averring communications with the company. Kenna had been found to be agent for Splents; therefore, all his communications were the communications of Splents. *Acey v. Fernie* (7 M. & W., 151), shewed that Kenna's authority from the company was limited, and that he had no right to make any representations. Anything that Kenna knew was evidence against Splents. *De Bouchout v. Goldsmid* (5 Ves. 211) and *Spaight v. Beyerlieb* (8 Ir. Jur., N. S., 146,) shew the necessity of seeing to the authority of a special agent. As to the Bible—Taylor on Evidence, s. 834; *Slaney v. Wade* (1 M. & Cr., 338). But even supposing this evidence to have been wrongly admitted, if it is put aside, all the evidence remaining is in favour of the defendants, and will support the verdict, which therefore the Court, on a motion of this kind, will not disturb. There is a distinction in this respect between a new trial motion and a bill of exceptions. *Househill Coal and Iron Company v. Nelson* (9 Cl. & Fin., 804); *Hughes v. Hughes* (15 M. & W., 701). On the question of waiver by the company, they cited *Doe v. Calvin* (2 Campb. 387); *Doe v. Steele* (3 Campb. 117); *Beauman v. Kinsella* (8 Ir. C. L. Rep. 291); *Horford v. Wilson* (1 Taunt. 12), and sections 40 and 41 of the Common Law Procedure Act, 1856, were also referred to in reference to proceedings on appeal on new trial motions.

Nov. 18.—MONAHAN, C. J., delivered the judgment of the Court.—Having stated the pleadings, evidence, and proceedings at the trial, his Lordship said that there had been no misdirection on the part of the learned judge to the jury, either on the question of agency, or on the question of election by the company, considering the ambiguous nature of the replication which had been put in. The question then arose whether illegal evidence had been admitted, and if it had, whether there ought to be a new trial. With respect to the letters, they were letters written by Kenna to Seward, and answers to them, and other letters written by Seward to Kenna. No doubt in the ordinary course of business, letters written by an agent to his principal, not for the purpose of being communicated to a third party, are not evidence against that third party. It was contended that Mr. Kenna in one of his letters asked the Company to admit the age of Mrs. Meredith, and

it was said that that was a letter written by him as the agent of Splents, to get the Company to do a thing favourable to Splents. It appears to the Court that that was not so. He was not directed by Splents to it; he did not tell Splents he was going to do it, nor communicate the answer to him. It was plain to the Court that he wrote them as the agent of the Company. He told them why he wanted them to make the admission, namely, that Mrs. Meredith had had her life insured elsewhere, that they could get from the other company the papers, and therefore it appeared that this was in the ordinary course of the business of Kenna with his employers. Therefore the Court was clearly of opinion that all those letters were inadmissible as being communications between principal and agent, and could not be given in evidence against a third party, and the Court had the less difficulty in coming to that conclusion, as it was the unanimous opinion of all the barons of the Court of Exchequer. Then with respect to the bible. The bible when produced in Court bore the appearance of being an old book, but all the Court knew of it was that it was given by Mr. Herbert to the attorney who produced it a few days before the trial. Mr. Herbert was a gentleman, who was still living; therefore there was no pretence made that this document was to be received in evidence on the ground of any difficulty in producing Mr. Herbert. It was said that because it was a bible, and contained entries, when made the Court did not know, but which seemed to have been made by one person at one time, and because it contained one or two entries as to births and marriages in Mr. Herbert's own family, the whole of the entries were evidence to show the time of the birth of Mrs. Meredith. One of the entries was as to her baptism. The Court had come to the conclusion that even if this was a matter of pedigree, the bible would not be receivable in evidence. They thought that to render a bible receivable, there should be evidence of entries by deceased members of the family, or at least that the entries made were something in the nature of pedigree, proved or sanctioned, or at least traced to the knowledge of deceased members of the family; therefore, the Court had come to the conclusion that even in a question of pedigree, it would not be receivable. Being thus of opinion it was not necessary for the Court to say whether hearsay evidence, admissible in matters of pedigree, was admissible where the question was not matter of pedigree, but questions as to the time of a birth or death, not connected with pedigree. 1st. East. 539 had been referred to. It was unnecessary for the Court to consider the question involved in that case, as they were of opinion that even if it were a question of pedigree, enough was not proved to make this bible receivable; therefore all the letters and the bible should have been rejected. The point then remains which had been principally argued by Mr. Jellett and Mr. Chatterton, that notwithstanding all that, there was a rule of law that because even though the illegal evidence were struck out of the case, all the evidence remaining was the one way; therefore the Court should not grant a new trial, as they would be bound to do in the case of a bill of exceptions. Then the question was, was there any foundation to bring this case within that rule of law

Was there no evidence? Now, the evidence given was this. Mr. Saward, no doubt, proved in general terms that Kenna had no authority to make such a representation as he made. Mr. Saward did not give in evidence, nor could the Court know what was the authority in fact of Kenna when he was appointed agent. There was no evidence in relation to that, beyond the general statement by Saward, that Kenna had not authority to make the representations. The facts of the case were that Kenna was the only agent of the Company in Tralee, for the purpose of soliciting policies in that neighbourhood. His Lordship need not say that in the absence of authority a party so employed was a general agent, he was an agent to receive the premiums, to receive proposals, and to transmit the proposals for the approbation of his employers. A portion of his business was to solicit policies. Well, then, that being his duty, what was the law, if that man for the purpose of procuring insurances, made representations in fact? Would the Company be bound by them? The Court must presume, for the purposes of the present argument, the pleading to be good. Well, then, how did the case stand on authority? The Company relied upon the case of *Acey v. Fernie* (7 M. & W. 15); but the facts of that case did not apply to the present one. The case of *Wing v. Harvey* (5 De G., M'N. & G., 265), bore on the present case. There was a covenant in a policy to become null if the party insured resided out of Europe without the consent of the trustees of the insurance company. The party went to Canada. An assignee of the policy, on paying a premium to a local agent, informed him that the assured was in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died. There was some evidence from which a jury might conclude that a knowledge had been communicated to the insurance office. The principal question was, was it necessary the knowledge of the agent should have been communicated. The Lord Justice decided the case on the supposition that it was not communicated, and that there was no express authority to give that consent; but the point decided in the case was, that here was an agent whose business it was to receive payment of premiums. He chose to make representations to the party. It was his duty to communicate the effect of what he had said to the insurance company. He did not communicate to them that he had made the representation. Who was to suffer? The Lords Justices held that the policy was not forfeited. So here it was an admitted fact that the party was the agent to procure insurances and to receive premiums. At the time that he was obtaining this proposal, and that he induced Splents to make the proposal, he, honestly believing the age of the woman to be two years less than it was, made a representation which induced Splents to send forward the proposal; and according to this case of *Wing v. Harvey*, it was his duty to communicate the fact, that at the time of receiving the proposal he had made this representation to Splents as an inducement to him. In all this there was evidence which struck his lordship individually as being evidence of a very cogent character to be submitted to a jury. If there was evidence at all that should

be honestly submitted to the jury, was it possible for any body to speculate that the letters might not have acted on the jury? If the letters were out of the case his lordship would have some difficulty in saying that a verdict, if found in favour of the plaintiff, ought not to be sustained. Therefore, being of opinion that there was evidence of a serious character, it was not for the Court to enter into a discussion whether in the old cases the rule was correctly laid down. It was established that if there was a serious question to be submitted to the jury, no judge had a right to speculate what effect a certain body of evidence might have had. Therefore, without deciding what the rule would be in other cases where there was not such a question, and without deciding the other questions as to the Court being at liberty to enter into these considerations, the Court said that the letters were such as to affect the jury, and therefore that sufficient cause was not shown. His lordship then referred to *Limpus v. The London General Omnibus Company* (1 Hurlst. & Colt. 526), and to *Seymour v. Greenwood* (7 H. & N. 355), as bearing on the question of the liability of a principal for the acts of his agent, and said that the rule of the Court would be to make absolute the order, on the ground of the reception of illegal evidence, the parties to abide their own costs in this Court.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

CONOLLY v. ALLIANCE GAS COMPANY.—Jan. 22.

Trespass—Parol Licence—Statute of Frauds.

To an action for breaking and entering the plaintiff's close, and erecting abutments thereon, and refusing to remove them, the defendants pleaded that the same were built for the necessary support of a party wall between premises held by them as tenants to one C., and the close in question, and that same were built with the consent of the occupier, who held the said close as tenant of C., and pursuant to an agreement between the defendants and C., and that the plaintiff became occupier of said close as tenant to C. after the same were built. Upon demurrer to replications, that the alleged consent and agreement were not contained in any deed nor in any note or instrument in writing, and that C. had revoked his consent, judgment was given for the plaintiff.

THE first count of the summons and plaint complained that the defendants unlawfully broke and entered a close and yard of the plaintiff, situate and known as No. 30 Sir John Rogerson's-quay, in the county of the city of Dublin, and unlawfully broke down a certain party or division wall, which separated and divided the yard, close, and premises of the plaintiff from the yard and premises of the defendants, and broke and made a draft hole therein, and against the assent of the plaintiff built and erected a wall of brick and lime in and upon the ground of the plaintiff, and did further unlawfully and wrongfully build and erect

on the plaintiff's said close certain abutments or buttresses of stone, lime, and mortar, and although requested to remove and take away same, refused to do so, and wrongfully and injuriously kept and continued said abutments and buttresses in and upon the plaintiff's said close, whereby plaintiff could not use and enjoy his said yard and close in as full and beneficial a manner as he otherwise might and would have done, to the plaintiff's damage in the sum of £500. The third defence pleaded was as follows:—"As to the residue of said first count, defendants say that said buttresses were built, to wit, in the year 1846, by the defendants, at a great expense of their monies, for the necessary support and maintenance of a party wall between premises then and still held by the defendants as tenants to one Mr. Corballis, and other premises, to wit, the close in said first count mentioned, then in the occupation of Messrs. Mullins, as tenants to said Corballis, and same were so built, with the consent of said Messrs. Mullins and Corballis, and pursuant to an agreement between defendants and said Corballis, whereby it was agreed that in consideration of said defendants at their own expense building said buttresses for the support of said party wall, they should be at liberty to build same on said close, and which said agreement was fully performed on defendant's part, and said buttresses were built and completed long before the plaintiff had any estate or interest in said close, or was at all possessed or in the occupation thereof, and the plaintiff first became occupier of said close as tenant to said Corballis after said buttresses were so built, and while they were standing on said close, and plaintiff was never tenant of said close, or possessed thereof, save with said buttresses built and standing thereon under the circumstances in this defence mentioned." To this plea the plaintiff put in the following replications:—1. A traverse of the alleged consent and agreement. 2. That the consent and agreement in said third defence mentioned were not, nor was either of them, contained in any deed signed and sealed by said Mullins and Corballis in said defence mentioned, or by either of them, or by any agent of them or either of them. 3. That the consent and agreement in said third defence mentioned was not, nor was either of them, given or granted, or entered into by the said Mullins and Corballis in said defence mentioned, or by either of them, with or to the defendants, by any note or instrument in writing signed by the said Mullins and Corballis, or either of them, or by their agent or agents, or either of them, lawfully authorized in that behalf. 4. That said Mullins in said defence mentioned was, at the time therein mentioned, only a tenant from year to year of the premises in said third defence mentioned, and long since had ceased to be tenant of same, and that long before the commencement of this action the said Corballis revoked and rescinded said consent and agreement in said third defence mentioned and alleged, and required the said buttresses to be taken down. The defendants demurred to the second of these replications, on the ground that the consent and agreement in the third defence stated were valid and legal, though not under seal, or contained in any deed signed or sealed by the said Messrs. Mullins and Corballis, or either of them, or by any agent for them or either of them. To the

third of these replications the defendants demurred, because that the said consent and agreement were valid and binding at law, though not granted by or contained in any note or instrument in writing signed by the said Mullins or Corballis, or either of them, or by either of their agents lawfully authorized in that behalf. To the plaintiff's fourth replication the defendants demurred, because upon the facts appearing in the third defence, and not traversed, it was not competent for said Corballis to revoke and rescind the consent and agreement in said third defence mentioned, and even if he had power to revoke and rescind said consent and agreement, the plaintiff could not rely on such revocation and rescission to maintain so much of said cause of action as by said third defence was pleaded to. The following were the defendant's points of demurrer:—That the consent and agreement in reference to the buttresses in the said defence mentioned was not a consent or agreement whereby any interest in land was assigned, passed, granted, or acquired. That the said consent and agreement in said defence mentioned did not refer to or deal with any interest, matter, or thing, within the operation of the Act of 7 Wm. 4, c. 12. That the defendants acted under the directions and in the employment of the said Corballis in the erection of the said buttresses for the benefit of the said Corballis, upon his, said Corballis's land, and as his agents. That the said buttresses so erected as in third defence mentioned were erected by the said Corballis for his own use and benefit, and for the necessary support of his own party wall as well as that of which defendants were in occupation, and inasmuch as defendants erected same by desire of said Corballis, at great expense to defendants, it was an executed agreement not competent for the said Corballis to rescind. That the plaintiff having, as tenant to said Corballis, entered into possession of the said premises, with said buttresses erected thereon, and said close so demised to him, not including the land under same, the plaintiff had no cause of action against defendants in respect of the erection of said buttresses; that the plaintiff could not in law rely on the rescission or revocation of the said agreement or consent by the said Corballis, in maintenance of his alleged cause of action as to the erection of the said buttresses; that if it were competent for said Corballis to revoke his said agreement and consent, and competent for the plaintiff to rely thereon, defendants were not bound, or under any legal obligation to take down or remove said buttresses.

Coffey (with him *Serjeant Armstrong*) in support of the demurrers.—It was held long ago that if expense was gone to in connection with a revocable licence, it becomes irrevocable. A licence, coupled with an interest, if executed, is not revocable, provided that the thing given is capable of being given without a writing under the Statute of Frauds; but this case rests on the consideration that there was no dealing with the land to bring it within the Statute of Frauds. The buttresses remained incident to the soil, the property of Corballis. The mere laying down of the bricks and mortar did not alter the property in the soil. There is no case which comes near this which is not distinguishable on the ground that the

property, instead of being in any way transferred to the defendants, remained in the possession of the original owner. *Wood v. Leadbitter* (13 M. & W., 838), distinguishes these cases, and puts them on their true ground, and the judgment in that case has the following from Vaughan, C.J., in *Thomas v. Sorrell*, "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful." If the defendants were to remove these structures without the authority of Corballis, the latter would have a right of action against them. No cause of action vests in this plaintiff, whatever rights Mr. Corballis may have.

Heron, Q.C., and *Hamill*, contra.—There are three things contained in this plaint. 1, that the close is the plaintiff's close, and not that of Corballis. 2, that the defendants built the buttresses. 3, that they have been requested to remove them. The pleading means "requested by the plaintiff," though it does not say so. They might have pleaded leave and licence to the original cause of action, or that the close is and was the close of Corballis, or that they did continue the buttresses, but were never requested to remove them. They plead what is a plea of a licence, of an interest or easement. The only argument that can fairly arise is whether there be an interest in the defendants entitling them to continue these buttresses. A licence never could confer this power, and it is revocable—*Fertinán v. Smith* (4 East. 107). In *Wallis v. Harrison* (4 M. & W., 549), Lord Abinger says, "a mere parol licence to enjoy an easement on the land of another does not bind the grantor after he has transferred his interest and possession in the land to a third person." In *Keppell v. Bailey* (2 Myl. & Ke., 535), Lord Brougham says, "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner; great detriment would arise, and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote"—*Crosby v. Wadsworth* (6 East. 602).

Serjeant Armstrong, in reply.—The case is peculiar, and will derive little assistance from authority. The distinction between the facts here and these other cases is strong. Corballis says to his tenants, Come inside and build buttresses, and they do so. The meaning of the defence is not that there was a licence or a grant. If we are subjected to this dilemma then there is the answer, that if a licence it is revocable, and if a grant there should be a deed, but that is not this case. If the circumstances show there was never a trespass, they cannot convert us into trespassers by the revocation of a licence. There was no trespass ever committed. Corballis could remove these buttresses. [*Keogh, J.*—Is not your plea substantially a defence that you maintain the right to hold them there? Why not plead that you are no party to continuing them? It may be that you were quite right in building, and yet be a trespasser by continuing. How does it show that you abandoned them?] It is not necessary to plead anything but facts.

MONAHAN, C.J.—Mr. Coffey's argument is very ingenious, provided there was a pleading to warrant it, but the action is brought for trespass by building buttresses, and continuing them though required to remove them. There is no allegation that the close is not the plaintiff's. There is no allegation that the defendants do not continue the buttresses, but they say, We justify all that because we built them under an agreement, And that would be valid provided it was under seal or in writing. Accordingly the replication is that it was not. They cannot turn round now and, say We did not build them. Such an argument is not open on the pleadings.

Judgment for the plaintiff.

It was arranged to withdraw the plea, and let the demurrer be overruled. Costs of demurrer to be paid, and short notice of trial taken.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

KEARNS v. HENDERSON.—June 9, 1863.

Pleading—Easement—Action for breaking and entering plaintiff's house—Plea of justification—Demurrer.

Where a dwelling-house obstructs the enjoyment of an easement, the defendant, in an action for breaking and entering plaintiff's said dwelling-house, may justify the breaking and entry, by pleading the enjoyment of the right for forty or twenty years before the commencement of the suit, and that said house obstructed him in the exercise of his said right.

A plea of enjoyment of an easement for twenty or forty years before the commencement of suit is sufficient without saying twenty or forty years next before.

THIS case came before the Court on demurrer, taken by the plaintiff to the defendant's third, fourth, fifth, and sixth defences. The summons and plaint was as follows:—"John Henderson, the defendant, is summoned to answer the complaint of William Kearns, the plaintiff, who complains that the defendant, to wit, on the 1st of August, in the present year, broke and entered a dwelling house of the plaintiff, situate at the weir on the banks of the river Dodder, and lying between the villages of Clonskea and Donnybrook, in the county of Dublin, and made a great noise and disturbance therein for a long time, and broke open the doors of the said dwelling-house, and broke to pieces, damaged, and spoiled the hinges of and belonging to said doors respectively, and broke, tore to pieces, and destroyed a large portion of the roof of said house, by means of which said several premises the plaintiff and his family were disturbed in the peaceful possession of said dwelling-house, and the plaintiff prevented from carrying on his lawful business therein; And also that the defendant on said 1st day of August, broke and

entered a certain other dwelling house of the plaintiff, situate at the weir on the banks of the river Dodder, and lying between the villages of Clonskea and Donnybrook, in the county of Dublin, to the plaintiff's damage of £500."

To the above plaint the defendant filed six defences. 1st,—The said John Henderson, the defendant, appears and takes defence to the action of the said William Kearns, and for defence thereto says, that he did not do or commit, or cause to be committed the acts complained of, or any of them, as alleged; 2ndly—And for further defence to said first paragraph of the plaint, the defendant says said dwelling-house, before and at said time, when, and so forth, was not the dwelling house of the plaintiff as alleged; 3rdly—And for further defence to said first paragraph of the plaint, the defendant says that the said dwelling-house in and upon which and so forth, consists of a certain structure erected, to wit, upwards of *twenty* years before the said time when and so forth, and same was erected by a person named, to wit, — Duffy, who was one of the then mill-owners of a certain mill situate along the banks of the said river Dodder, and who was of right entitled to use the waters of said river for the purpose of lawfully working his said mill in common with the other mill-owners who had mills along said river, and which were as of right respectively worked by the waters thereof, and defendant avers that said dwelling-house consisted of, and was, in fact, but a small hut or shed containing but the one room, and same was so erected immediately over the bed of a certain head race or diversion lawfully made from said river for the purpose of conducting the water of said river into the race or stream, wherewith and whereby said mills were so then worked; and defendant says that same was so erected over said part of said race or stream wherein was lawfully placed and constructed a certain weir or sluice gate, which for upwards of *twenty* years before the said time, when and so forth, and before this suit, was as of right used by said mill-owners for the purpose of being raised or lowered by them respectively, for the purpose of regulating the supply of water to their said mills; and defendant avers that said dwelling house was so erected over said weir and sluice for the purpose of preventing unauthorised persons from interfering or altering said sluice or weir, and thereby causing either injury or interruption to the working of said mills; and defendant avers from the time said dwelling-house was so first built, and from thence hitherto down to the time when he, the plaintiff, entered into possession thereof—to wit, on the 1st of July, 1862, the said dwelling house was always used and occupied by a caretaker, who was used and accustomed to attend to, and take charge of said sluice or weir, and see that no one improperly meddled therewith, and which caretaker was, during said time, paid by said mill-owner certain sums of money for the caring thereof; and defendant further avers that a portion of said dwelling-house so consisting of one room, had a small portion of the inside thereof fenced off so as to enable the said caretaker or occupier thereof to use the residue of the said apartment as a residence; and the defendant further avers that said sluice was so covered in and protected by said dwelling-house and fence therein as

aforsaid, that it was wholly impossible for the said mill-owners, or any one authorized by them, to regulate or alter said sluice or weir without entering into said dwelling house, and gaining thereby access to the portion thereof so fenced off and covering said sluice or weir; and defendant further avers that a person named Mrs. Bryan so acted as such caretaker, to wit, for ten years before her death, which took place in the month of July, 1862, whereupon he, the defendant, entered and possessed himself of said dwelling-house, and was so possessed thereof before and at the said time when and so forth; and defendant further avers that the several occupiers of said mills so lying and being along said bank of said river for *twenty* years before the commencement of this suit, enjoyed as of right and without interruption the rights of using the waters of said river so flowing in and along said race or stream, for the purpose of working their said mills, and the right from time to time, during said period of regulating and adjusting said sluice or weir, so as to cause a proper supply of water to flow down said stream or race, and for such purpose, such occupier during all said time enjoyed as of right, and without interruption, *the privilege at all times of the day or night of entering said dwelling-house, and of opening said portion thereof so fenced off as aforesaid, and within which was said sluice or weir, and of so altering or regulating same for the purpose aforesaid; and the defendant avers that for, to wit, five years before the said time when, and so forth, the father of him, the defendant, to wit, John Henderson, senior, was the lawful occupier of one of the said mills, the occupiers whereof were so as aforesaid entitled to the use of the said water, and the right of regulating said weir or sluice in manner as aforesaid; and defendant avers that shortly before the said time, when, and so forth, it became necessary for him the said John Henderson, senior, and he required for the purpose of regulating and working his said mill properly, as he was of right entitled so to do, to alter the position of said sluice or weir, and he, the defendant, then being his servant, and acting under his authority, and by his commands, did go to said dwelling-house for the purpose of so altering and regulating said sluice or weir, of which the person whom the plaintiff then had in possession of said house (the plaintiff being absent therefrom) then had due notice, and he, the defendant, then demanded admission into said house and apartment therein for the purposes aforesaid; and defendant avers that because the person then in possession of said house refused to allow him access to said sluice or weir for said purpose, and because it was then absolutely necessary that said sluice or weir should at once be regulated, otherwise interruption, injury, and damage would have occurred and been done to John Henderson, senior's said mill and the working thereof, he, the defendant, thereupon, and for the purpose of gaining access to said sluice or weir for the purposes aforesaid did, as the servant of the said John Henderson, senior, and by his authority, break and enter said dwelling-house in a peaceable manner, and he did make a little noise and disturbance therein, and he did necessarily, for the purposes aforesaid, a little break the doors and hinges thereof, same being then closed and fastened, and said person so in possession having, al-*

though requested so to do by defendant, refused to open same, and he did a little break, and tear, and damage a portion of the roof of said house, said acts having been necessarily done by him in order to enable him to get access to said sluice or weir, but in so doing he, the defendant, did no unnecessary damage or injury thereto respectively, and caused no unnecessary noise or disturbance in said house, and he thereupon did regulate said sluice or weir, as he lawfully might, for the causes aforesaid, and which were the supposed trespasses complained of. Fourth defence to first paragraph, a repetition of third defence, substituting forty years for twenty. Fifth defence to second paragraph same as third defence. Sixth defence to second paragraph, a repetition of third defence, substituting forty years for twenty. To the third, fourth, fifth, and sixth defences, the plaintiff demurred, and the following were the points for argument, First, that said defences do not traverse or confess and avoid any of the material averments. Secondly, that said defences admit that plaintiff was in legal possession of the house, and yet do not show any right in the defendant to enter upon such possession. Thirdly, that consistently with the averments in said defences, the said John Henderson, senior, never had any right to enter said house as against the plaintiff. Fourthly, that consistently with the averments in said defences, the said John Henderson, senior, and the other mill-owners in said defences mentioned, may have had legal possession of the house up to the time when the plaintiff entered into possession of same. Fifthly, that said defences only show a right in said mill-owners in said defences mentioned, to enter said house as occupied by a caretaker, but do not show whose servants said caretakers were, nor in whom the legal possession was, previous to the entry of the plaintiff into such possession. Sixthly, that said defences only profess to show a right in said mill-owners in defence to enter upon said house previous to the entry of the plaintiff into the possession of the same. Seventhly, that consistently with the averments of said defence, the said John Henderson, senior, in defence mentioned, may have had a right to enter said house up to the time plaintiff entered into possession of same, but said defence does not show any right in said John Henderson to enter the said house after plaintiff obtained possession of same. Lastly, that said defence is argumentative.

M'Donogh, Q.C., (with him *Coates*) in support of the demurrer.—The pleading is argumentative, and therefore bad. The defendant should have pleaded that he enjoyed the right of user for twenty years *next* before the commencement of this suit, and twenty years' user if interrupted by a year *next* before this action, would entitle plaintiff to a verdict. Gale on Easements, 3rd edition, 150, note, says the Act of Parliament is so worded, that, though there has been fifty years' enjoyment, that is no defence under the statute (2 & 3 Wm. IV. ch. 71, ss. 2-4), unless the enjoyment continues up to the time of the commencement of the suit (per Parke, in *Ward v. Robins* (15 M. & W., 241), and the result of the actual decision is, that if the action in which the question is raised be so timed as that no proof can be given of some user in the first and last year of the period next before the

commencement of the action, the claim under the Act will fail.—*Parker v. Mitchell* (3 Perry & Dav., s. c. 11 A. & E., 788). Again the plea is bad in not traversing, or confessing, or avoiding. The defence does not show any legal right in the defendants to commit the trespass in plaint complained of—namely to smash open the plaintiff's dwelling-house.

Ryan in support of the pleading.—The defence is good; it is not argumentative—*Jones v. Price* (3 Bing. N. C. 52); it is sufficient to say in the manner pleaded that we enjoyed the right for twenty or forty years before, without saying *next* before; the defendant justifies breaking open the house as it was necessary for the purposes of his mill to enter upon the house in order to adjust the sluices. Again, we justify the breaking and entry. In *Davies v. Williams* (16 Q.B., 546,) it was held that where a house obstructs the exercise of a right of common, the commoner may, *after notice* and request to the plaintiff to remove the house, pull it down, though the plaintiff is actually inhabiting and present in the house; and Wightman, J., in giving judgment there, says that the general right of a commoner to abate any building or erection upon the place over which he has the right, was not questioned. The only thing that was questioned either in *Davies v. Williams* or in *Perry v. Fitzhugh* (8 Q. B., 757), was the right to pull down the dwelling-house in which the plaintiff and his family were actually present and inhabiting, so that on the authority of these cases the plea which avers we had a right to the regulating the sluice, and a right of way thereto is good, and is sufficient in stating that we entered upon a house which obstructed our right and that even though, as in the fourth point for argument the plaintiff, may have been in possession of the house at the time he so entered, and the plea avers that the plaintiff had notice. The second section of the Statute of Limitations, 2 & 3 Wm. 4, ch. 71, enacts that twenty years' enjoyment must exist to give the right of every subject to be defeated in any other way by which the same was liable to be defeated at the passing of that Act. And by the fourth section it is enacted, "That each of the respective periods of years herein before mentioned shall be deemed and taken to be the period *next* before some suit or action."

Pigot, C.B.—A plea of enjoyment of a right of common for thirty years before the commencement of suit, was held sufficient in *Jones v. Price* (3 Bingham, N. C., 52), without saying thirty years *next* before the bringing of this action, and that case has never been overruled. The Court will follow that case. On the next ground, namely, the plea of justification, the defendant by his plea has justified breaking open the house, that it was necessary for the purpose of the adjusting the sluices and regulating the mill-weir, to enter upon the premises, and that he did that without any unnecessary damage.

Demurrer overruled accordingly.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

IN THE MATTER OF THE ESTATE OF MATTHEW
J. CASSAN—Feb. 18.

Jurisdiction—Apportionment—Fee-farm Rent.

Where lands ordered for a sale are held jointly with other lands under a fee-farm grant, the court has no jurisdiction to apportion the fee-farm rent between the sold and unsold portions. Casus omnisus in the Landed Estates Court Act.

THE lands ordered to be sold in this matter being held jointly with others under a fee-farm grant, a question arose as to the jurisdiction of the Court to apportion the fee-farm rent between the sold and the unsold part of the lands.

Carleton, Q.C., argued in support of the Court's Jurisdiction.—The 72nd and 79th sections of the Landed Estates Act were clearly confined to the case of rent service, and included the case of such a rent reserved by a "lease in perpetuity." No good reason could be assigned for ascribing to the Legislature an intention to exclude the case of a fee-farm rent; and it is not easy to see why if a man hold under a lease in perpetuity for three lives still subsisting, the Court should have power to apportion the rent, but if that lease were the next day converted into a fee-farm grant, a similar authority to apportion the fee-farm rent should be withheld from the Court. That it was not a *casus omnisus* appeared from the 54th section, which empowered the Court to sell, "subject to any annual charge affecting the land or part thereof sold, or to any such apportioned part of such annual charge as the judge may think fit should remain charged thereon." These words, "any annual charge" are comprehensive enough to include a fee-farm rent; they do not mean an "incumbrance," for the section proceeds in the next clause to specify the only incumbrance, subject to which the Court is authorized to sell; neither do they apply to quit-rent, or crown-rent, or dower, jointure, or annuity, for each of these is specially provided for by the Act itself; the words "annual charge," therefore, are not only large enough to include a fee-farm rent, but it seems to be the only subject to which they could be applied.

JUDGE HARGREAVE (after consulting with JUDGE LONGFIELD).—We consider that this is a *casus omnisus* in the Act, and that the Court has no jurisdiction. The 72nd section applies in terms only to leases, and the rents reserved by them, and does not include grants in fee, and rents created by them. The 54th section has a totally different object in view, and does not give the Court power to alter the contracts or rights of parties adversely to the interests of one of them. It merely enables the Court to deal with annual charges according to the rights of the parties, and removes the technical difficulties incident to the dealing with such charges.

[BEFORE JUDGE HARGREAVE.]

IN THE MATTER OF THE ESTATE OF JOHN CLANCY, OWNER
AND PETITIONER.—Feb. 22, 23, & March 1.

Settlement—Construction.

*By ante-nuptial articles executed in 1819, J. C. covenanted that if the marriage should take effect, and the intended wife should survive him, and if he should not in his lifetime have settled lands or other hereditaments to the value of 180*l.* per annum to the uses then specified, and if he should not have devised lands of the like amount for the like uses, then his heirs, executors, and administrators should, within six months after his decease, pay to the trustees 3,000*l.*, to be invested on the trusts specified, which were to be for the wife for life, remainder to the children of the marriage as she should appoint, and, in default, equally.*

*J. C. afterwards acquired property (including the lands of B.) which was, however, incumbered, and being considerably indebted, he, in the year 1850, assigned all the said property to a trustee for payment of his debts and for other purposes, and subject thereto upon the trusts of the articles of 1819, with various trusts as to the residue of the rents. Held, upon the construction of the whole deed, that the lands of B. were subject to the trusts of the articles of 1819 to the extent merely of an annuity of 180*l.**

THE petition in this case was filed by John Clancy, claiming to be owner of lands called Kilnamannagh, County Dublin, and Ballinlough, County Meath. A conditional order for sale to discharge incumbrances was made; and cause was shown against same being made absolute as to Ballinlough by Mrs. Elizabeth Clancy, the mother, and Mr. William Clancy, the younger brother of the owner and petitioner, on the ground that the petitioner's title as heir of John Clancy, senior, his father, was defeated by a settlement dated 1st Jan., 1850, by the last-mentioned John Clancy; and that under that settlement and a deed of appointment by Mrs. Clancy, they, Mrs. Clancy and William, were the absolute owners of Ballinlough, and that the petitioner had an estate or interest therein. The facts are fully stated in the following judgment; but it may be shortly mentioned that the two principal questions for decision were—1st, How far Ballinlough was subject to the trusts of marriage articles executed in 1819, when the late John Clancy was married—whether absolutely or merely to the extent of £180 a-year, Irish, or a sum of £3,000 in gross. 2ndly, Whether John Clancy had not by various transactions precluded himself from claiming any estate whatever in Ballinlough.

Chatterton, Q.C., and *O'Hagan* for John Clancy, the petitioner, to make order for sale absolute.

J. E. Walsh, Q.C., and *Burroughs, Q.C.*, for Mrs. Eliza Clancy, with *Serjeant Sullivan*.

John B. Murphy and *Sheldeton* for William Clancy, the younger son.

Cases cited on part of petitioner:—*Arundel v. Arundel* (1 My. & K. 316); *Carpenter v. Buller* (8 M. & W. 219). On part of parties showing cause: *Grey v. Pierson* (6 H. L. 61); *Wilcocks v. Wilcocks* (2 Wh. & Tad. L. C. 345); *Blandy v. Whimmore* (ib.

347); *Pickard v. Sears* (6 A. & E. 475); *Beresford v. Milward* (2 Atk. 49).

JUDGE HARGREAVE.—The petition in this matter is filed by John Clancy, claiming to be the owner of the lands of Kilnamanagh, in the county of Dublin, and the lands of Ballinlough, in the county of Meath; and it seeks a sale of those lands for the purpose of discharging the incumbrances thereon. A conditional order for sale has been accordingly made; and cause is shown as to the lands of Ballinlough by Mrs. Elizabeth Clancy, the mother, and Mr. William Clancy, the younger brother of petitioner, on the ground that the petitioner's title to these lands as the heir of his father, John Clancy, is defeated by a settlement made on the 1st Jan., 1850, by that John Clancy; and that by virtue of that settlement and a deed of appointment executed by Mrs. Clancy, they, Mrs. Clancy and William Clancy, are the absolute owners of Ballinlough, and that the petitioner has no estate or interest in that denomination. In order to understand the question at issue it is necessary to go back to the year 1819, when the late John Clancy was married to the lady who is now his widow. On that occasion articles were executed on the 12th February in that year by which Mr. Clancy (not then having any landed or other property which could conveniently be made the subject of a settlement) bound himself by a covenant to the effect that if the marriage should take effect and the intended wife should survive him, and if he should not in his lifetime have settled lands or other hereditaments to the value of £180, late currency, per annum, to the uses then specified; and if he should not have devised lands or hereditaments of the like amount for the like uses, then and in that case his heirs, executors, and administrators should, within six calendar months after his decease pay to the trustees £3,000 sterling, to be invested in Government funds or upon real security, and to be held upon the trusts in the deed specified. The meaning and effect of these articles are (with one exception not now material) too plain and obvious to need much comment. The pecuniary amount of the settlement which Mr. Clancy was bound to make was fixed at a gross sum of £3,000, late currency, or what was regarded as equivalent, lands of the value of £180 late currency, per annum. It was left entirely to Mr. Clancy's choice to determine which of the three modes of settlement he would adopt. If he should acquire land of the value of £180 a-year or upwards he might, if he thought proper, settle that land in his lifetime, and so get rid of the obligation to pay £3,000 after his decease; or if he thought proper so to do, he might abstain from making a settlement by deed and get rid of his obligation by settling lands of that value or upwards by will; and lastly, if he should adopt neither of these courses, his real and personal assets were bound in six months after his death, if his wife survived him, to pay £3,000, which would then be the subject of the settlement. Whatever course Mr. Clancy might adopt, the result was to be substantially the same. Whether land or money was settled, and whether (in case of land) it was settled by deed or by will, the trusts were to be for Mrs. Clancy for life, commencing at her husband's death, with remainder for the children of the marriage in such shares as Mrs. Clancy should by deed or will appoint; and in default

of appointment equally, and in case of no children, then upon such trusts as Mrs. Clancy should appoint by will; and in default, to Mr. Clancy's right heirs in case of land, and his next of kin in case of a money settlement; and the articles go on to declare that the provision thereby contemplated for Mrs. Clancy is to be in bar of her dower and of any share of her husband's personal estate under the Statute of Distributions. It is not obvious why the payment of the £3,000 is made contingent on Mrs. Clancy's surviving her husband, but with this exception (now immaterial), the scope and object of the articles are clear and free from ambiguity. If, on the one hand, Mr. Clancy should choose to settle real estate to any amount, however large, his heirs would have no ground of complaint; and if, on the other hand, he should choose to make no settlement of land or one of small amount, the objects of the articles would have no ground of complaint, for they could resort after his death to the covenant to pay £3,000, which is all that was actually contracted for on their behalf. This being the nature and extent of Mr. Clancy's obligations, matters so remained until the year 1850. The marriage had taken effect; and at this epoch the family consisted of Mr. and Mrs. Clancy, John Clancy, the eldest son, William Clancy, Richard Clancy, and James Clancy, both since deceased, and a daughter, Ann, who was then the wife of a French gentleman named De Versan. Mr. Clancy in the interval had acquired several properties, which, however, were incumbered. In the year 1829 he had purchased Ballinlough for £6,300, which he soon afterwards charged with an annuity of £400 a-year for two old lives; and in 1830 the property was also liable to an annuity of £60 a-year for his own life. In 1832 he had purchased Kilnamanagh for 3,200; and at a still earlier period he had purchased a leasehold house in Fitzwilliam-square for £2,500; and he was the owner of £7,400 stock in the Hibernian Banking Company, and of two policies on the life of a Mr. Bermingham. All the properties which I have now mentioned were subject to a mortgage for £8000. At this period he was also entitled to an estate called Cahircilla, in the county of Clare, which was mortgaged for £4,097 Government stock, or about £3,500 cash. Mr. Clancy resided in the house in Fitzwilliam-square, the furniture of which belonged to him, and is minutely scheduled in the deed to which I have now to direct my attention, being the deed relied upon by Mrs. Clancy and William Clancy as divesting Mr. Clancy of any descending or divisible interest in Ballinlough. The deed bears date 9th Jan., 1850, and is made between John Clancy of the 1st part, Mr. John Robinson, of the 2nd part, Mr. Clancy's scheduled creditors of the 3rd part, and John Nalty, M.D., a trustee, of the 4th part. It recites Mr. Clancy's title to the various properties and chattels which I have mentioned, and the incumbrances affecting them; it then recites in an abbreviated manner the articles of 1819 (erroneously giving £150 a-year instead of £180 a-year), the marriage, and the fact of their being several children; and it states that "no lands have been settled to the value of £150 per annum to any other trustee," and that the articles themselves were not registered. The deed then proceeds to recite the marriage of Ann Clancy, a daughter, with Monsieur de Versan; and that Mr. Clancy

had agreed on that occasion to settle on her for her separate use an annuity of £50 for her life. At this point the recitals revert to a further statement of Mr. Clancy's assets, from which it appears that he was entitled to a reported charge of £5858 odd on the estate of Edward William Bermingham, the person upon whose life he was previously recited to have policies to the extent of £4080; and under an order of the Court of Chancery Mr. Clancy was entitled to receive about £220 a-year out of Bermingham's rents. The deed then recites that Mr. Clancy had been taken in execution for £656 odd, and that he had requested Mr. John Robinson to advance him that amount, which Mr. Robinson had agreed to do on having the repayment secured with interest by Mr. Clancy's bond and warrant, and a conveyance of the before-mentioned lands and premises upon trust to pay the debt. It further recites that Mr. Robinson had agreed to advance £140 more to pay off pressing creditors on the same security; and that Mr. Robinson had accordingly advanced said sums; and that a bond and warrant had been given for £800 principal. We then come to some recitals of considerable importance, one of which states that the said John Robinson and John Clancy had mutually agreed upon Dr. Nalty as a proper person to be a trustee for paying off said advances with interest, and another refers to Mr. Clancy's scheduled creditors, whose demands amounted in all to £3,529; and states that he is desirous of paying them all off; and that the residue of his properties thereunder particularized and specified, which should remain after payment of said debts, should be held upon the trusts of the articles, and for the purposes of securing said annuity of £50 per annum. And that for said purposes he had determined to convey Kilnamanagh, Ballinlough, the Fitzwilliam-square house, the bank stock, and policies, and in short everything included in the mortgage for £8,000, subject to that mortgage and its provisions (referring, I presume, to the fact that the money was not payable until the year 1853); and also to convey Cahircella and everything included in the mortgage for £4097 stock, subject to the mortgage and its provisions; and also to assign his household goods, &c., and the yearly monies payable under the Chancery order out of Mr. Bermingham's rents unto Dr. Nalty upon the trusts after mentioned. These being the recitals the deed is then divided into three operative parts: By the first, in consideration of the debts and of 5s., and for the purpose of having the residue of his property as thereunder specified, which should remain after payment of his debts held upon the trusts of said articles of agreement; and to secure said annuity of £50 as thereunder mentioned he conveys Kilnamanagh and Ballinlough, subject to the £8,000 mortgage, and Cahircella, subject to the stock mortgage, to Dr. Nalty on the trusts afterwards expressed. By the second, for the considerations assigned, he assigns the Fitzwilliam-square house, subject to the £8,000 mortgage, to Dr. Nalty on the trusts afterwards explained. And by the third he assigns the bank stock, the two policies, the household effects, and the sum payable out of Bermingham's rents under the then existing Chancery order, or any other order, to Dr. Nalty on the trusts afterwards expressed. The trusts of all are then declared, 1st, to pay costs of deed and

other incidental costs. 2nd, to pay costs of Mr. Robinson's bond, warrant and judgment. 3rd, to pay head rents and renewal fines, and perform covenants in leases, and to keep up the two policies on Bermingham's life, and any expenses incurred in reference to the bank shares or the receipt of the money under the Chancery order. 4thly, to keep down the annuities on Ballinlough and the interest on the two mortgages. 5thly, to pay off Mr. Robinson's advances with interest. 6thly, to pay off the scheduled creditors or compound with them. And subject as aforesaid, to hold the residue of the rents, &c. (excepting the rents of Kilnamanagh, the profits of the bank shares, the house and furniture in Fitzwilliam-square, and the income under the Chancery order), upon the trusts in said articles of 12th February, 1819, specified. And upon further trust, as to Ballinlough, subject to the trusts and powers aforesaid, to pay out of said rents, &c., an annuity of £50 per annum to Ann De Versan for her life, for her separate use. And upon further trust, as to all said premises subject to the trusts and powers assigned to pay the rents, &c., and the interests, and dividends, and yearly income or allowance (meaning by this last phrase the income payable under the Chancery order) unto the said John Clancy, his heirs, executors, administrators, and assigns, for his and their own benefit. Then comes a proviso that the rents and income of Kilnamanagh, the bank shares, and Fitzwilliam-square house should, in the first instance, be applied in payment of debts before recourse should be had on said last-mentioned proposal to the rents and income of the residue of the premises vested in Dr. Nalty. The deed then empowers Dr. Nalty, at any time during its continuance for the purpose of paying the mortgages or the debts, to sell all or any of the properties assigned to him (mentioning them in detail, but not including the annual sums payable under the Chancery order), and out of the proceeds to pay the mortgages and then to pay his expenses (including the expense of keeping up the policies), then to pay Mr. Robinson and the scheduled creditors; and to hold the residue or surplus, except so far as such residue or surplus might arise from the sale of Kilnamanagh, the bank shares, and the house in Fitzwilliam-square, upon the trusts in said articles specified, and subject thereto, so far as such residue or surplus might arise from the sale of Ballinlough, upon trust for payment of said annuity of £50 as aforesaid, and subject as aforesaid, to hold such residue or surplus thereof in trust for said John Clancy, his heirs, executors, administrators, and assigns, or as he or they should direct. A proviso follows, corresponding with the one I have before stated, to the effect that Kilnamanagh, the bank shares, and the premises in Fitzwilliam-square should be disposed of before any other of the premises thereby vested in Dr. Nalty should be disposed of; and that Ballinlough should not be sold until all the other premises should be disposed of under the power. The residue of the deed consists of formal powers and covenants, which are not very material in reference to the question which has arisen. I observe in reading them that the phrase, "during the continuance of these presents," again occurs, and that the power of appointing new trustees is vested absolutely and with-

out restriction in Mr. John Robinson. The deed is executed by Mr. Clancy and Dr. Nalty, but apparently not by any of the scheduled creditors except Mr. Clancy's brother, who was a creditor for 160*l*.; but whether that gentleman executed the deed in that capacity, or for the purpose of expressing his approval of the deed as a proper settlement on his sister and her family, does not appear. He is not, however, a party to the deed except in the capacity of a creditor. Dr. Nalty having accepted the trusts of this deed, entered into possession of the various properties assigned. He sold the bank shares, and the premises in Fitzwilliam-square, and on Mr. Bermingham's decease received the amount of the two policies, and was thus enabled not only to pay off Mr. Robinson and the schedule creditors, but also the mortgage for 8,000*l*.; and as the annuity of 400*l*. on Ballinlough ceased in 1855, and the annuity of 60*l*. ceased on Mr. Clancy's decease in 1862, the result is, that Kilnamanagh and Ballinlough are free from any charges or liabilities created by Mr. Clancy. Cahircella, it appears, was sold in the Incumbered Estates Court for 5,350*l*., and a small surplus after paying off the stock mortgage and some other charges, was received by Dr. Nalty as a trustee for Mr. Clancy; and it is necessary to observe that some of the debts paid in this manner were debts contracted by Mr. Clancy after the deed of 1850. The main question for consideration is, whether the deed of 1850, having regard to Mr. Clancy's prior obligations, and the other circumstances under which it was made, is to be construed as a settlement of Mr. Clancy's entire interest in Ballinlough and Cahircella, or merely as affixing specifically upon these denominations the *quasi* obligation of Mr. Clancy under the articles to settle lands to the extent of 180*l*. a year in value. The question is one purely of construction, and its decision cannot be in the smallest degree influenced by Mrs. Clancy's impressions as to her husband's intentions, or by any subsequent conduct or proceeding of Mr. Clancy. Nor could any such matters be resorted to for the purpose of reforming the deed; for if Mr. Clancy settled lands to the extent of 180*l*. a year, he did all he was bound to do, and a bill could not be sustained against him to compel him to do more; and if, on the other hand, he settled all Ballinlough and Cahircella, his heir is bound, and has no equity to restrict the operation of the deed to the measure of Mr. Clancy's prior obligation. I allude to these elementary principles, because unfortunately in this case affidavits have been filed on the part of Mrs. Clancy for the purpose of proving John Clancy's intentions by extrinsic evidence of an exceedingly weak character, and by Mr. Clancy's subsequent conduct. I cannot, however, fail to observe that if the Court were to attach any weight to Mr. Clancy's subsequent conduct, it would be of a character adverse to that construction of the deed which Mrs. Clancy is interested in sustaining. I have already observed that the proceeds of Cahircella, after paying off the stock mortgage, were applied for Mr. Clancy's own purposes, *i.e.*, debts of his contracted after 1850 were paid off, and the small surplus was also paid for his use. One of the creditors so paid was Mr. John Robinson, who was the solicitor conducting that sale; and it is therefore evident that

neither Mr. Clancy nor Mr. John Robinson could have thought that Cahircella was settled in 1850; for if they thought so, their conduct would have been fraudulent. Now, if Cahircella was not settled, neither was Ballinlough; for the two are never separated in the deed, except in the possible event (which did not happen) of its being necessary to sell Cahircella, or the equity of redemption of it, for the purposes of the deed. I propose now to proceed to consider the deed itself. The first observation upon it has reference to the parties. Mrs. Clancy is not a party, nor any person representing the covenantees in the articles; and the trustee, Dr. Nalty, who is a party, is expressly stated to be the nominee of Mr. Clancy and Mr. Robinson; and Mr. Robinson has the exclusive power of appointing the future trustees. This circumstance is relied on by the petitioner, as showing that there could have been no intention to make a new settlement of a more extensive character than that contemplated by the articles; and he insists that this view is strengthened by the circumstance that while the articles are recited with a statement showing that Mr. Clancy had made no settlement either of 180*l*. or any other sum, so that his *quasi* obligation remained in full force; yet there is no recital of any intention on John Clancy's part to do anything different from what the articles pointed to. There is also a rather singular recital that the articles had not been registered, which points to the necessity of remedying that supposed defect, by fixing them upon specific lands. These are small matters, and are only important in so far as they bear on the somewhat ambiguous portions of the deed. The important recital which states Mr. Clancy's determination (and it is important to observe that the deed speaks of it entirely as a determination of his, and not at all as an agreement between him and Mr. Clancy's brother) appears in the first part of it to point to a settlement of all the lands not sold to pay debts on the trusts of the articles; but its termination is adverse to that view, because it goes on to add other words, which makes the entire sentence run, "should be held upon the trusts of said articles, and for the purpose of securing the annuity of 50*l*. for Madame de Versan." The whole recital, considered as expressing one determination, is, therefore, so far as it goes, in favour of the petitioner; and I think that the trusts which are expressed, as it were, in duplicate (once in reference to the income, and again in reference to the produce of the sales), are still more explicit in the sense. The trusts of the rents and income of all the properties assigned to Dr. Nalty are declared up to and inclusive of the payment of the scheduled debts; and at this point the residue is divided into two parts; one part includes the rents of Kilnamanagh, the dividends of the bank shares, the income arising from the house in Fitzwilliam-square, and the income under the Chancery order; and the second part includes Ballinlough, Cahircella, and the policies; these latter are to be held upon the trusts in the articles specified; a further division of these latter is then made, by which Ballinlough is separated from Cahircella and the policies; and a further trust is declared as to Ballinlough (subject to the trusts and powers aforesaid) to pay out of the rents an annuity of 50*l*. to Ann de Versan for the life. At this point all the properties are again re-

united; and there is a further trust as to all (subject to the trusts and powers aforesaid) to pay the rents and income to Mr. Clancy. These trusts necessarily imply or rather express that in directing the rents of Ballinlough and Cahircella to be held on the trusts specified in the articles, the settlor contemplated a residue of such rents, and disposed of that residue as to Ballinlough in favor of Madame de Versan to the extent of 50*l.* a year, and as to all (so subject) in favor of Mr. Clancy. To hold that a complete settlement of all Ballinlough and Cahircella was effected by this trust, appears to me inconsistent with its express language; but the whole trust is consistent throughout, if we consider that Ballinlough and Cahircella were by this trust specifically charged with the fulfilment of the articles, and subject thereto, then on the specified trusts in favor of Madame de Versan and Mr. Clancy. The trusts are repeated as to the produce of sales, and they are the same *mutatis mutandis*. There is the same separation and re union of the properties in reference to the different trusts, and the same specific reference to the proceeds of Ballinlough by name as a fund available for Madame de Versan and Mr. Clancy after satisfying the articles. The conclusion is a necessary one, that what Mr. Clancy did was to impose on Ballinlough and Cahircella his *quasi* obligation to settle lands to the value of 180*l.* a year, or to impose that obligation on Ballinlough only, if it should be necessary to sell Cahircella to pay the debts; subject to that obligation Ballinlough was to pay Madame de Versan's life annuity, and so subject both denominations or Ballinlough only, as the case might be, was to remain at Mr. Clancy's disposal. I do not here refer to Kilnashanagh, which was, of course, to remain Mr. Clancy's if not required to pay debts. It has been suggested on Mrs. Clancy's part that Madame de Versan's annuity might be answered by Mr. Clancy's life estate during his life, and that after her death her annuity might be considered as the provision to be made for her under the settlement. This, however, is impossible, for the interest she would take under the settlement is not 50*l.* a year for life but a share of the estate liable to be entirely defeated by Mrs. Clancy's appointment; and even if this view were well-founded, it would not affect the construction of the deed, which is to be determined by its sentences and language, as they appear on the face of the deed, and not by speculations as to how its provisions can be made to take effect, consistently with a particular mode of construing the deed. This instrument, which I have now endeavoured to construe, is one which requires to be considered with the greatest care and attention, in order to arrive at its true meaning, which, however, can, I think, be made out with reasonable certainty. The doubts which have arisen flow not so much from the contents of the deed as from the fact that the members of Mr. Clancy's family, or some of them, in his lifetime, appear to have been made aware of the existence of the deed, and to have supposed it to have an effect more extensive than that to which, on the fullest consideration, I feel myself obliged to give to it. They had the idea apparently that the intervention of Mrs. Clancy's brother in effecting the discharge of Mr. Clancy from prison was to be looked at as a species of consideration for a new

and independent settlement. The nature of the transaction and the language of the deed are both quite incompatible with such a view. If, therefore, the case rested on this deed alone, the cause shown by Mrs. Clancy and William Clancy would prevail only to the extent of such part of the lands of Ballinlough to the value of 180*l.* Irish per annum, as under the decision of the Court shall be set out for the purposes of the articles of 1819; but a further case is made, that by reason of certain acts of John Clancy, the petitioner, he is estopped from asserting his title as heir, and is bound to give such an effect to the deed as Mr. Clancy and William Clancy have now contended for. If J. Clancy, the petitioner had by deed confirmed the settlement of 1850, and extended it to the whole lands of Ballinlough, under an impression that such was his father's intention, probably a Court of Equity would not at his instance subsequently set aside the deed, merely because he got no sufficient consideration for it; but what I am called on to do is to infer a family arrangement from the circumstance that John Clancy and William Clancy joined together in raising money by mortgage on the assumption and belief by both parties that Ballinlough was subject to the settlement. This transaction did not injure William Clancy, or alter his position. He got the better half of the money, and if he pays what he received he need be under no apprehension of being made liable for the petitioner's portion. It is at least as probable that the petitioner will be made liable to William Clancy's part of the debt as that William Clancy will be made liable to petitioner's portion. Mrs. Clancy, it is to be observed, was no party to this transaction, and I do not understand how it can in any way benefit her. If a family arrangement is to be proved, it must be shown that Mr. Clancy and her two sons all concurred in it, and it would be necessary to determine the exact character of it. It can scarcely be supposed that the petitioner, knowing his title to Ballinlough, would without any consideration not merely give it to his mother for life (which would not be a very remarkable thing), but would also put it in her power to give the whole of it (as he has professed to do) to her younger son, to the total exclusion of the elder one. If such a transaction is to be inferred from circumstances, they must be of the clearest and most unequivocal character, such as do not exist in this case. The petitioner I think is wrong in his petition in stating that the subject matter of the settlement is an annuity of £180 late currency. I think it is lands of that value taken out of Ballinlough. The cause must be allowed to this extent, and disallowed *quod ultra*. As to the costs, the parties showing cause ought to pay the costs of the latter part of the case, which presents itself to my mind as rather of a frivolous character, and they ought also to pay the costs occasioned by the introduction of irrelevant matter. On the other hand, they would be entitled to the costs of the main argument, or a substantial portion of them, as having in part, at least, succeeded. My best course, under these circumstances is to make no order as to costs.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE FELIX M'CANN.

Committal for unsatisfactory answering by bankrupt, or by a witness examined with regard to bankrupt's property—Committal to Kilmainham prison.

There is no distinction in the examination of a bankrupt and a witness who is examined with regard to a bankrupt's property; the test in every case is, if the account given be such as a reasonable man can believe.

It is not necessary, in a warrant of committal, to refer to the particular answers that are deemed unsatisfactory; it is enough to refer to the evidence generally, and ask the bankrupt or witness if he have any further or other account to give.

Although the examination may disclose grounds for a criminal prosecution, that will be no bar to the Court exercising its jurisdiction to commit for unsatisfactory answering. The Court has power to commit a witness for unsatisfactory answering to a criminal prison. A witness examined in Dublin may be committed to Kilmainham, and not the Four Courts Marshalsea.

THE 385th section of the Irish Bankruptcy and Insolvency Act, 1857, provides that if any person shall refuse to be sworn, or shall refuse to answer any lawful question put by the Court, or shall not fully answer any such question to the satisfaction of the Court, or shall refuse to sign and subscribe his examination when reduced into writing, not having any lawful objection allowed by the Court, or shall not produce any books, papers, or writings, in his custody or power, relating to any of the matters under enquiry, which such person is required by the Court to produce, and to the production of which he shall not state any objection allowed by the Court; it shall be lawful for the Court, by warrant, to commit such person to such prison as such Court shall think fit, there to remain without bail, until he or she shall submit himself or herself to such Court to be sworn, and full answers make to the satisfaction of such Court to all such lawful questions as shall be put, and sign and subscribe such examination, and produce such books, papers, deeds, writings, and other documents in his custody or power. The 386th section provides that it is not necessary in the warrant of committal to specify the questions to which the answers may be deemed unsatisfactory, and the form of warrant for unsatisfactory answering is as follows:—Whereas E. F., the said bankrupt, (or if a witness) G. H., of in the county of , was on the day of , duly sworn and examined in this Court, as by the examination and deposition of the said , now on the file of proceedings in this matter, will appear. And whereas the answers of the said , as now appearing in said examination, are unsatisfactory,

these are, therefore, to authorise and require you immediately, upon receipt hereof, to take into custody the said , and him safely convey to her Majesty's prison of , and him there deliver to the governor of the said prison, who is hereby authorised and required to receive the said into his custody there, and him safely keep without bail, until this Court or the Lord Chancellor shall make order to the contrary, and for so doing this shall be your sufficient warrant. Given under the seal of the Court of Bankruptcy and Insolvency, this day of , (signature of judge.)

To , messenger, and his assistants, and to , governor of said prison, or his deputy there.

The bankrupt was a shopkeeper in Virginia, in the County of Cavan, and immediately after his being adjudicated bankrupt, being then in Dublin, he was brought into Court, and examined as a witness. The depositions were taken by a short-hand writer, and the questions put were nearly a thousand in number, with, of course, a corresponding number of answers; but the answers which were deemed unsatisfactory, were those which related to the alleged destruction by fire of his stock in trade and books, and to a quantity of goods sent to his son-in-law, Matthew Daly.

Kernan, Q.C., appeared for the creditors, and examined the bankrupt. The following is the account given of the loss of his stock and books by fire:—"What books used you to keep? Three or four books. What sort of books did you keep? A ledger. My son kept the books; I knew nothing about them. Used you write in them yourself? No. Do you know whether any book was kept that would shew what stock you got in? No; I had nothing whatever to do with the keeping of the accounts; it was my son kept them. Can you tell me do you know was there any book kept that would show the amount of stock you got in? No. Was any book kept that would show the amount of stock sent out or sold? I don't know; it was my son kept the books. Do you understand book-keeping? No. Did you ever examine your books? No. How many years have you been in trade? About thirty. What was your trade? A draper. Do you know how many books you had in which entries were made? I am not sure how many were in it; they were old books. I mean the books that were in use? I cannot say. You said there was a ledger? I suppose there was a ledger, of course. Can you give any information respecting your books? I know nothing about my books. What became of them? They were burned, and all my goods were burned. How do you know the books were burned? They were in the desk, and of course the books were burned in it. Where used the books to be kept? They were generally kept beside the desk on the counter. Had you a separate place for putting the books into? I had not. You say they were burned? Yes. When did the fire take place? Last Sunday week (January 10). What hour did you first hear of the fire? A quarter after 7 o'clock in the morning; my son alarmed me. Who were the parties that slept in the house that night? My two sons and myself, William and Francis; William is the elder. Was there any other person in the house that night? No

other person. Where was your wife that night? She was down seeing her daughter, who was ill. When did your wife leave the house? On that same Sunday evening. Had you a servant girl? I had a woman who attended in the day-time, but she does not stop there at night, nor never did. I had a girl until her time was up in November last year, when she left. Used that girl to sleep in the house? Yes. Were you insured? No. Had you ever an assurance on your house or goods? Never. Can you give any reason why your present servant did not sleep in the house at night? Well, since something occurred in my place I never kept a servant girl in the house at night. What is the name of the servant woman you have at present? Mary Howe; she is a grandmother. Are you sure she did not sleep in the house on the night of the fire? The woman I have at present never slept in my house at all. Your wife went away at half past seven in the evening? Yes; she went to Ballyjamesduff to her daughter; it is five miles from Virginia, and she was accompanied by my son Felix. How did they go? I sent them on my own car and horse. Has the car remained at Ballyjamesduff since? No; it is at home at present. When did your son come back with the car and horse? I cannot say whether he came back the next day or not. I expected him back that night with his mother, but they did not come; my daughter was very ill, and had a doctor. Did any man of yours call you up on that Monday morning, and tell you it was time to go to the market of Newcastle? Yes; my servant man came to the door. Tell me what he said. He called me, that was all. What is the man's name? His name is Michael Flood. Did he usually sleep in the house? No; he is a married man, and has a house of his own. About what hour was it in the morning when he called you? I could not recollect, indeed. Do you recollect that he called you at all? I do recollect that he called me. Which was it before or after your son told you of the fire that this man called you? It was after, of course. Do you mean to say when your son called you at a quarter past seven, and told you of the fire, you did not get up then? I meant to say it was after the man being there that my son called me. Did you go to sleep after being called by this man, and before your son called you? I think I did. What hour was it this man called you? I cannot say, but I was in no hurry rising, the horse being away, and I knew I could not go to the market." He was asked a great number of similar questions about being called by this man, and about the fire. He went on to say that a fire was discovered in the shop about seven o'clock, and that he and his son got up, and saw the whole of the cloth-shop in flames; that the police and all the neighbours came and helped to extinguish it; there used to be a fire in the cloth shop at night. The substance of a very lengthened examination was, that at the time of the fire he had about four or five thousand pounds worth of goods, and that all were consumed with the exception of about four or five hundred pounds worth at invoice price that remained, but they were damaged, and that he never had his goods or premises insured. There was a fire in the shop that was not put out at night, as they wanted to keep the shop aired. It appeared

that there were holes burnt in the shop in different places, and the witness said he did not enquire how it was those separate burnings took place. He said he had about thirty pounds in a cash-box, which he brought upstairs that night, and which he had safe. The bankrupt was examined on a subsequent day at great length, and the substance of the entire was, that about four or five thousand pounds worth of goods were destroyed by the fire with the exception of about four hundred pounds worth that remained, and were damaged, and that all his books were burnt. The desk in which it was said the books were sometimes kept was produced in Court partly burnt, and the lid not on it; the bankrupt said he thought the lid of it had been burnt. The bankrupt was very fully examined as to the actual amount of stock he had when the fire took place, when it appeared beyond all doubt that in the month of September previously he got £3,700 worth of new goods, for which bills were running due when the fire took place. He stated that from September until the time of the fire he made payments amounting to about fifteen hundred pounds; but it appeared pretty clearly that at the time of the fire he had about five thousand pounds' worth of goods, and the only account he could give of them was, that with the exception of what remained after the fire, which cost about four hundred pounds, all were destroyed by that fire. The persons in his employment, and several others, were examined, but none of the goods were ever discovered, nor any evidence given of the removal of them. The bankrupt and his son-in-law, Matthew Daly, were examined on this branch of the case. It appeared that in the month of November he purchased five hundred pounds' worth of goods at one house, four hundred at another, and about one hundred at another. The five hundred and four hundred pounds' worth were sent to the Kells railway station, and from thence brought to Daly's house, at Ballyjamesduff, five miles from Virginia, where the bankrupt lived. The bankrupt's account of this transaction was, that when going to Dublin to purchase, Daly authorised him to purchase some things for him, and that they were accordingly sent first to Daly's house; that he and the bankrupt opened them at night in Daly's shop; that Daly took what he wanted, but not as much as the bankrupt expected he would take, and that the bankrupt took the remainder away, from time to time, to his own house in Virginia. The third parcel of goods that went to the Cavan station was stated to have been brought to Daly's, and from thence to the bankrupt's, without being opened. The bankrupt was examined on several days with regard to the five thousand pounds' worth of goods, and the absence of the books, and the only account he gave was, that all were destroyed by the fire except the remnant that remained in his house in Virginia. Kernan, Q.C., upon this state of facts, asked for the committal of the bankrupt, on the ground that his answers were wholly unsatisfactory.

Heron, Q.C., (Levy with him) contended that such a mass of irrelevant evidence had been given, and so many unnecessary questions put that it was impossible to know which of the answers were relied on as unsatisfactory; and that although it was now unnecessary to put the questions and answers in the warrant

of committal, it was absolutely necessary to refer to such of the answers as were relied on, as being unsatisfactory. There were about a thousand questions put and a similar number of answers given, and it was not contended that all the answers were unsatisfactory; and before the Court consented to commit the bankrupt, they asked the Court to point out to the bankrupt such particular answers as were deemed unsatisfactory, and ask him with regard to each if he had any other answer or explanation to give; otherwise, if the bankrupt were brought up upon a *habeas corpus* the judge or court before whom he would be brought would be left to search through the whole thousand answers to make out these that were unsatisfactory to the judge of the bankrupt court, a thing impossible to do, and the bankrupt might be doomed to perpetual imprisonment. As to the probabilities of the case, and the account being such as a reasonable man ought to believe, subsequent events were in favour of the bankrupt's statement; large rewards were offered for the discovery of any property; in fact, for evidence against the bankrupt, but notwithstanding all the vigilance of the police, and the tempting rewards offered, not a particle of evidence could be obtained against the bankrupt. He was, in fact, accused of arson and robbery, and if such a charge could be sustained, let him be tried before the proper tribunals of the country, and not attempt to do indirectly what they would not venture to do directly; that he asked the Court not to commit the bankrupt, but leave the assignees to prosecute him if they thought they could establish any criminal charge against him.

Kernan, in reply, cited *Re Lord* (11 Jar. 186).

JUDGE LYNCH asked the bankrupt had he read over all the depositions; he said he had heard them read, and the judge then asked him had he any other or further information or explanation to give with regard to the goods that were sent by him from M'Conkey and Company, and Fox & Co., of Dublin, to the Kell's Railway Station, and also the goods sent to the Cavan Station, and from thence to Matthew Daly, of Ballyjamesduff, and he replied he had no other account to give that the goods were sent from Dublin to the railway, as stated, and that they were brought from the railway to Daly's as described by the witnesses, namely, the goods from M'Conkey & Co., and Fox & Co., that were opened there as described, and then brought by him to his own house in the way described by him; that all that was true, and he could give no other account about these goods; the goods sent to Cavan, and from Cavan to Daly's, were brought by him from Daly's to his own house, without being opened, and that was all true.

JUDGE LYNCH.—Then you have no other account to give about these goods? I have not.

JUDGE LYNCH.—Have you any other or further account to give of the large quantity of goods that were ordered by you in September and November, and all that were in your house the day before the fire? I have not, they were all consumed. Have you any account to give of your books? No; they were all consumed the night of the fire.

JUDGE LYNCH said he was called upon to commit the bankrupt for unsatisfactory answering, and he

thought he would be abrogating the power committed to him by the law if he were to hesitate a moment in exercising it. The present case was, in a mercantile point of view, an important one, and of a most extraordinary character. The bankrupt, a man about thirty years in business, carrying on an extensive trade in the town of Virginia, and in good credit. In the month of September last he proceeded to Dublin, and made large purchases of goods, which, added to the usual stock in his shop, left him at least £5000 worth to account for; and how did he account for it. The whole story about the burning was so unsatisfactory, nay, so incredible, that no reasonable man could believe it. It was said, indeed, that he ought to have been left to be prosecuted before the ordinary tribunals of the country. Well, suppose it even was a case for a prosecution for perjury or fraud, that was no bar to the exercise of the jurisdiction given to him by the statute to commit for unsatisfactory answering, a course of proceeding that might be of more advantage to creditors at present than an immediate prosecution; at all events the creditors were entitled to call on him to exercise the jurisdiction he had, and in his opinion there never was a case more loudly calling for the exercise of the power of committal for unsatisfactory answering. His Lordship reviewed the evidence given with regard to the burning and the attempt to account for the large amount of property that came into his hands, and said he thought he had wholly failed in doing so. It was urged on the part of the bankrupt, as corroborative of his story, that no goods had been made away with or concealed; that none had been discovered by the police or others who searched; but such an argument amounted to no more than that the fraud was so well managed, no discovery had yet been made. And then with regard to his books, the story was still more incredible; he said they were in his desk, and that his desk was burnt, but the desk being produced, was without the lid, and although it appeared to have been burnt inside, it was not burnt underneath. If he came up before a judge on a *habeas corpus*, of course the desk would be produced. No doubt, he said, the books were sometimes on the counter beside the desk, but wherever they were it seemed wholly improbable, from the extent and character of the fire, that they could have been destroyed so that not a vestige of them was left. And then his account of the goods sent to the Kells Railway Station, and from thence to Daly's, was wholly incredible. His account was that the £500 and the £400 worth sent from the Railway Station to Daly's were opened by himself and Daly in the dead of the night, some small portions of them taken out and kept by Daly, and then that he brought all the rest to his own house in Virginia, without a human being ever seeing them except himself. The whole story with respect to the burning, the loss of property, the loss of his books, and of the goods sent to Daly's was such as no reasonable man could believe, and that was the test as to a committal, and he had not the slightest hesitation in committing the bankrupt for unsatisfactory answering.

The bankrupt was accordingly committed to the Four Court Marshalsea.

Mathew Daly, the son-in-law of the bankrupt, who

had been previously examined at considerable length was again examined, and his committal for unsatisfactory answering asked for by counsel for the assignees. As in M'Cann's case, the questions amounted to several hundred, but the following are the answers that were principally relied on as unsatisfactory:—Did you ever get any goods from the railway station that had been ordered by M'Cann? Never. Did you ever buy goods from M'Cann? I did; but they were goods bought from him at his own house in Virginia. I ask you again did you ever get any goods from the railway station that had been ordered by M'Cann? Never; any goods I got from him I got direct from his own place.

The carriers who delivered the goods, namely, the £500 worth ordered by M'Cann from M'Conkey and Co., and £400 worth from Fox and Co., from the Kell's Railway Station to Daly, having been examined and having stated that they delivered the goods at Daly's house, he being there at the time, Daly was again examined as follows:—Listen to what you swore the other day when asked this question—Did you ever get any goods from the Railway? I never got any goods from the railway that had been ordered by M'Cann; any goods I got from him I got direct from his own place. Now how do you reconcile that with the fact that you got the goods sent from M'Conkey & Co., and Fox & Co., delivered to you at your own house? His explanation was, first, that he did not expect the goods at all, and, secondly, that he thought the question asked by counsel was, did he get any other goods from the railway but those referred to, for he was well aware that M'Cann had been examined before him, and told all about them, and that he never intended for one moment to deny the receipt of them, as he was well aware that the creditors and their counsel knew all about them, and that he merely mistook the question. He was then examined as to how these goods were disposed of or what became of them, and he corroborated the bankrupt to the extent of saying that they opened the bales in his (Daly's) shop at night after it had been closed; that Daly selected out of them goods to the amount of £50 or £60, for which he paid the bankrupt at the time of selection, but made no entry either of the receipt of the goods or the money paid for them; that a shopman of Daly's named Commiskey saw the goods opened at night, although he did not assist. Commiskey was afterwards examined, and denied the statement made by Daly as far as he was concerned. Daly further stated that the bankrupt took the goods away different times on his cart, stating his intention to bring them to his own house at Virginia, but he could not name any person who saw him take them away, or who met them on the road to his own house. Under those circumstances, counsel for the creditors asked the Court to commit Daly also for unsatisfactory answering. Counsel for Daly contended that he stood in a different light from the bankrupt, who was there to make a disclosure of his estate and effects, and show the Court what had become of the property of his creditor. Daly was examined as to a substantive fact, namely, the receipt of the goods from the railway station, and their subsequent removal from his house by the bankrupt. No doubt he

denied having received them under a misconception of the question put to him, but no one for a moment could believe that he wilfully denied a fact that he was well aware had been deposed to by the bankrupt before he (Daly) was examined at all. If the Court believed for a moment that he was guilty of perjury, let him be prosecuted, but no such belief could be entertained by any one, and on the whole the explanation given was rational, and consistent with truth, and such as any reasonable man ought to believe, and Daly ought not to be committed.

JUDGE LYNCH said the story of Daly was just as improbable as that of the bankrupt, and with regard to the examination of a witness, where the subject of enquiry related to the property of a bankrupt there could be no distinction between them. He (Judge Lynch) had been anxious that Daly should clear up the case against him, and give his account a semblance of probability, but he did no such thing. He totally denied the receipt of the goods until he knew the carrier had been examined; he stated that Commiskey, his shopman had seen what was done with regard to the goods, but when he found that Commiskey denied it, then he attempted to shift his ground; he denied that any goods had come from the Cavan Station; in fact, he never acknowledged anything until it was discovered. And then with regard to the taking of the goods by the bankrupt in the way he described, not a single witness had he to corroborate him. On the whole he deemed the answers of Daly unsatisfactory, and he would commit him.

On the application of counsel for the creditors, Daly was committed to Kilmainham, in order to keep him separate from the bankrupt.

Heron, Q. C., objected to a committal to a criminal prison, which Kilmainham undoubtedly was. Although the statute gave the judge authority in such cases to commit to such prison as he thought fit, it did not give him power to send a witness to a criminal prison for unsatisfactory answering. Besides the Four Court Marshalsea was the prison of all the Courts, and a committal for anything in the nature of a contempt should be only to the Four Courts Marshalsea.

JUDGE LYNCH said he thought the objection was not valid, but as it was intimated in the course of the argument that Daly would be brought up on a *habeas corpus* that might be one of the points on which counsel would rely for his discharge.

Daly was committed to Kilmainham.

Attorney for the creditors—Mr. Michael Larkin.
Attorney for the bankrupt, and for Daly, Mr. J. D. Rosenthal.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

REA v. NAGLE—Nov. 23, 1863.

Setting aside pleading—Action of mandamus—Duty of officer.

The Court will set aside a summons and plaint in an action for a mandamus brought against its officer for refusing to receive a pleading in a criminal case, tendered after issue joined, and after the record had been sent from the Crown office to the Assizes.

THIS was a motion on behalf of defendant that the writ of summons and plaint in this action be removed from the file, or that further proceedings in this cause be stayed upon the grounds that the Court ought not to permit any question as to its practice to be tried in an action of mandamus, or to allow its records to be affected by such a proceeding, and that the defendant as an officer of the Court discharging his duty according to the practice of his office, ought to be protected from the vexation and expense of a personal action; that an action of mandamus is inapplicable to the enforcement of the alleged breach of duty stated in the plaint, and that the defendant would not properly have performed what is alleged in the plaint to have been his duty, that the plaintiff attended and intervened at the striking of the jury, and that the record was actually made up and sent down for trial before he tendered the pleading which he alleges the defendant ought to have received. The summons and plaint stated that the defendant before and at the time of the filing of the criminal information hereinafter mentioned in the Court of Queen's Bench against the plaintiff, was and from thence continually hitherto had been, and still was the Clerk of the Crown and the Master of the Crown office of the Court of Queen's Bench at Dublin, and coroner and attorney of her Majesty the Queen, in the said Court, and the proper person to receive and file all pleadings on criminal and Crown cases pending in said Court in the said Crown office, being the only office in said Court in which said pleadings could or can be filed, and heretofore, to wit, on the 1st day of January, 1863, one John Lytle, was and from thence continually hitherto had been and still was Mayor of the Borough of Belfast, in the County of Antrim, and during all the time aforesaid the plaintiff was, and still was, one of the town councillors of the said borough of Belfast; and the plaintiff further said that in pursuance of the order of said Court for that purpose theretofore made as of Easter Term last, the said defendant, at the relation of the said John Lytle, and as the coroner and attorney of the Queen, and on her behalf filed a criminal information in said Court against the plaintiff, containing nineteen counts, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th of said counts being for the speaking and publishing by the plaintiff on the 1st day of January, 1863, at a meeting of the town council of said borough, held in the town hall of said borough of Belfast aforesaid (at

which meeting the said John Lytle presided as such mayor as aforesaid, and which meeting the plaintiff as such town councillor as aforesaid attended) to, of, and concerning the said John Lytle as such Mayor of Belfast as aforesaid, and to, of, and concerning the said John Lytle, in the execution of his office of Mayor of Belfast, in said counts respectively mentioned, and to, of, and concerning the said John Lytle whilst he was so presiding over said meeting as in said counts respectively mentioned, and to, and of and concerning the said John Lytle whilst he was so presiding over said meeting as in said counts respectively mentioned, the several supposed false, scandalous, malicious, and defamatory words in said 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th counts respectively mentioned; and the plaintiff further said that the 13th, 14th, 15th, and 16th of said counts of said information were for that on the 1st day of January, 1863, a meeting of the town council of said borough was held for the transaction of certain municipal business of the said borough, at which said meeting the said John Lytle, in the execution of the duties of his said office of such Mayor of Belfast presided, and at which meeting the plaintiff, as such town councillor attended, the plaintiff, in order to provoke, instigate, and excite said John Lytle to commit a breach of the peace whilst the said John Lytle was in the execution of his said office, so presiding at said meeting, the plaintiff wickedly, maliciously, and in the presence and hearing of divers good liege subjects of the Queen, did publish, utter, pronounce, and address to the said John Lytle, as such Mayor, and whilst he was so acting in the execution of his duties of said office of Mayor, certain, violent, abusive, provoking, and insulting words as in said 13th, 14th, 15th, and 16th counts respectively stated and set forth; and the plaintiff further said that the 17th, 18th, and 19th counts of said information were for the writing and publishing, and causing or procuring to be written or published, to wit, on the 1st day of January, 1863, certain alleged false, and scandalous defamatory, and malicious libels of and concerning the said John Lytle, and as of and concerning the said John Lytle, as Mayor of Belfast, and of and concerning the said John Lytle in the execution of his duties of his office of Mayor of Belfast, as in said 17th, 18th and 19th counts respectively mentioned; and the plaintiff further said that in or as of Trinity Term last he in his own proper person pleaded and caused to be filed in the said Crown office the following pleas to the said information—that is to say, first, to the whole information the general issue, that he the plaintiff was not guilty thereof, and thereof he, by the said plea put himself upon the country; and for a further plea to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th and 13th counts of said information, the plaintiff pleaded a special plea of justification upon the grounds, and shewing and averring that the said several words and said several counts in the introductory part of said last-mentioned plea mentioned, spoken, and published of the said John Lytle by the plaintiff were true in substance and in fact, and that it was for the public benefit upon the grounds in said plea mentioned, stated, and set forth, and in order to prevent the repetition by the said John Lytle of the

several illegal and improper acts in said plea mentioned, and to cause their prevention that the said several words should be published, and that it was the duty of the said plaintiff, as such town councillor as aforesaid to publish same, whereupon the plaintiff at the said several times when and so forth, in said several last-mentioned counts respectively mentioned, did speak and publish the said words of and concerning the said John Lytle, as in said counts mentioned, as he lawfully might, and said plea concluded with a verification and prayer of the judgment of the Court for the plaintiff; and for a further plea in that behalf as to the 17th, 18th, and 19th counts of the said information by mistake mentioned in said plea, as the 18th, 19th, and 20th counts of said information, the plaintiff pleaded certain facts, showing and also averring that the words written and published of and concerning the said John Lytle, and of and concerning the said John Lytle as such mayor, and of and concerning the said John Lytle in the execution of the duties of his said office of mayor by the plaintiff, in said last three counts of said information contained, were true in substance and in fact, and it was for the public benefit upon the grounds in said plea mentioned that the said several words in the said last three counts mentioned, should be published, and that it was the duty of the plaintiff as such town councillor to publish same respectively, wherefore he the plaintiff, at the said several times when and so forth in the said last three mentioned counts, in said information respectively mentioned, did write and publish the said words of and concerning the said John Lytle, as in said counts mentioned, as he lawfully might for the cause in said plea mentioned, and said plea concluded with a verification and prayer of judgment of said Court for the plaintiff; and the plaintiff further said that afterwards as of Trinity Term last, the said James Nagle, the coroner and attorney of our said lady the Queen, who for our said lady the Queen, prosecuted the plaintiff in that behalf, filed in the said Crown office the following replication to said pleas of the plaintiff, that was to say, as to the said plea of general issue, and whereof the plaintiff had put himself upon the country, the said James Nagle did the like, and the said coroner and attorney of our said lady, as to the second plea of the plaintiff replied that said plea, and the statements therein contained in manner and form as the same were pleaded, were not true in substance and in fact, and this he the said coroner and attorney of our said lady for our said lady the Queen, prayed might be enquired of by the country, and the said coroner and attorney of our said lady the Queen to the said last plea of the plaintiff, replied that the said plea and the statements therein contained in manner and form as the same were pleaded, were not true in substance and in fact, and this he the said coroner and attorney of our said lady for our said lady the Queen, prayed might be enquired of by the country, as by said information, pleas, and replication filed in the said Crown office, and to which the plaintiff for greater certainty, and to avoid prolixity, craved leave to refer would fully and at large appear; and the plaintiff further said that afterwards, to wit, on the 24th of July, 1863, he, the plaintiff delivered to the said James Nagle, as master of said Crown office, and

Clerk of the Crown aforesaid, with the proper and necessary fees in that behalf, and requested him to file for and on behalf of the plaintiff in said office a rejoinder and demurrer to the said replication of the said James Nagle, in the words and figures following, that is to say—"Court of Queen's Bench. As of Trinity Term, in the 25th year of the reign of Queen Victoria. John Rea, at the suit of the Queen. And the said John Rea, as to the replication of the said coroner and attorney of our said lady the Queen, to the plea of the said John Rea; by him secondly above pleaded to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th 11th, 12th, and 13th counts of said information, and which the said coroner and attorney of our said lady for our said lady, prays may be enquired of by the country doth the like. And the said John Rea, as to the said replication of the said coroner and attorney to the plea of the said John Rea, by him secondly above pleaded to the counts of the said information numbered in the said plea, the 18th, 19th, and 20th counts, and which the said coroner and attorney of our said lady for our said lady the Queen, prays may be enquired of by the country, doth the like. And the said John Rea, as to the said replication of the said coroner and attorney to the plea of the said John Rea, by him secondly above pleaded to the eighth count of the said information, saith that the said replication, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law, and that he need not nor is he obliged by the law of the land to answer the same, and this he is ready to verify; wherefore, and for want of a sufficient replication in this behalf, the said John Rea prayeth judgment, and that he may be discharged and dismissed by the Court hereof, and from the premises above charged upon him in said eight count in form aforesaid.—John Rea." And the said plaintiff further said that afterwards, to wit, on the 25th day of July, 1863, the said James Nagle returned said rejoinder and demurrer to the plaintiff, and refused, and still refused to file same upon the alleged grounds, that the said John Lytle had already caused to be made up the Nisi Prius record upon said criminal information pleas and replication, and had caused notice of trial of said record to be served on the plaintiff for the then pending assizes, in and for the county of Antrim, and because said record was then in the list of causes for trial at said assizes, and to be afterwards tried at said assizes; and the plaintiff said that it was and is the duty of the defendant as such officer as aforesaid, to receive and file said rejoinder and demurrer in said Crown office, the grounds aforesaid alleged by him notwithstanding; and the plaintiff said that in consequence of the neglect and refusal of the defendant to file said rejoinder and demurrer, the said record was afterwards against the will, and the protestation of the plaintiff in court publicly made, tried at said assizes, and the plaintiff was thereupon at said assizes illegally found guilty upon said trial of said several offences charged in said information; and the plaintiff said that he was personally interested in having said rejoinder and demurrer filed in said Crown office, and he sustained, and had sustained, and would sustain damages by the non-performance, of the defendant of his said duty, to re-

ceive and file said rejoinder and demurrer in said office, and performance of the said duty by the defendant had been demanded by the plaintiff of the defendant, and the defendant had refused and neglected and still refused and neglected to perform the same and all conditions had been fulfilled, and all things happened, and all times had elapsed necessary to entitle the plaintiff to the performance of the said duty by the defendant, and to claim a writ of mandamus in that behalf; and the plaintiff prayed judgment against the defendant for a writ of mandamus commanding the defendant to receive and file the said rejoinder and demurrer in the said Crown office of the said Court of Queen's Bench, and his costs of suit. From the affidavits filed for the purpose of the motion, it appeared, besides other matters, that after issue joined on the defendant's pleas of not guilty, and after the replications filed to the pleas of justification in the criminal prosecution stated in the summons and plaint, *similiters* were duly added for Mr. Rea to all the replications in accordance with the practice; that the record was then engrossed by the prosecutor's attorney, that it was made up, signed, and sealed by the defendant in this action, and handed by him to the chief clerk, who delivered same to the prosecutor's attorney in said cause, on the 16th July, 1863, from which time the defendant, as Clerk of the Crown, ceased to have any control over it; that the Belfast Assizes commenced on the 21st July, and that while the record was out of defendant's custody, and after issue joined, the document in the summons and plaint called a rejoinder and demurrer were, on the 24th of July, tendered to him, and that he refused to receive them in the then state of the cause.

Serjeant Sullivan (with him *Kirby*, for the motion.)—Mr. Rea never moved to have the officer compelled to receive the pleading, which would have been the proper course. It never was intended that the action of mandamus given by the Common Law Procedure Act of 1856 should supersede the prerogative writ of mandamus; and the Court never would grant a prerogative writ of mandamus to compel the officer to receive a pleading. The 73rd section of the Common Law Procedure Act of 1856 shews that it would be necessary for Mr. Rea, in case he obtained judgment to come back again to the Court for a writ of mandamus. That shews the intility of the present proceeding. If there was any real grievance, it might have been made the subject of a motion. Tapping on Mandamus, p. 178, shews that the Court will not interfere by mandamus against officers of the courts. If the present action lay in this court, it would lie in any other, and then you might, in fact, have an action in the Court of Common Pleas or Exchequer to try the practice of the Court of Queen's Bench.

Serjeant Armstrong and *M. Mahon*, contra.—There are really two questions here; first, whether the demurrer tendered by the defendant in the case of *The Queen v. Rea*, was receivable; and, secondly, whether, if it was, the present action would lie. One of the counts (the 8th) of the criminal information was for oral slander, without any averment of an attempt to provoke a breach of the peace; that was bad on demurrer, and we could have fallen back upon that. What Mr. Rea says is, that in point of form he never

was served with a rule to rejoin, and that there is no jurisdiction in the officer to add a *similiter*, unless the rule to rejoin was served. The *similiter* never was filed, and it was added for the first time when the record was made up. Then as to the second question, the cases of *Benson v. Paull* (6 El. & Bl. 273); *Norris v. The Irish Land Company* (8 El. & Bl. 512); and *Ward v. Lowndes* (1 El. & Bl. 940 and 956), shew the difference between the old prerogative writ of mandamus, and that given under the Common Law Procedure Act of 1856, which, the judges throw out, is not to be confined within the same limits as the other. What Mr. Rea wants is a decision on the point whether he had a right by demurrer, at any time before the trial to have the question in his case determined by the Court as a matter of law, and not by the jury as a matter of fact. It is the right of the party to have his case determined on demurrer if the common law gives him that right. The common law principle as laid down in *Ashby v. White* (1 Sm. L.C. 105) applies to this case. There has been a wrong, therefore, there must be a remedy.

LEFROY, C.J.—The course which has been taken by the plaintiff in this case is wrong in every possible aspect in which he has presented it. And even if he had a case, he comes to maintain his right to have the reception of a pleading not only after the time at which it ought to have been presented, but to have it received after the record has been issued and the notice of trial served. He is therefore wrong in point of time. He is wrong as to the course of proceeding which he has adopted when he chooses to proceed by an action instead of applying by motion to the Court for his redress if he has suffered any injury. The obvious objection to suffering this proceeding by an action has already been adverted to by the members of the Court in terms which show that absurdity so plainly that one might have expected it would have put an end to any further application—I will not say misapplication—of the public time. The principle of the law is, that the practice of the Court can only be known in the Court itself, and cannot be judged of by any other Court. It is an inquiry as to matter of fact, to be made therefore by application to the Court itself by motion, which will enable the Court to ascertain the course of practice as a matter of fact. Here it was said there was something done in the office contrary to practice; the Court therefore should have an opportunity of knowing what was the practice of the office, and the practice of the office is the practice of the Court, and the practice of the Court is the law of the land. The party has also erred in the form of proceeding which he has selected to try this question—namely, an action of *mandamus* as it is now given by the statute. It has been observed that he must come to the Court afterwards before he can have the full fruit of his proceeding. In short, if I was to go on and consume more time I could add many more grounds on which the absurdity of this course of proceeding would be manifest; but I should be contributing to what I cannot approve of—an actual waste of public time, if I were to add anything further to the reasons which appear to my mind a perfectly conclusive reason for taking the pleading off the file, and giving the officer of the Court the protection to which he is entitled at our hands.

HAYES, J.—I concur, and for the same reasons.

FITZGERALD, J.—I also concur. I do not think it necessary to say anything as to the question of practice. If the officer was wrong there is a mode of setting him right by an application to the Court, or by an application to set aside the pleading if it is wrong; but such a proceeding as applying to compel the officer to do his duty by a *mandamus* cannot be allowed. Why, if this was tolerated, there is not a case in which any of the officers acting on what he thinks right and the practice, would not have fifty actions of *mandamus* brought against him. Even the judges themselves might have such actions brought against them. Mr. Rea has the means of ample redress. If the trial is wrongly had he has redress also, and we must protect our officer.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

WYSE v. LEWIS.—Jan. 13.

Setting aside summons and plaint.

A paragraph of a summons and plaint which left it in doubt whether it contained one or two causes of action, and whether the plaintiff relied on the defendant's relation as her attorney and solicitor, or on an express promise by him as the foundation of the duty, the breach of which was complained of, was directed to be amended in those particulars.

THE first paragraph of the summons and plaint complained that the defendant was heretofore, to wit, about the month of June, 1862, retained by the plaintiff as her attorney and solicitor to institute and prosecute a certain suit on her behalf in the Court of Chancery in Ireland, and for other purposes; and that as such attorney and solicitor the defendant became and was possessed of money of the plaintiff, properly applicable to and intended by the plaintiff, for the payment of a certain debt amounting to £20 7s. 8½d., then due by the plaintiff to one Edward Russell, of Dublin, and which debt the plaintiff then expressly ordered the defendant to pay out of the said sum so in his hands (to which the defendant assented); and that it thereupon became and was his duty as such solicitor and attorney to pay said debt; yet the defendant, in violation of his said duty, and having said money of the plaintiff in his hands for payment of said debt, neglected and refused to pay said debt; and afterwards, and in consequence of such refusal of defendant, to wit, on the 21st day of April, 1863, the said Edward Russell caused a writ of summons and plaint to issue against the plaintiff forth of her Majesty's Court of Common Pleas in Ireland, service of which writ was afterwards by an order of said Court duly substituted on said defendant, William Lewis, as the attorney for the plaintiff; and that said defendant was duly served with copies of said writ and order as such attorney as aforesaid, and that a judgment was subsequently en-

tered in said action against plaintiff by default for a sum of £32 2s. 6½d.; and that on being served with said writ and order as aforesaid it became and was the duty of said defendant to inform the plaintiff of the pendency of said action; but the defendant, neglecting his duty in that behalf, never informed the plaintiff of same, and the plaintiff in fact never received from the said William Lewis or from any other person any intimation whatsoever of said debt remaining unpaid, or of the proceedings so instituted by the said Edward Russell, or of the judgment so recovered, but remained entirely ignorant thereof until on the 20th day of November last she, the plaintiff was arrested under an execution upon the judgment so recovered by default against her in said action. And that by reason of such arrest and the neglect and misconduct of the defendant in the premises the plaintiff was compelled to pay a sum of £33 13s. 7½d., and was rudely and with great violence seized, dragged, and handled by bailiffs and others, and was imprisoned, and had otherwise endured great inconvenience and pain of body and mind to the plaintiff's damage of £1000. The second paragraph complained that the defendant was heretofore acting as the attorney and solicitor of the plaintiff; and while he was so acting, there being a debt due by the plaintiff to one Edward Russell amounting to £20 7s. 8½d., and action having been brought against plaintiff for recovery thereof an order was made by her Majesty's Court of Common Pleas in Ireland in said action, whereby the service of the writ of summons and plaint in said action was substituted upon the defendant as such attorney; and the defendant neglecting his duty in that behalf neglected to inform the plaintiff of said action, by reason of which judgment by default was entered against the plaintiff, and an execution on said judgment issued against her person; and plaintiff remained in entire ignorance of said proceedings until she was arrested under said execution, and was compelled to pay a large sum, to wit, the sum of £12 15s. 10d., as and for the costs of said action and execution; and by reason of the defendant's neglect and misconduct in failing to inform her of such proceedings, and allowing said execution to issue, the plaintiff was with great violence seized, dragged, and imprisoned, and suffered great inconvenience and pain of body and mind, and was greatly injured in her health and credit to the plaintiff's damage of £1000.

Macdonogh, Q. C. (with him *Byrne*), for the defendant applied that the first paragraph of the summons and plaint might be set aside as embarrassing. There are two causes of action contained in one count. By the 68th section of the Common Law Procedure Act, 1853, all facts stated in any summons and plaint, and not denied in the defence, shall be deemed to be admitted; and by the 70th section, in actions upon contract every defence by way of denial must traverse some one or more than one material matter of fact. If a summons and plaint like the present were to be allowed, defences would have to run thus:—"As to so much of the said count as charges, &c., and as to so much," &c. It is impossible to plead to a portion of a count. [*Monahan, C.J.*—There must be something on the record which covers the residue, but it need not be in the same plea.] This paragraph violates

the 34th General Rule, which directs that each cause of action in a summons and plaint shall be commenced in a new paragraph. [Monahan, C.J.—If it be uncertain whether there be one or two causes in the one count it must be set aside.] In *Redmond v. Butler* (4 Ir. C. L. R. 287), the copy of the plaint served on the defendant was not paragraphed, though there was a count for each cause of action, beginning with the words, "And the plaintiff further complains." The defendant was held not to be embarrassed, but there the statements and conclusions were regular. The plaint could not have been objected to for uncertainty. It could not have been the subject of demurrer under the old system. In an action against an attorney the party should state the duty, and show as many breaches of that duty as he pleases. Where there is an express promise and a legal obligation results from it, the cause of action is most accurately described in *assumpsit*. But where the law raises a legal obligation to do a particular act an action on the case founded on *tert* is the more proper form of action—1 Chitty on Pleading, 152. [Monahan, C.J.—To pay the money is not a duty arising out of being an attorney, but from the direction and the assent.] This is *assumpsit* so far as regards the first part of it.

Kelly, Q. C., and Dillon, contra.—This is an action on the case against an attorney as an attorney. The grievance and gist of the action is the not having paid the money which was placed in his hands for the purpose of paying as an attorney. The defendant having that money, and being directed by his client to pay it, keeps it in his pocket and allows an action to be brought. An order to substitute service is procured: the defendant allows the action to go on and the party is arrested. This is not *assumpsit*. [Keogh, J.—If you stopped there or added "and in consequence thereof," that would present one simple cause of action; but you go on to introduce a new duty.] It is aggravation. [Monahan, C.J.—It would be no plea to this count as it stands to traverse the latter part of it.] It was the defendants duty to pay the money, and it was an additional duty to caution his client. [Monahan, C.J.—Then there are two causes of action.] There is a distinction between actions *ex delicto* and *ex contractu*. We could not recover for the arrest even by averring special damage without what went before. A party may bring an action for several breaches of duty if in one transaction. [Monahan, C.J.—Would you not have a complete cause of action by stating that the defendant was your attorney, and being your attorney the Court made an order to substitute service; that it became his duty to communicate; that in violation of his duty he did not, and by reason of this the first you heard of it was that you were arrested. Would it be a good plea to the whole to say, I never saw your attorney at all?] It would. [Monahan, C.J.—I think it would not. What we want authority for is not that one count may have two causes of action, but that it may have two causes; and if it be uncertain if the first arise out of express promise or from, the relation of the parties. I am not aware of any law laying down that if an attorney recovers money in a suit, and if the client requires him to pay it to somebody, that he is bound to do so. No doubt, if he gets a letter to that effect he is bound

to answer, refusing to do so.] We are willing to strike out the words "to which the defendant assented." [Monahan, C.J.—If you do, we must set aside the plaint. Is your real case this: that the defendant got your money and assented to pay it over, and neglected to do so?] Yes. [Monahan, C.J.—Then you are embarrassing the case by making that depend on his position of attorney, for it is no matter whether he was or not.] Breaking and entering a house and converting the goods may be put together. [Monahan, C.J.—That is one transaction.] In *Galway v. Rose* (6 M. & W., 294), Baron Parke says in his judgment, "The declaration is good in whatever way it is viewed. If the first part of it be considered as two counts, then the word 'respectively' attaches a separate promise to each count, and the only objection would be that the second count is informally commenced. If, on the other hand, the declaration be viewed as one count only it is equally good, for then there are different causes of action arising out of different considerations, all of which are executed." If we did not set out these breaches it might be complained that we did not specify what we were going to rely on. The worst that can be said is, that this is pleading evidence. It is the combination of being the attorney and assenting that makes the duty.

Byrne in reply.—There is a substantial embarrassment. We are embarrassed if we do not know whether there is one cause of action or two. [Monahan, C.J.—We hold it embarrassing to that extent, but not substantially embarrassing.] There is a cause of action founded on contract.

MONAHAN, C.J.—We think the plaintiff should amend her plaint by making it appear distinctly whether she relies on the relation or on an express promise. All that is wanted in the first count is the breach of duty in not paying over the money and the damage resulting therefrom; that the party was arrested, &c. Let the averments be distinct. That the defendant received money from a third person on the plaintiff's behalf, &c. We shall not give costs on either side.

Rule accordingly.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

THE ATTORNEY GENERAL v. THE GREAT SOUTHERN AND WESTERN RAILWAY COMPANY—Nov. 20, 24, 1863; Jan. 12, Apr. 16, 1864.

Construction of statute—7 & 8 Vic. c. 85, s. 12—Meaning of the words "public baggage"—Case stated for the opinion of the court—3 & 4 Vic. c. 105, s. 50—Common Law Procedure Amendment Act, 1853, sec. 92.

By the 7 & 8 Vic., c. 85, s. 12, all railway companies incorporated are bound to convey the military and others mentioned, together with half a cart of personal luggage along with each person, at the rates and in the manner in said

section provided for, and all public baggage, stores, arms, and ammunition, and other necessities and things (except gunpowder and other combustible matters) at charges not exceeding twopence per ton per mile, the assistance of the military being given in loading and unloading such goods:—where, therefore, a brigade was moved from K. to C., and where a portion of said brigade was conveyed by the defendants in their carriages, along their line of railway from K. to C., the other and greater portion being marched along the high road, but where the whole baggage of both moving bodies of said brigade was carried by defendants along their line of railway, it was thereupon insisted by the defendants that they were not bound to convey as public luggage any greater proportion at the rate of two pence per ton per mile, than the baggage which belonged to the number of military who were travelling along their line. The Attorney-General on the other hand insisted that the defendants were bound to carry the entire baggage as public baggage, (except combustible materials), at the rate of twopence per ton per mile of the moving body, a sufficient number of the military being sent to load and unload same. Held, that the defendants were bound to convey as public luggage the entire baggage of the brigade (except gunpowder and other combustible matter) at the rate of two pence per ton per mile, from K. to C., quite irrespective of how the brigade was moved, whether conveyed by the defendants in the carriages, or marched along the high road.

When after information filed, but before issue joined, a case is stated by consent of plaintiff and defendant, for the opinion of the court under the 50th section of the 3 & 4 Vict., c. 105, it was Held, that that section has no reference to cases where issue is not joined. The 92nd section of the Common Law Procedure Amendment Act, 1853, which empowers to parties to state a case does not deal with informations.

CASE FOR THE OPINION OF THE COURT.

THIS was an information filed by her Majesty's Attorney-General to recover from the Great Southern and Western Railway Company the sum of £12 13s. 10d., alleged on the part of the Crown to have been an overcharge for the conveyance by that Company of the public baggage stores and other necessities belonging to the first battalion of her Majesty's 11th Regiment of Foot, (not being gunpowder or other combustible matter,) from the Kildare Station to the Cork Station, both on the Great Southern and Western Railway, in the year 1862, and for an overcharge for the conveyance of public baggage stores and arms belonging to the 8th Brigade of Her Majesty's Regiment of Royal Artillery, (not being gunpowder or other combustible matter,) from the said Cork Station to the Station at Kildare aforesaid, in the same year on the same railway. This case is stated for the opinion of the Court by consent of the parties, plaintiff and defendant, and by order of the Court. The Great Southern and Western Railway has, since the passing of the 7 & 8 Vic. c. 85, hereinafter mentioned, ob-

tained from Parliament new powers, and has been since that period authorised to do acts unauthorised by the provisions of any previous Act. By the said Act of the 7 & 8 Vict., c. 85, s. 12, it is enacted that all railway companies which had obtained such powers should be bound to provide such conveyance as in the said act is mentioned for her Majesty's military forces of the line, ordnance corps, or other forces, on their respective railways, at certain rates, for the conveyance of the officers, soldiers, and the wives, widows, and children of soldiers, at certain rates, in the said Act specified, and that all public baggage, arms, ammunition, and other necessities and things (except gunpowder and other combustible matters) should be conveyed at charges not exceeding twopence per ton per mile, the assistance of the military or other forces being given in loading and unloading such goods. In the month of October, 1862, it was deemed expedient by the general commanding her Majesty's military forces in Ireland, that the 1st battalion of her Majesty's 11th Regiment of Foot, the said regiment being part of her Majesty's military forces of the line, should be moved from Newbridge to Cork, and that an officer, and a number of soldiers, with the wives and children of the soldiers of the same regiment, should be conveyed by railway, and that the public baggage and arms of the said battalion should also be conveyed by the said Railway Company on their said railway, from their station at Kildare to their station at Cork; the distance on the said railway from the Kildare Station to the Cork Station was and is 136 miles, and that the remaining officers and soldiers of said battalion should march by the high road to Cork. That accordingly on the 1st day of October, in the year of our Lord, 1862, one officer, seventy-nine soldiers, ninety-two women, and fifty-five children, to the number in all of 227 persons with the public baggage and arms of the said battalion, amounting in weight to 52 tons and 12 cwt., no part of the same being gunpowder or other combustible matter, with a sufficient military force to load and unload the said baggage, stores, and arms were sent to the Kildare Station of and conveyed by the said Railway Company upon and by their said railway, from their said Kildare Station to their Station at Cork aforesaid; that the regiment, with the exception aforesaid, marched to Cork by the high road; that the proper sum for the conveyance of the officers and soldiers, and wives, widows, and children, was demanded and paid; that the fare for the conveyance of the public baggage, stores, and arms of the battalion from the Kildare station to the Cork station, at the rate of twopence per ton per mile, is £59 12s. 3d., which sum was tendered by an agent on behalf of her said Majesty to the station-master of the said railway company at the time of loading the said baggage and arms, to wit, on the 1st day of October, 1862, at the Kildare Station aforesaid; that the said master of the said railway company aforesaid refused to accept the said sum of £59 12s. 3d., for the conveyance of the same, and demanded the sum of £78 18s. as payment for the conveyance thereof, and then refused to have the said baggage stores and arms conveyed unless the said sum of £78 18s. was paid for the conveyance of the said public baggage, stores, and arms; that the

said railway company afterwards reduced the said charge by the sum of £7 18s. 3d., as it was found that the weight of 5½ tons, and 12 cwt., included the personal baggage of the officer and soldiers, who were conveyed on the same train with the baggage, then making the demand for the conveyance of the baggage, arms, and ammunition conveyed by the said Railway over and above the personal baggage of the officers and soldiers conveyed on the said railway amount to the sum of £70 19s. 9d., whereupon the said agent or officer on behalf of her said majesty paid to the said agent for the railway company the said sum of £70 19s. 9d., at the same time protesting that the same was an overcharge, and that the same was not admitted as a proper or just demand, and overpaid under necessity the said sum of £70 19s. 9d. being £11 7s. 6d. over the sum properly payable for carriage of the baggage and arms, at the rate of two pence per ton per mile; that in the same year 1862, it was deemed expedient by the general commanding her Majesty's military forces in Ireland, that her Majesty's 8th Brigade of her Majesty's Regiment of Royal Artillery (being part of her Majesty's ordnance corps), should be removed from Cork to Kildare, and that the guns and baggage of the said brigade of artillery should be conveyed by the said railway company on the said railway, from the station on the said railway at Cork, to the Kildare station, as also twelve non-commissioned officers, soldiers of the said regiment, and seven women and three children, the wives and children of soldiers of the same regiment; that accordingly in the month of July in the same year, the guns and public baggage of the said brigade of artillery, together with the soldiers and the wives and the children last-mentioned, and the guns and baggage, not being gunpowder or other combustible matter, with the said twelve soldiers as a sufficient military force to load and unload the said guns and baggage, were sent to the railway station at Cork, and conveyed by the said railway company upon and by the said railway, from the said Cork station to the Kildare station on the said railway; that the other officers and soldiers of said brigade did not travel by said train, but marched by road; that the weight of the guns and baggage so sent amounted to 3 tons 12 cwt., and the distance on the said railway from the Cork Station to the Kildare station, was and is 136 miles, and the charge for the guns and baggage at the rate of two pence per ton per mile amounts to 4l. 1s. 7d. but that the said railway company insisted on the payment of £5 8s. for the conveyance of the said guns and baggage, and refused to carry or deliver the same until the said sum of £5 8s. was paid for the carriage of the same, whereupon the said sum of £5 8s. was paid by an agent on behalf of her said Majesty to an agent of the said railway company, at the same time protesting that said sum of £5 8s. was an overcharge by the sum of £1 6s. 4d., and that the same was paid under necessity. The questions for the Court are—1st, Whether under the circumstances stated in this case, the Great Southern and Western Railway Company was bound to convey the baggage and other things which they were required to carry at the Parliamentary rate of two pence per ton per mile, a sufficient military force being sent to load and unload the

goods. 2ndly, Whether the said railway company in the event of a regiment of soldiers being marched by road is bound to convey on their railway the public baggage, stores, and arms of such regiment, the same not being gunpowder or other combustible matter, at the rate of two pence per ton per mile, although no officers or soldiers of such regiment travel in the train with the baggage other than and except a sufficient military force to load and unload the baggage stores and arms so conveyed. If the Court shall be of opinion that both or either of the above questions the railway company was bound to carry the baggage, stores, and arms thereon respectively mentioned, at the rate of two pence per ton per mile, then the judgment is to be entered for the Crown on both or either of the questions for the sum of £2 13s. 10d. or £11 7s. 6d., or £1 6s. 4d., as the Court shall decide; but if the Court should be of opinion that the railway company was not bound in either case, or was bound in one and not bound in the other case, to carry the baggage, stores, and arms, at the rate of two pence per ton per mile, then the judgment shall be entered for the said railway company on both or one of the questions as the Court shall decide; the Court to be at liberty to amend this case, and to draw such conclusion as a jury might."

W. H. Griffith appeared for the Attorney-General.—By the 5th & 6th Vict., cap. 55, section 20, it was enacted, "that whenever it shall be necessary to move any of the officers or soldiers of her Majesty's forces of the line, ordnance corps, marines, military or the police force by any railway, the directors thereof shall and are hereby required to permit such forces respectively, with their baggage, stores, arms, and ammunition, and other necessities and things, to be conveyed at the usual hours of starting, at such prices, and upon such conditions as may from time to time be contracted for between the Secretary-at-War and such railway companies for the conveyance of such forces, on the production of a route or order for their conveyance signed by the proper authorities." The practice after the passing of this Act was for the railway company, and an agent or officer on behalf of the Crown, to bargain on the sum to be given by the Crown to the Companies, this system was altered in the year 1844, by the passing of the 7 & 8 Vict., c. 85, s. 12. By that section, after reciting the 5 & 6 Vict., c. 55, s. 20, enacts that "all railway companies which have been or shall be incorporated by any Act of the present or any future session, shall be bound to provide such conveyance as aforesaid for the said military, marine, and police forces, at fares not exceeding two pence per mile for each commissioned officer proceeding on duty, such officer being entitled to conveyance in a first-class carriage, and not exceeding one penny for each soldier, marine, and private of the militia or police force, and also for each wife, widow, or child above 12 years of age of a soldier entitled by Act of Parliament, or by competent authority to be sent to their destination at the public expense, children under three years of age so entitled being taken free of charge, and children of three years of age or upwards, but under twelve years of age so entitled, being taken at the half price of an adult; and such soldiers,

marines, and privates of the militia, or police force, and their wives, widows, and children so entitled, being conveyed in carriages, which shall be provided with seats, with sufficient space for the reasonable accommodation of the persons conveyed, and which shall be protected against the weather; provided that every officer conveyed shall be entitled to take with him 1 cwt. of personal luggage without extra charge, and every soldier, marine, private, wife or widow, shall be entitled to take with him or her $\frac{1}{2}$ cwt. of personal luggage, without extra charge all excess of the above weights of personal luggage, being paid for at the rate of not more than one halfpenny per pound, and all public baggage, stores, arms, ammunition, and other necessaries and things (except gunpowder and other combustible matters, which the company shall only be bound to convey at such prices and upon such conditions as may be from time to time contracted for between the Secretary at war and the company) shall be conveyed at charges not exceeding two pence per ton per mile, the assistance of the military or other forces being given in loading and unloading such goods." Under this last section, all public arms and stores sent by the line of railway by the commander-in-chief, should, as public baggage, be conveyed at two pence per mile. By *public baggage* it is submitted is meant the baggage belonging to any moving brigade or regiment.

Brewster, Q.C., contra.—The expression "public baggage" in the sec. of the Act above last mentioned is the baggage belonging to so much of the brigade or regiment as is in motion on the railway. Under this *nomen generalissimum*, "public baggage," might be included the whole furniture of Dublin Castle, nay all the furniture of the Government offices might be sent along the line of railway for two pence per ton per mile, with a single man to attend thereto, and all the rest of the men might be marched by the high road. [*Deasy, B.*—What is the construction of the Act as contended for by the railway company? If the Government send a thousand men by the railway, are not the company bound to send the luggage belonging to that number of men?] The company are bound to carry the luggage belonging to the thousand men as public baggage, if the men are also carried therewith, and charged at two pence per ton per mile, a price far under what would be charged for any other body, not military, transporting goods. [*Hughes, B.*—Do you contend that if a regiment of 800 men strong is to be moved from Dublin to Cork, and that 100 men, that is, one-eighth of that regiment, are sent by the railway, and 700 men are marched by the high road, then that the company are bound only to carry one-eighth of the baggage at the rate of two pence per ton per mile?] That is precisely the view taken by the railway company. [*Deasy, B.*—Your refusal was not a refusal to carry a portion of the luggage or public stores, but a refusal to carry the whole. The allegation is, that you refused to carry any portion, and it does not appear that you agreed to carry any portion of public stores in proportion to the number sent by the railway].

Coffey, on the same side.—We may be constrained to ask for leave to amend that portion of the case should it become necessary so to do. The construction which the

Solicitor-General sought to affix to the words "public baggage" would involve an absurdity; thereby the railway company would lose considerably, inasmuch as the real gain was on the transport of the men, the conveyance of the luggage being merely at a nominal sum, and far under what the public paid per ton for baggage. An Act of Parliament shall not be construed in a manner so as to inflict a flagrant injustice. In *Perry v. Skinner* (2 M. & W. 471), Baron Parke said that "The rule by which we are to be guided is to look at the precise words, and to construe them in the ordinary sense, unless it would lead to any absurdity or manifest injustice, and if it should so do, that could not have been the intention of the Legislature, we must put a reasonable construction on their words."

The Solicitor-General in reply.—The case here is not that put by the other side of the whole furniture of Dublin Castle being transported, but that the baggage of a regiment in motion, no matter how that regiment is moved, is public baggage, and as such must be conveyed at the rate of two pence per ton. [*Fitzgerald, B.*—What is public baggage? Does it belong to the moving body?] Yes, to the moving body, no matter how that body is moved. Put the case of an insurrection or invasion. What an absurdity would not the construction contended for on the other side involve, could the company refuse to convey baggage then as public baggage. This question deeply affects every railway company in the kingdom.

[*Fitzgerald, B.*—What is occurring to me is, that we have no jurisdiction whatever in this matter; by the 30th section of 3 & 4 Vict., c. 105, power was given to "the parties in any action or information after issue joined to state the facts of the case for the opinion of the Court, and to agree that a judgment shall be entered for the plaintiff or defendant, as the Court shall think fit, and judgment shall be entered accordingly." Is not that Act repealed by the Common Law Procedure Act, 1853 (16 & 17 Vict., ch. 113, Schedule A)?] The 30th section is repealed by Schedule A. of the Common Law Procedure Act, only so far as it relates to personal actions and actions in ejectment, but in every other case by the 3rd section it is in full force. The third section is as follows:—"From and after the commencement of this Act, the several Acts and parts of Acts set forth in the Schedule A. to this Act annexed, so far as the said Acts or parts of any Act relate to personal actions or actions of ejectment in the Superior Courts of Law in Ireland, and no further or otherwise, and to the extent to which such Acts or parts of Acts are by such schedule expressed to be repealed, are hereby repealed, except as to anything done before the commencement of this Act, and except so far as may be necessary for the purpose of supporting and continuing any proceeding heretofore taken upon any action brought before the commencement of this Act, and except as to the recovery or application of any penalty for any offence which shall have been committed before the commencement of this Act." Therefore, that section, as far as the present case goes, is in full force; yet even apart from that section, the Court has full power under the 92nd section of 13 & 14, Vic. c. 113 (Common Law Procedure Act). [*Fitzgerald, B.*—That section does not deal with informations. *Hughes, B.*—I apprehend that neither under

the sections of the Common Law Procedure Act, nor of Pigot's Act, has the Court any jurisdiction. In both those sections, jurisdiction is given to the Court to deal with the case where the parties state a question for the opinion of the Court. The expression "parties," I apprehend, has reference to subjects of the Crown, and not to the Crown itself.]

DEASY, B.—This is a case of great importance to the Crown and to the defendants. My brother Fitzgerald suggests impanelling a jury, and taking a verdict *pro forma*; the Court will, on a further day, hear counsel on the point of jurisdiction.

Nov. 24.—*The Solicitor-General*, on the part of the Crown, said that he was not prepared to rely on the 92nd section of the Procedure Act; he, however, thought that the parties were fully authorised by the 50th section of Pigot's Act, to state the facts for the opinion of the Court.

Jan. 12, 1864.—FITZGERALD, B.—In this case of *The Attorney-General v. The Great Southern and Western Railway*, we expressed a doubt last Term whether we had any jurisdiction; the Solicitor-General then referred us to the 50th section of the 3 & 4 Vict., c. 105. The Court are of opinion after considering the point, that there is no jurisdiction under that statute; by that section it is enacted that it shall be lawful for the parties in any information after issue joined by consent, and by order of any of the judges of the superior Courts, to state a case for the opinion of the Court, and the parties are thereby empowered to agree that judgment shall be entered for the plaintiff or defendant; that action has no reference to cases where issue is not joined. Issue has not been joined here; as the case now stands, we have no jurisdiction, and that we cannot therefore proceed.

On agreement between the Crown and the defendant, the suggestion thrown out by Fitzgerald, B., was adopted, and the following Order was then made:—

"By consent let the special case be turned into a special verdict to be taken before the Lord Chief Baron at the next Nisi Prius sittings. The judgment to be given thereon without further expense or argument."

The above facts were found by special verdict at a trial had at the sittings after Hilary Term, 1864.

April 16.—FITZGERALD, B., (having read the facts which were found by the special verdict, and also the 12th section of the 7 & 8 Vict., c. 85, which is given above in Mr. Griffith's argument).—The question we have now to decide is, whether the charge made for conveying the baggage was an overcharge or not. The Attorney-General contends that the company were bound to carry as public baggage the luggage of the regiment, same not being gunpowder or other combustible material, at the rate of twopence per ton per mile, when a sufficient number of military were sent in charge to load and unload same, and that, no matter whether the whole brigade was carried or not. The defendants, on the other hand, insist that they were only bound to carry such luggage as public baggage as belonged to so much of the brigade as were carried on their railway at the rate provided for, and that the baggage so conveyed by them beyond the actual luggage of the men carried was not

public baggage in the contemplation of the 12th section. I am unable to acquiesce in this view of the case. It seems to me that when the public luggage is placed in the charge of any number of men belonging to the military, police, or other forces travelling along the line, that that luggage is public baggage. It is in the charge of the men travelling; it is theirs in the only sense in which public baggage can be theirs; it is committed to their charge, and therefore the company were bound to carry it. My brother Deasy, who is engaged at the Consolidated Nisi Prius, and for whom I have read this judgment, fully concurs in the view I have taken of the case.

HUGHES, B., observed that this was the unanimous opinion of the Bench.

Judgment for the Crown.

SCORE v. MURPHY.—Jan. 30.

Pleading—Embarrassing defence—Immaterial issue.

When the summons and plaint, which was for malicious prosecution, complained that the defendant, falsely and maliciously, and without reasonable or probable cause, on the 7th February, 1863, appeared before one W. M., a justice of the peace in and for the county of C., and charged the plaintiff that she did, on the 16th January, 1863, at Cootehill Quarter Sessions, at the hearing of, &c., commit wilful and corrupt perjury in giving her evidence; and upon said charge defendant procured said W. M. to issue a summons in writing, signed by said W. M., wherein the defendant was complainant, and the plaintiff was defendant, whereby the plaintiff was commanded to appear as defendant on the hearing of said complaint, &c.; "and the plaintiff saith that in obedience to and pursuance of said summons she did personally appear at the time and place mentioned in said summons at said petty sessions before certain justices in and for said county presiding at such sessions; but the defendant not having any grounds or evidence to support said false and malicious charge, did not swear any depositions against the plaintiff before the said justices, and the defendant has not further prosecuted his said complaint, but has deserted and abandoned same, and the said prosecution is wholly ended and determined." Defendant pleaded thereto "That the defendant did support the said charges by sworn evidence before the said justices, who thereupon duly made an order that informations should be sent forward to the assizes in and for said county, and that the defendant has not deserted or abandoned his said complaint and prosecution, nor is same ended and abandoned, as in said counts alleged, and therefore," &c. Held, that the defence should be set aside as raising an immaterial issue as to whether the evidence taken before the magistrates was reduced to writing or not.

THIS was an application to set aside the second defence to the first and second counts of the writ of summons

and plaint as embarrassing. The plaint was as follows:—"Victoria, &c. Charles Murphy is summoned to answer the complaint of Anne Scorr, the plaintiff, who complains, for that before the committing of the grievances by the defendant herein-after mentioned, to wit, on 16th of January, 1863, in the Civil Bill Court in and for the County of Cavan, holden at Cootehill, in the division of Cootehill and for said county, before the chairman of the quarter sessions of the said county, a certain action of ejectment by civil bill for overholding was tried, wherein the defendant was the plaintiff, and one Rose M'Keon was defendant; and the plaintiff further saith, that upon the said trial the plaintiff was duly sworn and examined, and gave certain evidence as a witness for and on behalf of the said Rose M'Keon on said trial before said chairman. And the plaintiff further saith that afterwards the defendant, falsely and maliciously, and without reasonable or probable cause, on the 7th day of February, 1863, appeared before William Murray, a justice of the peace in and for the County of Cavan, and charged the plaintiff that she did, on the said 16th of January, 1863, at Cootehill Quarter Sessions, on said day, and at the hearing of said action of ejectment pending in said Court, commit wilful and corrupt perjury in giving her said evidence, and upon said charge procured the said justice to issue a summons in writing signed by said justice, wherein said C. Murphy, the now defendant, was complainant, and the plaintiff was defendant, and whereby, after reciting said charge, the plaintiff was commanded to appear as a defendant on the hearing of said complaint at Cootehill Petty Sessions in said county on the 14th day of February, 1863, at eleven o'clock in the forenoon, before such justices as should be then there. And the plaintiff further saith, that afterwards, to wit, on the 8th day of February, 1863, the defendant caused the plaintiff to be served with the said summons in the said town of Cootehill, within the said petty sessions district; and the plaintiff saith that, in obedience and pursuance of said summons, she did personally appear at the time and place mentioned in said summons at said Petty Sessions before certain justices in and for said county presiding at said sessions, but the defendant, not having any grounds or evidence to support said false and malicious charge, did not swear any depositions against the plaintiff before the said justices, and the defendant has not further prosecuted his said complaint, but has deserted and abandoned same, and the said complaint and prosecution is wholly ended and determined, and by reason of the premises the plaintiff has been injured in her reputation, and suffered pain of body and mind, and was prevented from attending to her business, and incurred expense in necessarily preparing to defend, and in defending herself from said charge." 2nd count—"And for that the defendant, falsely and maliciously, and without any reasonable or probable cause, on the 7th day of February, 1863, appeared before William Murray, a justice of the peace in and for the County of Cavan, and charged the plaintiff that she did, on the 16th day of January, 1863, at Cootehill Quarter Sessions, at the hearing of a certain ejectment, commit wilful and corrupt perjury, and upon said charge procured the said justice to issue a summons in writing signed by the said justice, wherein

the said defendant was complainant, and the plaintiff was defendant, whereby, after reciting said charge, the plaintiff was commanded to appear as a defendant on the hearing of said complaint at Cootehill Petty Sessions on the 14th day of February, 1863, at 11 o'clock in the forenoon, before such justice as should be there; and the plaintiff further saith that afterwards, to wit, on the 8th day of February, 1863, at Cootehill aforesaid, and within the said petty Sessions district, the defendant caused plaintiff to be served with the said summons, and in obedience and pursuant to said summons, she did personally appear at the time and place mentioned in said summons, at the said petty sessions, before certain justices in and for said county presiding at said sessions; but the defendant not having any ground or evidence to support the said false and malicious charge, did not swear any depositions against the plaintiff before said justices, and the defendant has not further prosecuted his said complaint, but has deserted and abandoned the same, and the said complaint and prosecution is wholly ended and determined, and by reason of the premises the plaintiff has been injured in her reputation, and suffered pain of body and mind, and was prevented from attending to her business, and incurred expense in necessarily preparing to defend herself, and in defending herself from the said charge, to the plaintiff's damage of £250." To the above plaint the defendant filed the following defences:—"The said Charles Murphy appears and takes defence to the action of the plaintiff, and says, that admitting the commission of the alleged grievances, he did not commit the same, or any of them, maliciously, nor without reasonable or probable cause, in manner and form as in the plaint is alleged;" 2ndly, and for a further defence by leave of the Court that the charge, complaint, and prosecution respectively mentioned in the first and second counts of said summons and plaint are *one and the same*, and that the defendant did support the said charges by *sworn evidence* before the said justices, who thereupon duly made an order that informations should be sent forward to the Assizes in and for the said county, and that the defendant has not deserted or abandoned his said complaint and prosecution, nor is same ended and abandoned as in said counts alleged, and therefore," &c. The grounds on which the present application was made were, firstly—because the defendant by the allegation, that the complaint and prosecution in the first and second count mentioned were one and the same, has unduly attempted to confine the plaintiff to one cause of action in respect of the causes of action in the first and second counts of the plaint, respectively mentioned; secondly—because it alleged by way of defence to the said action that the defendant did support the said charges in the plaint mentioned by sworn evidence before the said justices, who thereupon duly made an order thereon that informations should be sent forward to the assizes for the County of Cavan, and also traversed the allegations in said counts respectively contained, namely, that the defendant deserted and abandoned his said complaint, and because the issue proposed to be raised by the said new matter introduced into said defence is immaterial, and because the said defence traversed what was not alleged in either of the

counts of the plaint, viz., that the defendant supported the said charges by sworn evidence before said justices, and because the defence was double and bad for duplicity, and because said defence was in other respects uncertain, informal, and insufficient.

M'Mahon (with *John Richardson*) in support of the motion.—The second defence is bad in alleging that the charge, complaint, and prosecution respectively mentioned in the first and second count of the plaint, are one and the same—*Edmonds v. Walker* (2 Chitty R., 291), there the declaration having in the first and second counts alleged the composing and publishing of two libels, the defendant in his plea of justification stated, "that the libels so set forth were one and the same supposed libel, and not other or different supposed libels," and it was held on demurrer that the pleas were bad on this ground. *Vide* also *M'Curdy v. O'Driscoll* (3 Tyr. 571); 3 Chitty on Pl. 7th ed., 543. The second objection to the plea was that it was alleged that the defendants supported their charge by sworn evidence before the justices; this plea is faulty in thus setting forth evidence taken before the magistrate in a manner not contemplated by the 14th section of the Petty Sessions Act, 14 & 15 Vic., c. 93, s. 14; that section directs that evidence in indictable offences shall be by taking depositions on oath and in writing (not as alleged in the plea by mere sworn statements), and such depositions shall be read over to and signed by the witnesses, and also by the justices; and the 19th section of the said last-mentioned Act directs how the informations are disposed of, viz., the justices at Petty Sessions shall transmit, or cause the Clerk of Petty Sessions to transmit the informations received from any justice out of petty sessions, &c., to the Clerk of the Crown of the county where the same shall relate to any matter to be tried at the assizes, or to the Clerk of the Peace where same shall relate to any matter to be tried at the quarter sessions; it thus appears that mere sworn evidence, not reduced to writing, is a nullity, and no issue could be sent to a jury thereon. The proper plea to have put in would have been simply a traverse of the determination of the prosecution, and no more; but the plea as it now stands, raises an immaterial issue, namely, whether the evidence taken before the magistrates was reduced to writing or not.

James P. Hamilton, contra.—The first objection cannot prevail; the defence accords with the system of pleading introduced by the Common Law Procedure Act, s. 56. The pleading is good in substance, and therefore sufficient. The 81st sec. of the Act enacts that every defence or other pleading which shall, with all reasonable clearness and distinctness, state all matters necessary for the defence, shall be sufficient.

Prior, C. B.—The first objection raised to the pleading is upon mere technical grounds.

HUGHES, B.—Upon the second ground, the plea is bad, as raising an immaterial issue, namely, whether the evidence taken before the magistrates at Cootehill Petty Sessions was sworn, or was deposed to and committed to writing as required by the Petty Sessions Act.

Defence set aside.

FOX v. BRODERICK.—April 16.

Pleading—Action for libel—Defence—Publication of libel by mistake—Demurrer thereto.

To a summons and plaint for composing and publishing a certain libel (which libel in substance charged that the plaintiff, while in defendant's employment as his shop assistant, received certain monies due to defendant by a customer, which he, the plaintiff, failed to account for, and fraudulently converted same to his own use). Defendant pleaded in effect, after stating facts by which he was induced to believe the truth of the charge in the libel set forth, that the libel complained of was in the form of a letter intended by the defendant to be written and addressed to the plaintiff, and to be received only by him; that the letter was written bona fide, and without malice, and was intended to obtain payment of certain monies received by the plaintiff while in defendant's employment, and that the letter was sealed, and by pure mistake directed to one K., and not to the plaintiff; that K. was then the employer of the said plaintiff, and received same in due course of post. On demurrer to the defence, it was held, that the averment of publication by mistake was no answer to the cause of action.

THIS case came before the Court on demurrer taken by the plaintiff to the defendant's fourth defence. The summons and plaint was for libel, and complained, "For that whereas the plaintiff, before and at the time of the committing of the grievances herein-after mentioned, was and now is a shop assistant, and hath always exercised and still exercises the trade and calling of a shop assistant, and whereas the said plaintiff, before and at the time of the committing of the grievances herein-after mentioned, was employed in a position of trust and confidence as shop assistant with one Edward Keevil, yet the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff in his good name and reputation, and to cause it to be suspected and believed that he the said plaintiff was guilty of embezzlement, misconduct, and dishonesty in his said trade and calling, falsely, wickedly, and maliciously, did compose and publish, and procure to be composed and published, and did deliver and publish to the said Edward Keevil of and concerning the plaintiff, and of and concerning him in relation to his trade and calling a certain false and malicious libel in the words and figures following, that is to say, "Mr. Fox (meaning the plaintiff), your letter to Mr. Carroll has been handed me (meaning the defendant) regarding a small balance against Mr. Luke M'Dermott, which debt you contracted with Mr. M'Dermott (meaning the said Luke M'Dermott) while in my employment, and which still appears to be due me. May I request the amount in stamps before Saturday next, 4s. 10d.; if not, I will hand it over for collection. Mr. Carroll has no recollection whatever of its being paid; he distinctly denies your telling him it was paid at any time. Yours, Michael Broderick (the defendant). Mr. Carroll will prove this on oath" (meaning thereby that the plaintiff, while in the employment of the defendant as shop

assistant, had been guilty of embezzlement and fraudulent and dishonest conduct, and had not paid to the defendant, or placed in his till, as was the duty of the plaintiff, the said balance of 4s. 10d. received by the plaintiff as the produce of goods sold for and on behalf of the defendant, but that the plaintiff had applied the same to his own use, to the plaintiff's damage of £300.

And for a further cause of action the plaintiff says, that whereas the plaintiff, before the committing of the grievances herein-after mentioned, had been retained and employed as shop assistant by the said defendant, and whereas as such shop assistant it became and was the duty of the said plaintiff to place in the till of the said defendant the produce of all goods sold by the plaintiff as shop assistant for the defendant, and he, the plaintiff hath, at all times, and in all instances, faithfully performed said duty, and hath faithfully performed all other duties of said employment, and whereas the plaintiff, before and at the time of the committing of the said grievances, had quitted and left the service of the said defendant, and was employed by and in the service of one Edward Keevil as shop assistant, yet the defendant, well knowing the premises, but contriving to injure the plaintiff in his said trade and calling, and to bring him into disrepute more particularly with the said Edward Keevil, and to cause it to be believed that the said plaintiff had been guilty of gross misconduct in his trade and calling of shop assistant, falsely and maliciously composed and published, and procured to be composed and published, and did compose and deliver to the said Edward Keevil of and concerning the plaintiff, and of and concerning him in his calling of shop assistant, a certain malicious, false, and defamatory libel in the words and figures following, that is to say, "Mr. Fox (meaning the plaintiff,) your letter to Mr. Carroll has been handed to me regarding a small balance against Mr. Luke M'Dermott, which debt you contracted with Mr. Luke M'Dermott (meaning the said Luke M'Dermott) while in my employment, and which still appears to be due me. May I request the amount in stamps before Saturday next, 4s. 10d.; if not I will hand it over for collection. Mr. Carroll has no recollection whatever of it being paid; he distinctly denies your telling him it was paid at any time. Yours—M. Broderick. Mr. Carroll will prove this on oath (meaning thereby that the plaintiff, while in the employment of the defendant as shop assistant, had grossly misconducted himself in reference to a certain balance of 4s. 10d. due to the defendant, and received for him by the plaintiff, being the produce of goods sold by the plaintiff for the defendant as shop assistant, that he, the said plaintiff, had not paid same, as was his duty to the defendant, or placed it in his till, or otherwise accounted for same with the defendant, so that he, the plaintiff, was and still remained accountable to the said defendant for the same, and that one Charles Carroll, a book-keeper in the service of the defendant, would prove on oath that the plaintiff was guilty of misrepresentation in writing to said Charles Carroll that he, plaintiff, had received the money so due by the said Luke M'Dermott, and placed the same in the defendant's till, and that he, the plaintiff, had, as was his duty, informed the said

Charles Carroll that the said balance was paid, to the plaintiff's damage of £300."

To the above plaint the following defences were filed:—"The said Michael Broderick, the defendant, appears and defends the action of the said Denis Fox, the plaintiff, and says as to each and every of the several paragraphs in the plaint mentioned, and for defence thereto separately and distributively that the words, the composing and publishing whereof are by said plaint respectively complained of are not, nor is any of them, a libel, as in said several paragraphs respectively alleged.—2nd. And for further defence to each and every of the several paragraphs in the plaint mentioned, and for defence thereto separately and distributively, the defendant says that he did not compose or publish the said words in any of the said paragraphs respectively mentioned in the defamatory senses therein respectively alleged.—3rd. And for further defence to each and every of the several paragraphs in the plaint respectively mentioned, and for defence thereto separately and distributively, the defendant says that he did not publish, or cause or procure to be published, the said supposed libel as in each or any of the said several paragraphs of the plaint respectively alleged and stated.—4th. And for further defence to each and every of the several paragraphs in the plaint respectively mentioned, and for defence thereto separately and distributively, the defendant says that before the writing, composing, or publishing of said supposed libel in each and every of said paragraphs respectively mentioned and set forth, he, the defendant, carried on trade as a general country shopkeeper, to wit, at Castlereagh, in the County of Roscommon; and defendant further says that the plaintiff was for a time in defendant's employment and service as a shop assistant in defendant's said establishment as aforesaid, and defendant further says, that whilst plaintiff was so in defendant's said employment, a certain person named, to wit, Luke M'Dermott, obtained and purchased on credit from plaintiff, as such shop assistant of defendant, certain goods of defendant's from and out of his, the defendant's, said establishment, to wit, goods of the price and value of four shillings and ten pence; and defendant further says, that plaintiff duly entered the fact of the sale of said goods to said M'Dermott in a certain ledger or book of defendant's kept for such purpose in his, the defendant's said establishment; and defendant further avers and says, whilst plaintiff was so in defendant's said establishment, he, the defendant, had also employed therein a certain person named Carroll, who acted for defendant in the capacity of book-keeper; and defendant avers that it was the duty of plaintiff, whilst in defendant's employment, on each occasion when he, the plaintiff, was paid by a customer any money for or on account of goods previously sold on credit, immediately thereupon to inform defendant's said book-keeper of the fact of such payment having been so made, in order that said book-keeper should and would thereupon write off and enter the fact of such payment in his, the defendant's, said books so containing the entry of such previous sale on credit of said goods; and defendant avers and says that plaintiff quitted his, the defendant's, employment, to wit, about the end of October, 1863, and subsequently thereto, and before, and

at the time of the alleged composing and publishing of said supposed libel in each of said paragraphs of the plaint respectively mentioned and stated; he, the plaintiff, had entered, and then was, in the employment of one Mr. Edward Keevil, of No. 27 Merchant's Quay, in the city of Dublin; and defendant further avers, that shortly after he, the plaintiff, so quitted his, the defendant's, said employment, and whilst he, the plaintiff, was so then in the said employment of said Mr. Keevil, his, the defendant's, attention was called to the fact, that said account of said M'Dermott appeared by his, the defendant's, said books, and by the said entry therein in plaintiff's handwriting not to have been paid, and that same was then an existing debt due to defendant by said M'Dermott, and thereupon defendant, *bona fide* and honestly believing that said debt was still due to defendant by said M'Dermott, he, defendant, caused an application to be made to said M'Dermott for the amount of his said account, and said M'Dermott thereupon, and in reply to such application for payment, alleged that he had paid the amount of his account to him, the plaintiff, whilst he was in his, the defendant's said employment, and defendant says that he thereupon made enquiries of his said book-keeper whether he was aware of such payment having been in fact so made to plaintiff, and said book-keeper thereupon stated to defendant that he was not, and that if he had heard of such payment from plaintiff, or had known thereof, he would forthwith have marked off same in his, defendant's, said books, and defendant says that he then *bona fide* believed the statements so then made to him by his said book-keeper; and defendant avers that he thereupon caused his said book-keeper to write to plaintiff (who was then in said Mr. Keevil's employment, at No. 27 Merchant's-quay, Dublin,) in reference to said transaction, and for the purpose of enquiring from plaintiff whether the said debt was still due or not, and defendant says that his said book-keeper in reply to said letter so written by him to plaintiff for said purpose, received a reply from plaintiff, stating amongst other matters that said debt so due to defendant by M'Dermott was paid, and that he the plaintiff had, whilst in defendant's said employment, told him, the said book-keeper, that it was so paid; and defendant says that said last-mentioned reply of plaintiff was handed to defendant by his said book-keeper, who thereupon assured and stated to defendant that the plaintiff had never informed him of such debt having been so paid or handed him the amount thereof, or accounted with him therefor, and that he the said book-keeper never was aware that same had been paid until it was so as aforesaid stated to be so by said M'Dermott and by plaintiff, and said book-keeper thereupon said to defendant that he was ready to depose on oath that plaintiff had not so informed him of said payment, and that his, the plaintiff's allegations in that behalf were false; and defendant avers that he then, and down to and at the time of the said alleged composing and publishing of said supposed libel in each of said paragraphs respectively mentioned *bona fide* and honestly, believed the said statements so then made to him by his said book-keeper were true, and that plaintiff had so received said money of defendants by virtue of his said em-

ployment, and whilst in his the defendant's said employment, and that he had made a false statement to defendant's said book-keeper in relation to the fact of his having informed said book-keeper that the said debt had been so received by him or paid, and *bona fide* believing that the said plaintiff had not disclosed such fact to his said book-keeper, or accounted for or paid said money so received by the plaintiff to the defendant, or to defendant's said book-keeper, or put or paid same into defendant's till, or otherwise accounted therefor, and *bona fide* believing that his the plaintiff's statements and allegations, concerning the said transaction, were untrue; and that he had not disclosed the fact of his having been so paid said money whilst in defendant's said employment, or accounted for or paid over same into his, the defendant's, said establishment, or for defendant's use, and *bona fide* believing that the statements, and charges, and imputations made in and by said supposed libel in each of said paragraphs respectively mentioned, were respectively true in fact, he the defendant afterwards, to wit, at the said times, when and so forth as in each of said paragraphs respectively mentioned, composed and published the said supposed libel in the words and figures as in each of the said paragraphs respectively stated, and defendant says that the said publication was in the form of a letter written by defendant, and intended by him to be transmitted by post to the plaintiff only; and that he, the defendant, wrote said letter so intending same only to be read by plaintiff himself, and not otherwise, and same was so written by defendant honestly and *bona fide*, and for the sole purpose of enforcing a settlement or explanation of said transaction from plaintiff, and under the *bona fide* belief that plaintiff had in reference to the said money so paid to him, so acted as aforesaid, and as so imputed to him by defendant, by said supposed libels respectively, and as in each of said paragraphs set forth, and defendant at the time he so wrote and published said letter *bona fide* and honestly, believed the statements and charges therein, and thereby imputed to plaintiff to be respectively true in substance, and same was so written and published by defendant honestly and *bona fide*, and without malice; and defendant avers and says that immediately upon so writing said letter so intended by defendant solely for plaintiff, and to be transmitted by post to plaintiff, he the defendant, enclosed said letter in an envelope which was securely sealed, or otherwise fastened or secured, so that no person without forcing open said envelope could read said letter enclosed therein; and defendant further avers that after having so enclosed said letter in said envelope, he the defendant unwittingly, and by a pure and honest oversight and mistake, omitted to write plaintiff's name on the said envelope, as being the person for whom said letter was so intended by the defendant, and he, the defendant, instead thereof merely directed said letter to said

M'Keevil, No. 27 Merchant's-quay, Dublin, and thereupon he the defendant posted said letter so erroneously addressed as aforesaid; and defendant says that the error so committed by defendant in the superscription or address on said envelope so written by defendant was an honest and *bona fide* mistake or oversight of defendant's, and was not made or occasioned designedly, or from or by reason of any indirect motive or design, or wilful neglect, or default of defendant's; and defendant says that the publication of said supposed libel in each of said paragraphs of the plaint respectively mentioned was the delivery by the post office authorities of the said letter intended by defendant solely for plaintiff, but so erroneously addressed as aforesaid at his, the said Edward Keevil's said establishment, at No. 27 Merchant's quay, Dublin, and which letter, by reason of said erroneous address thereon, was received and opened by the said Edward Keevil, or by some one acting for him in his said establishment, and duly authorized by said Edward Keevil to open his letters before same reached the plaintiff, and which is the alleged publication in each of said paragraphs respectively complained of, and defendant says that the said mistake so committed by him in the address on said letter was not discovered by plaintiff until after said letter had been so delivered and published as aforesaid, and that in so writing and publishing said alleged libel, he, the defendant, acted honestly, *bona fide*, and without malice towards the plaintiff; and, therefore," &c.

To the above fourth defence plaintiff demurred, and the following were the points of demurrer:—First, because the plea does not show that the libel, the publication, and defamatory sense of which it admits, was written and published upon a privileged occasion. Secondly, because the publication by mistake in the manner and form in said defence alleged is no answer to the cause of action in the summons and plaint stated. Thirdly, because the publication of the libel by mistake in the manner and form in the defence alleged, does not rebut the legal inference of malice. Fourthly, because the said defence shows that the said alleged mistake occurred through the negligence of the defendant, and his want of due and proper care. Fifthly, because the said defence confesses the cause of action in the summons and plaint set out, and does not avoid the same.

M'Dermott, in support of the demurrer, said, that if this were a good plea of privilege, the legal inference of malice would be undoubtedly rebutted; but the plea bore no affinity to such a plea, and conformed to no known defence of a plea of that character. A great number of facts were set forth to establish that the defendant had cause to suspect the plaintiff, and was justified in addressing to the plaintiff himself the defamatory matter. This would not be an actionable publication; the rule which exempts from civil responsibility, publications not made to third parties, is universal, neither needing nor admitting privilege. Whether the facts set forth are true or false, the defendant incurred no civil liability by publishing to the plaintiff, the facts showing that he was entitled to do so material, and therefore not traversable. Counsel stated the definition of a plea of privilege from *Harrison v. Bushe* (5 El. & Black, 348) adopted by Lord

Campbell. All the cases require that a privileged communication should be made to a party having a duty or interest to receive it. *Ex confesso*, Mr. Keevil was not the proper recipient of such a communication. The plea, if true, rebutted actual malice, not legal malice, which may and often does co-exist with the utmost honesty of intention. The actual circumstances did not warrant the publication actually made. An averment of mistake does not rebut the legal inference of malice; the act of publication was by one under no constraint of duty or otherwise, and the law will presume that he intended his acts. The interests of society require that certain classes of communications should be privileged, but no interest of society requires that mistake or negligence should be privileged—on the contrary, the interests of society demand that if injury be inflicted, the party inflicting it should repair the injury he had caused, the object of civil procedure not being so much the punishment of an offence as the reparation of damages. *De la Croix v. Thouvenel* (2 Starkie, 65,) was an action for a libel contained in a letter written by the defendant to the plaintiff. Proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, was held by Lord Ellenborough to be evidence to go to the jury of the defendant's intention that the letter should be read by a third person.

Coates, contra.—This is not a motion to set aside the plea; but the question is, does the defence disclose a good answer to an action for libel. It is not disputed that malice in fact is not essential to an action for libel. In order to constitute malice, it is laid down by Lord Kenyon that malice must be intentional; the mind must be at fault. The act maliciously done must be an intentional act. The plea is, that the defendant acted *bona fide*, and that he believed same to be true. This is an argumentative denial of malice. As to publication by mistake, *vid. The King v. Paine* (5 Mod. 163, case 83) was in point. That was an information setting forth that the defendant was a publisher of a libel. The evidence was, that the defendant wrote a libel, he put it into his study drawer, and by mistake gave it to a third party, who transmitted a copy thereof to the Mayor of Bristol, and it was found by the jury that he composed the libel; but the Court, the case being tried at bar, told the jury that this was no publication, as it was an act done by mistake, but even supposing mistakes out of the question, still the defendant would be justified in communicating with the plaintiff's employer. Lord Campbell says in *Harrison v. Bushe* (5 El. & Black., 348), "that a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it would contain criminating matter which, without the privilege, would be slanderous and actionable." And it is laid down that not only he may, but he ought, to acquaint the new master with the character of his servant—*Vide Cook on Defamation*, 32. The case of *De la Croix v. Thouvenel*, relied on by the plaintiff, was not on a question of pleading; but the very question of fact was there left to the jury, whether or not the writer knew the letter

would fall into the hands of the clerk of the plaintiff.

Sidney, Q.C., in support of the plea—*The King v. Payne* is not distinguishable from the present case. The plea cuts at the root of the complaint.

Hamill, in reply, in addition to the cases given above in support of the demurrer, relied on *Weaver v. Ward* (Hob. 139), to show that the absence of intention does not relieve the defendant of the consequence of his own act—*Mercer v. Sparks* (Owen's Rep. 51.)

Coates said that new cases having been cited in the reply, he was entitled to observe on them. The cases relied on were not in point; they were actions of trespass.

April 20.—*FITZGERALD, B.*—This was an action of libel brought by the plaintiff, who had been a shop assistant in the employment of the defendant, a shopkeeper at Castlereagh. The libel in substance charged that the plaintiff, while in the defendant's employment, received money due to the defendant by a customer, and fraudulently failed to account for it and converted it to his own use. The defence stated certain facts by which the defendant was induced to believe the truth of his charge: the libel complained of was in the form of a letter intended by the defendant to be written and addressed to the plaintiff, and received only by him. It was further pleaded that the letter was written *bona fide* without malice, and intended to obtain payment from plaintiff; that the letter was sealed, and by a pure mistake was directed to Mr. Keevil, the then employer of plaintiff, and was received by him in course of post. To this defence the plaintiff demurred. It was stated that this was a plea of privilege negating malice, and that it was also an argumentative traverse. The only thing necessary to sustain an action of libel was the legal inference from the defamatory nature of the libel, and its publication; but such inference might be rebutted by showing that the occasion excused or justified the publication. I agree with the defendant's counsel that the publication to warrant the inference of malice must be voluntary and intended. I am of opinion that the pleading cannot be sustained. The vice of the defendant's argument appears to consist in supposing that the voluntary publication to the plaintiff himself was not a publication from which malice could be inferred, or that such publication was privileged. The letter in question was admittedly defamatory, the publication to the plaintiff was admittedly intended, and with that view the defendant voluntarily and intentionally parted with the possession of the letter and put it out of his own control. It was wholly a mistake to suppose that a voluntary publication of defamatory matter to the party defamed only was a privileged communication. Although it might not give a right to bring a civil action it might be the subject of a criminal prosecution.

HUGHES, B.—I also think the demurrer ought to be allowed. I do not think the averment in the defence—that the defendant, by a pure and honest oversight and mistake, omitted to write the plaintiff's name on the envelope, and wrote instead the name of Mr. Keevil—afforded a valid defence. The transmission by post for the purpose of delivery was a publication in itself; it was a parting with the libel for the purpose

of its reaching the hands of another person. In this case the defendant voluntarily delivered the letter into the post office, and thus voluntarily parted with it. If the letter, instead of being misdirected, had been put into the post office through oversight, without any direction at all on the envelope, and if according to the practice of the post office, the blank envelope was opened by the clerk in the dead letter office, that would be a publication. I mention this merely to illustrate the principle upon which the defence demurred to affords no valid defence in the action.

Demurrer allowed.

Court of Probate.

[Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.]

CAMPBELL v. CAMPBELL.—*April 18.*

Heir-at-law—Costs.

An heir-at-law who pleaded fraud and undue influence as to the making of a codicil, and did not make due inquiries of the drawer of the will and others as to the circumstances, and who put forward a witness whose evidence was palpably untrue, and known to be so by the defendant, who failed altogether in his opposition, was condemned in costs.

An heir-at-law stands on the same ground as to costs as a next of kin.

THE facts of this case have been already reported *ante* p. 39, on the motion made by the defendant for a new trial, when no rule was made on the motion. The cause was now set down for final judgment.

Dr. Ball, Q.C., and *Hamill*, for the defendant, asked for costs out of the estate.—They relied chiefly on the circumstance of the codicil of the 21st February, 1863, having been made by the testator *in extremis*, and on the great departure in it from the provisions of his former will of the 5th December, 1862, and that the defendant had a *bona fide* belief in the validity of his opposition to the codicil on the grounds of want of capacity and undue influence, and had no reason to doubt the information given to him by M'Gowan. They cited *Michel v. Gard* (33 L. J., Pr. 7); *Ross v. Chester* (1 Hag. 235); and *Fairtlough v. Fairtlough* (Milw. 30).

Serjeant Armstrong, Q.C., *M'Donogh, Q.C.*, and *T. Purcell*, for the plaintiff, asked for costs against the defendant.—An heir-at-law stood exactly in the same position as a next of kin, and failing in proof of his pleas of fraud, undue influence, and want of capacity, should be visited with costs. The conduct of M'Gowan, of itself, was sufficient to oblige the Court to make the defendant pay costs. They cited *Fyson v. Westropp* (1 S. & Tr. 279); 2 Dan. Ch. Pr. 859.

KRATINGER, J.—I must assume on this hearing that the verdict of the jury in favor of the validity of the will was correct. There were several testamentary papers in this case—the last of them, the codicil, varying the provisions of the will preceding it, and also the additional circumstance that, the codicil being dated

and executed on the 21st February, 1863, the testator died on the 24th of the same month. The codicil in question was a very important departure from the will immediately before it. By that will, everything was given to the widow for her life, with remainder to the defendant, Duncan Campbell—not absolutely—but for his life—no provision for his children or issue, with remainder over to John Campbell, son of James Campbell, in fee. The first will of the 27th November, 1862, gave the lands and the personal property to the wife for life, with remainder to James Young, the testator's nephew, absolutely. He is the same person who is the remainder-man in the codicil, and there is this peculiarity in it, that it was only restoring this James Young to his former position in the first will. It cannot be denied that this is the case of a death-bed codicil, and the case comes before the Court under circumstances which would in an ordinary case require it to deal liberally as to the costs of the next of kin, and while there are general rules which cannot be departed from, still the question as to costs is to be decided having regard to the special circumstances of each case. In this case, all the testamentary papers were prepared by a highly respectable professional gentleman, Mr. Hellard, by whom no one could possibly be misled, and no difficulty could have existed as to finding him, and ascertaining from him the facts. He was not an attorney or solicitor residing in London, where perhaps some difficulty might be found in tracing him out, but he was a local solicitor, residing in, and who was a public character at Portsmouth, having been several times mayor of that borough. After the deceased's death, Duncan Campbell, it appeared, went over there, and he might, without any difficulty, have seen Mr. Hellard, and have got all the necessary information he wanted from him; but he made no application to him at all on the matter. There could have been no difficulty in finding out that he was the drawer of the wills, as Duncan was in communication with Mrs. Chapman, in whose house some of them were prepared, and no doubt she told him who the persons were who visited him—who the several respectable physicians were who attended him, and also who was the clergyman who for six weeks before his death attended and visited him two or three times a week, and all of whom deposed positively to the full possession of his mental faculties at the time in question. Dr. Harvey attended him from the 24th November, 1862, to the day he died, and to him he (the deceased) frequently spoke in the highest terms of his nephew, James Young, and of his professional prospects, and on the 21st, and also on the 23rd of February, he had enough of conversation with the deceased to enable him to know that his mind was perfectly sound. So Dr. Jackson visited him on the 14th January, and down to the day before he died, and proved complete soundness of mind. All this evidence, if uncontradicted, left no doubt as to the deceased's capacity on the 21st February—that his memory was good, and that he carried in his mind what he had done by his first will, as he referred to it to Mr. Hellard, in telling him that his object was to give back to James Young what he had taken away from him. Therefore, on this part of the case no reasonable doubt can be entertained. But on the

part of the defendant, his case, by pleading, is a traverse of the formal execution of the will, and of the capacity of the deceased, and then an allegation of the will having been obtained by means of the fraud and undue influence of the plaintiff. I am quite prepared to say that no one has any right to protection from costs who goes into a special case and fails, unless it appears that he had a reasonable *bona fide* case to sustain his allegations; but if he acts on his own suspicions, and without making due enquiry, he cannot be said to have a reasonable or *bona fide* case. Now, the defendant knew that the deceased intended that if he, Duncan, did not marry, the estates should go out of the name of Campbell, and in cross-examination the defendant said the deceased told him so, though he, the defendant, immediately attempted to correct what he said, by a statement that the deceased said the estates were to go out of the family, not out of the name of the family. Now, for that statement of the deceased, there can be only one solution. There was only one person, a member of the family, who was not of the name of Campbell; he was James Young, his sister's child. This becomes most important on the question now before the Court; for if a party is to be excused from costs, because he had reason to suspect the instrument to be a *fraudulent* one, he is at the same time bound to keep in his recollection all the facts in his knowledge which would go in support of the instrument; and as Duncan Campbell knew all these things, he must be visited with the inference that he had a recollection of them now. Another reason why the defendant cannot be excused from costs, is that under the statute a party may be examined as a witness on his own behalf; but I must say, that the defendant's evidence did not appear at all satisfactory. Men examined for themselves are under a strong bias, and are too apt to colour their evidence, and to conceal matters which they could prove, but which might operate against their interests, and in several parts of his evidence the defendant did not appear to me to be a witness on whose evidence a jury could with safety rely, especially when opposed to contradictory evidence given by other persons. Then there was the astounding circumstance that Charles M'Gowan swore to a variety of matters which no one could possibly believe. Amongst other things, he swore that he desired several persons in Portsmouth not to tell Duncan Campbell that he was there, but it was Duncan who put him on the car at Manorhamilton when he was leaving, and knew quite well that he was there; and I cannot disconnect Duncan from participation in the letter of M'Gowan to Mrs. Campbell, attempting to intimidate her, and prevent her from acting on the codicil. I visit the defendant with all the consequences of his share in that transaction, which shows that he had not a case, but wanted, in collusion with the widow, to defeat Young's rights. Under the codicil she had no rights, but Young's rights would have been thereby affected. Without violating any rule of the Court, I hold on the special circumstances of this case, that it is the duty of the Court to visit the defendant with the costs. I therefore make a final decree establishing the will and codicil, and I direct the defendant to pay to the plaintiff the costs of the suit.

Decree accordingly.

THE GOODS OF SIR FRANCIS HAMILTON LOFTUS, BART.,
DECEASED.—April 25.

Practice—Citation of heir-at-law.

Where an executor has warned a caveat filed by a next of kin, who has appeared, he is entitled then to an order giving leave to cite the heir-at-law. *Coplestone v. Nicholas* (33 L.J., Pr., 57) considered.

The deceased Sir Francis Hamilton Loftus by his will, dated the 24th December, 1857, named Mary Murphy, Mathew Murphy, and several others, his executrix and executors, and died on the 12th March, 1864. Two caveats were lodged, one by Lord George Loftus, and the other by a Mrs. Maria Squirrel. The deceased had died unmarried and without issue, leaving Harriet Louisa Dickson, wife of Alexander Dickson, his heiress-at-law.

Dr. Townsend, on a former day, had applied for leave to cite the heir-at-law; but as no appearance had been then filed, the Court suggested that it was better to wait until the time for appearing was out. An appearance was filed on the 21st April for Mrs. Squirrel, as a niece and one of the next of kin of said deceased.

Dr. Townsend now renewed his application. A difficulty has arisen from a recent decision of Sir J. P. Wilde, to which Dr. Miller had referred me—*Coplestone v. Nicholas* (33 L. J. Pr. 57)—where it was held that such an application was premature if made before the defendant has pleaded, the Court considering that until the plea was filed it was impossible to know if the validity of the will was disputed. But the defendant may perhaps never plead; and the 65th section of the Act of 1857 (20 & 21 V. c. 79) applies to all cases "where proceedings are taken under this Act for proving a will in solemn form, or for revoking the probate of a will, on the ground of the invalidity thereof, or where in any contentious cause or matter under this Act the validity of a will is disputed," &c. Now an affidavit has been filed stating the intention of the executor to prove this will in solemn form, and desiring to cite the heiress-at-law. The caveat warning and appearance are proceedings taken under the Act for proving a will in solemn form; and it is quite unnecessary to wait for a plea, which may never be filed.

KEATINGE, J.—In the case cited Sir J. P. Wilde says that the defendant commenced the contentious business by lodging his caveat. With us the contentious business begins with the appearance; and I consider, having regard to the affidavit, that proceedings are taking under the Act for proving a will in solemn form. What is to be done if no plea should be filed? I feel no difficulty in making the order under the circumstances, and I therefore give you liberty to cite the heiress-at-law.

Order accordingly.

NOTE.—In the case referred to, the plaintiff (the executor) had filed his declaration, propounding the will. That, of itself, would appear to be a proceeding under the Act taken to

prove a will in solemn form. No doubt, an executor may proceed by citation; but if a caveat is lodged he must warn it, before he can file his declaration, and then his declaration states the object which he is proceeding for—namely, to prove a will; and as it is in a suit, it follows, to prove a will in solemn form; just as much so as if—there being no caveat—he had begun the suit by citation. The 6th rule, contentious, expressly says that the contentious business begins from the appearance, not from the caveat.

Landed Estates Court.

IN THE MATTER OF THE ESTATE OF J. H. BLAKE, OWNER
AND PETITIONER.*

An agreement for a lease at a fair rent and value entered into by the owner of an estate at the time when a receiver had been appointed over it by the Court of Chancery, the Court of Chancery never having taken any course in respect to it, although the tenant went into possession under the same, held valid; and Held, that the owner of the estate, which was then selling in this court, should execute a lease to the tenant in pursuance of the agreement, and that same should appear upon schedule of tenancies.

E. Beytagh applied to the Court, pursuant to notice, to have the opinion of the Court on behalf of the owner as to whether the lease above referred to should appear in the schedule of tenancies; and referred to the fact, that at the time of the said agreement for the lease being entered into, the estate of the owner, the lessor was in Chancery, and a receiver appointed over it; and also that owner was a tenant himself of portion of the lands under the Court.

A. Hodgins appeared to sustain the agreement for the lease, and argued, that although the estate was in *custodia legis* at the time the owner made the lease, still the legal estate was in the owner, and the power of granting leases was an incident of that estate; and although by exercising that power the owner left himself open to an attachment for contempt of court, still that could not be construed as a restriction of the right; and the fact of the *bona fides* of the lease should be here taken as acknowledged, as no evidence was adduced to the contrary. If not *bona fide* or at a fair rent, of course it could not be argued that it was valid as regards the creditors of the estate; although if it was clear that a surplus should come to owner after sale, it could not be disturbed even on these grounds.

JUDGE LONGFIELD.—Under the circumstances of this case the owner must execute a lease in pursuance of this agreement, and same must appear upon the schedule of tenancies, and the tenant is to have costs of this application.

* Ex relatione.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK, J.]

RE ANGUS MURRAY.

Lien—Order and disposition—Trustees of chattels becoming bankrupt after taking possession of them—What amounts to consent on the part of the true owners.

Where the assignees of a bankrupt dispute the right of lien and a doubt exists on the subject, the Court will not make an order to give up the property, but leave them to establish their right by law if so advised.

Where the owner of chattel property and of an establishment where he carried on his business leaves the country without giving any directions as to his affairs, or making any provision for his wife, and one of the trustees of the marriage settlement of that wife takes possession of those chattels which are made the subject of the settlement, and pays the wife a weekly sum for the hire of them with the consent of his co-trustees, and so remain with him to his bankruptcy, they will be held to be in his order and disposition, and the true owner cannot claim them, it appearing that he knew of the arrangement but did not remonstrate against it.

THIS case came before the court upon two distinct applications. The first was in the nature of an examination of Pattison Jolly, a printer, who had in his possession a quantity of type upon which he claimed a lien under the following circumstances:—The bankrupt, who was a printer, had the publication of an evangelical work called *The Witness*, and was in the habit of sending the type when set up to be worked off by Jolly on a steam-press. This course of dealing between the parties existed for some months—Murray sending the type when set up weekly to be worked off by Jolly's machine, and when the machine-work was done the type was sent back to Murray to be distributed, and then set up again for the next publication. This course of dealing continued for several months until a bill passed by Murray to Jolly became due and was unpaid; and Jolly, as a security for the overdue bill, claimed to keep the type, then in his possession, until paid. Murray agreed to this arrangement; and the type, together with other printing materials, remained in the possession of Jolly until Murray became bankrupt, which was in a few days after the bill became due.

Carton now, on the part of the assignees, asked for an order directing Mr. Jolly to give up the type in question. It was a portion of a large fount, and by being thus separated, rendered the whole comparatively valueless. The type was sent to Jolly to be passed through a printing machine, and he could not on any principle that regulated the law of lien have any claim whatever upon it. As to a lien by special agreement, Murray had no right to create such a lien. In

the first place the type was not his; it belonged to his brother, who had it vested in trustees of his marriage settlement; and in the second place Murray was actually bankrupt at the time it was said he had entered into the alleged agreement with Jolly; and upon either views of the case Jolly had no right to keep the type, and the assignees were entitled to get an order of the court to deliver it up.

Levy, for Jolly, in reply.

JUDGE BERWICK said, upon ascertaining the dates in the case, he found that the bill was due ten days before the bankruptcy; and having been dishonoured, the court had evidence that an agreement was made that the type should remain with Jolly until it was paid. It did not appear that Jolly knew anything of the type being the property of a third party, and under those circumstances he did not think he would be justified in making a peremptory order that Mr. Jolly should give up the type. Where any doubt existed it was a safer way to leave the parties to establish their rights by the verdict of a jury if they should be so advised.

On a subsequent day *Mr. Purcell*, on the part of John Murray, came before the court upon a charge filed by his client, who claimed all the types, presses, and printing materials in possession of the bankrupt at the time of his bankruptcy as his property, and that it did not vest in the assignees of the bankrupt under the reputed ownership clauses of the Act, as it was never in the bankrupt's possession with the consent of John Murray or of his trustees.

Carton, for the assignees, resisted the application. The facts appear in the judgment of Judge Berwick.

His lordship said:—A claim has been made on the part of John Murray to be declared entitled to the type, printing presses, and printing materials which at the time of the bankruptcy were confessedly in the possession of the bankrupt at his printing establishment, and were then, and had been since July, 1863, used by him as his own in carrying on the business of the firm of which he was in fact the sole member. The case of the claimant is, that this property was his own; had been purchased by himself in October, 1861, with monies which he had borrowed from the trustees of his wife's marriage settlement in that month; that he had carried on business at 26 Eustace street thenceforward until June, 1862, when he went to London with a view of commencing business there, leaving his type, printing presses, and printing materials in charge of his wife. That the bankrupt, as trustee of her marriage settlement, assumed and took possession of the same, and paid her fifteen shillings a week for the use and hire of the materials, but that John Murray never authorized this arrangement. That those things were never in possession of the bankrupt as reputed owner; that they never ceased to be the absolute property of the claimant, and ought now to be declared his. To this the assignees have filed a discharge, by which they allege that the chargeant left the property in dispute in the concerns in Eustace-street in June, 1862, without having made any arrangements as to the carrying on of his trade or the management of his establishment; that his wife never interfered with the con-

cerns or property; that on the departure of John Murray (the chargeant) from Dublin the bankrupt entered into the possession of the trade and premises, undertook the working of the establishment for his own benefit, made himself responsible for the debts of his brother, theretofore contracted in his trade, including the debts for this very type and printing materials, purchased all the necessaries for the concern, made several alterations and additions in it, and paid the wife of the chargeant an allowance of fifteen shillings per week, as for her claim to the surplus capital in the concern and for maintenance, removed the business from Eustace-street to Fleet-street, carried on business in his own name, and remained in undisputed possession up to the time of his bankruptcy, having during all that time dealt with the property as his own, and actually pledged some of it for a debt (the type left with Jolly); and therefore as the true construction of the dealing of the bankrupt with his brother, by making himself liable for the price of the type and the debts of the establishment in Eustace-street, he had become a purchaser; and even if that were not so, that the goods must be held to be in the possession, order, and disposition of the bankrupt as reputed owner, by consent and permission of his brother; and I am now to consider if the assignees have established in either way their title to the property in question. Now, in the first place, some embarrassment has been created by mixing up in the investigation of the rights of the parties two totally distinct considerations which do not appear to be fairly joined together in the issue I have to try, namely, the right of the chargeant as the true owner, and the right of the trustees of his marriage settlement or of his wife, as represented by them. The case may be fairly enough treated in each point of view; but, most certainly each title should be separately considered, and both ought not to have been joined together to hold out an otherwise defective title. I will first consider the case of John Murray as admitted owner of the property in June, 1862; and although I think he must on this charge or discharge rise or fall by the strength or weakness of his own title, yet I shall afterwards have to consider how far the trustees of the marriage settlement of Mrs. Murray could succeed if they were claimants before the court for this property. Now, there is no controversy as to the facts. John Murray, the claimant, was undoubtedly the true owner originally subject to the claims of his then creditors. In June, 1862, he leaves this country in consequence of some disagreement with his brother, the present bankrupt, apparently abandoning the concern, and making no provision for the payment of the debts due by him or for the maintenance of his wife, who remained in Dublin. By his charge he admits that he heard his brother had taken possession of his printing establishment, and used the type and printing materials during his absence, and that he paid chargeant's wife a weekly sum on being allowed by her and his co-trustee to use the types; but, he adds, I never authorised or consented to this arrangement. I have not, however, heard of his having made any remonstrance against, or offered any objection to, the arrangement made during the whole period since June, 1862, and without going into any further enquiry on

the consideration of the question, whether dealing of the parties would warrant my assuming that John Murray is now estopped from denying that Angus is the true owner, so far at least as the claims of the creditors of the establishment who dealt with Angus as such owner. I think it sufficient to decide this question,—whether, supposing John to be still the true owner of such of the type and printing materials as were in the establishment in June, 1862, they were in the terms of the 313th section of the Bankruptcy and Insolvency Act, by the consent and permission of the true owner, in the possession, order, or disposition of the bankrupt as reputed owner, or whereof he had taken on himself the sale, alteration, or disposition as owner; and unless I am bound in construing this section of the Act of Parliament, bound to hold that a formal and positive consent and permission must be affirmatively proved by the assignees, I cannot hesitate to decide that they were in the possession, order, and disposition of the bankrupt with the consent and permission of the true owner, and that the bankrupt is the reputed owner thereof. The exposition given by Lord Redesdale in *Joy v. Campbell* (1 Sch. & Lef. 328), of the words “in the order and disposition of the bankrupt with the consent of the true owner,” and which appears ever since to have been accepted as the best elucidation of the meaning and object of the enactment is this.—The clause refers to chattels in the possession of the bankrupt, in his order and disposition, with the consent of the true owner. That means where the possession, order, and disposition are in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits unconsciously, as the Act supposes, to have that order and disposition. Now, was there ever a clearer case of permission than the present? The true owner goes over to London, leaving his concern and chattels behind; he knows that his brother takes possession of them, and takes upon himself the debts of the establishment, and actually changes the place of business, and the name of the firm to his own name, and deals with it and the property in it as his own, paying to the wife of the claimant, who was bound in duty to support his own wife, a weekly allowance, and stands by for a period of eighteen months, and sees all this going on without one word of remonstrance or suggestion of dissent. I am bound not merely by law but by every principle of justice, and in accordance with the ordinary dealings of sane men of business, to conclude that this took place with his consent and by his permission, and therefore that he cannot now, as against the creditors of the firm who dealt on the face of such consent and permission, sustain his claim to the property. And I must say that I never met with a clearer case to show the wisdom, justice, and policy of the provisions of this section of the Act of Parliament, the object of which was, to use the words of Lord Redesdale in the case to which I have already referred, to prevent deceit by a trader from the visible possession of property to which he was not entitled. And now supposing I were at liberty to consider the rights of the trustees of Mrs. Murray's settlement, I am at a loss to see how they could now claim this property successfully. In the first place I have no evidence to show that they

ever had the possession or the right to it vested in them. It is true Angus Murray is one of the trustees, but he never claimed the property as trustee, but always held himself out to the world as the real owner. But even if he did take it as trustee he cannot, as I apprehend, having embarked it in trade with the assent of his co-trustee, and held himself out to the world as owner of it, withdraw it from the liabilities that have been incurred on the faith of such possession. This, however, I merely state as the difficulty that would be in the way of any claim by the trustees in case their names were substituted for that of John Murray. I must at present simply disallow the claim of the chargeant, with costs, and declare that the assignees are entitled to an order that the property in question be sold for the benefit of the creditors under the bankruptcy, and I make such order accordingly.

Attorney to the bankruptcy, Mr. Larken. Attorney for Jolly, Mr. William Bloomfield. Attorney for John Murray, Mr. Forsythe.

Court of Admiralty.

[Reported by William Chantrey, Esq. Barrister-at-Law.]

THE ERIN GO BRAGH.

Derelict salvage—Costs.

In this case of derelict salvage the Court awarded a sum of £470 to the salvors, or a little more than "one-third" of the total value of the property saved, and gave them their costs of the suit.

THIS was a cause of derelict salvage, in which the Atlantic Royal Mail Steam Navigation Company, H.M. revenue cutter *Diamond*, Lieutenant Brown, R.N., commanding, and John Anderson, chief boatman at Arran, and his boat's crew, were petitioners, and the *Erin go Bragh*, of Liverpool, and her cargo the respondents. The services for which salvage was claimed were rendered by the petitioners in February. In the month of March following ownership of the cargo was decreed to the underwriters at Lloyd's, who had paid on cargo and freight as on a total loss; and in the month of April following, Messrs. Dixon & Wynne, of Liverpool, merchants, having established their proofs of ownership of the vessel obtained a decree of ownership, leaving the property respectively dealt with by them subject to the salvage claims in the present suit.

Dr. Townsend and Elrington for the salvors.—The services commenced on the day information that the vessel was in distress in Galway bay reached the office of the Atlantic Steam Navigation Company in that town. The company, without delay, despatched a small steamer, with its master, officers, and sufficient crew, to her aid; and the steamer arriving off Black Head, the southern point of Galway bay, at 5:20 that evening, found the wreck, which proved to be the English barque, *Erin Go Bragh*, of Liverpool, laden with a cargo of timber, her sails, topmasts, and rigging carried away, and hanging over her sides, fast on the rocks, derelect, and abandoned by her master and crew. Her rudder was beaten away, and her bottom gone aft, her transoms being entangled among the rocks, and several logs of timber—portions

of the cargo—sticking out of her. By exertions unceasingly applied from the day of finding until early on the Tuesday following, the salvors, each in their own way and by combined efforts, succeeded in towing the derelect from her exposed and perilous condition and mooring her in safety to the westward of Nimmo's pier at 6:30 on the day last mentioned. The case was one of meritorious salvage, and merited the best consideration of the Court. The defendants by their plea admitted those merits, and had precluded themselves from contradicting them. The net amount in value of the property so preserved was a sum of £1,373 1s. 8d. They cited *The George Dean* (Sw. 290).

Dr. Gibbon and Todd for the underwriters, the owners of the cargo, resisted any view but a very moderate one being taken of the case. The salvors had shown in their services neither skill or precaution, and were not entitled to ground any special claim upon the fact of their being so many days employed. The real salvage occupied actually but one day; the other days being consumed in abortive and unskilful attempts.

JUDAX KELLY.—Upon a just consideration of the facts stated in the petitions of the several salvors, and admitted by the defendants to be truly stated, I am of opinion that the defendants were not warranted in the observation with which they attempted to disparage them. In the judgment of the Court a case of meritorious salvage has been established, although not one of the first class, and therefore not entitled to the highest rate of reward. Property to by no means a small amount had been rescued from certain destruction and with complete success. Five days and nights, in a season of unparalleled storm and tempest, upon an exposed coast, was spent and consumed in unwearying labour in the service. A steamer had been cheerfully sent out, and returned again and a third time to Galway for fresh supplies and aid during that period. The utmost harmony and good feeling prevailed between the civilians employed, the officers and men of her Majesty's cutter, and the coast-guard—every branch working in its own particular sphere, manfully and all together, for the one object. On the other hand, there was no peril to life or limb, or property—everything succeeded without risk. The Court will therefore award such a proportion as these petitioners, under such circumstances, are fairly entitled to—fairly, not with reference to their services only, but to the just expectations which defendants in a suit of this nature may reasonably be supposed to entertain, namely, that the sentence by which the Court casts upon them the obligation of rewarding salvors should regard also their rights as owners. The Court therefore awards to the petitioners a sum of £470, being by a very small sum above one-third, and apportioning that sum amongst them as follows, in proportion to the merits of their respective services:—To the Atlantic Steam Packet Company, the services of whose steamer and people were unremitting, and without which the salvage could not be effected, £350; to the commander of the *Diamond* and his crew, £90; to the chief boatman and his crew, £20; to Gill, who carried the intelligence of the wreck, £10. The salvors are to have their costs also.

Proctor for the salvors Mr. Hamerton, Q.P.
Proctor for the defendants, Mr. Doran.

Court of Appeal in Chancery.

Reported by R. Buxton Bolton, Esq., Barrister-at-law.

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

COLCLOUGH v. SMYTH—Apr. 28.

Falsa demonstratio—Identity of cestui que vie—Renewal—Veritas nominis.

When a lease under a lease for lives renewable for ever, in taking out a renewal named and described the cestui que vie so ambiguously, that it was uncertain which of the two persons was meant, one of whom died thirteen years before the other; the landlord claimed fines from the first death, the tenant offered them from the last death. Held, that the tenant ought to have named the life distinctly and clearly, and not having done so he must suffer the consequence, and must pay renewal fines from the first death.

THIS was an appeal from an order of his Honor, the Master of the Rolls, reversing an order made by Master Litton. The original cause had been before the Master of the Rolls on several occasions, *vide* 14 Ir. Ch. Reports, 127. A lease for lives renewable for ever was made in 1719, of certain lands in Westmeath, the beneficial interest in which ultimately vested in the present appellant, and the reversion, subject to such lease, in the respondent. Renewals of this lease were regularly taken out from time to time. One of the *cestui que vies* having died in the year 1803, Mrs. Bridget Colclough, in whom the beneficial interest under the lease was then vested, nominated as a new life her grandson, "Beauchamp Colclough, the younger, son of Beauchamp Colclough, of Zion Hill, in the Co. of Carlow, Esq., now of the age of fifteen years or thereabouts." It appeared that Bridget Colclough had two sons, Henry, the elder, who resided at Zion Hill, and Beauchamp, who usually resided at Kildavin. Beauchamp had several sons; his fourth son was named Beauchamp Urquhart; Henry's eldest son was also named Beauchamp (styled throughout this report as Beauchamp, the third). It will be seen that no person corresponded exactly with the description in the clause of nomination. Beauchamp Urquhart did not answer to it, for though he was the son of Beauchamp, yet he did not reside at Sion, and he himself had a second Christian name. Beauchamp, the third was the son of a Colclough, who did reside at Sion, but whose name happened to be Henry and not Beauchamp. Beauchamp Urquhart died in 1845, and his cousin, Beauchamp the third, died in 1858. On an order of reference, that an account of renewal fines, &c. be taken, the Master found that the last life of the lease, under the renewal of 1803, died in 1858, and based his accounts and reports accordingly. On appeal the Master of the Rolls reversed this order, holding that the life died in 1845, *vide* 8th Irish Jurist, N.S. 407. From this decision the present appeal was brought.

Brewster, Q.C. (with him Walsh, Q.C., and J. D. Robinson) in support of the appeal.—The order of

Master Litton was right, and ought not to have been reversed. Beauchamp, the third, the son of Henry must be taken to be the life of the lease. His cousin's name was Beauchamp Urquhart, so it cannot be taken to be him. We have got the correct name; therefore there can be no uncertainty, for there are not two of the same name. The error in description does not make it uncertain, for in *Cameys v. Blundell* (1 H. of L. Cases, 778) it is laid down by Lord Wensleydale that when the name is right a mistake in description is immaterial; so in *Drake v. Drake* (8 H. of L. Cases 172), where the description was accurate, but the name was not, a bequest was held to be void. Much weaker is the case on the opposite side, for neither is the name, nor yet the description true. There is a false demonstration on both sides; therefore, the description not being true cannot override the true name; but this description, such as it is, favours our argument more than that of the opposite side. The life was to be Beauchamp, the son of Beauchamp, of Sion; now Beauchamp, the third, who, we contend was the *cestui que vie*, was son of a Colclough, of Sion, and the only flaw is that his name was Henry. In this view the greater part of the description is accurate, and the Court is bound to adopt that construction which will give meaning to the greatest number of words, and in doing so it must take the appellant's view of the case. This is not a case of the construction of a will, where certainty is required to be shown before the heir can be divested of his rights. Neither party has a stronger right to assistance than the other; nor is there ambiguity in this view, in the case of *Dilley v. Mathews* (2nd New Reps. 60), where a testator having a wife named Eliza, from whom he was separated living, and having gone through the marriage ceremony with a woman named Sarah, with whom he lived at the date of his will, gave the income of his property "to his wife Sarah." V. C. Wood held that Sarah was entitled, though she was not his wife; so also it was held in *Plunket's case* (11 I.O.R. 361), that the name should control the description. Likewise in *Blundel v. Gladstone* (11 Sim. 467), and in *Garner v. Garner* (29 Beav. 14), in *Doe v. Rowe* (5 Com. B. R. 422), and in *Feltham's case* (1 Kay. & John. 528). It is worthy of remark that Beauchamp the third was the eldest son of the eldest son, and it is very probable that he was so named that when he would enjoy the property as heir, he might have the freehold during his own life undisturbed by any fresh renewals. Beauchamp the third was about 15 years old at the time of the nomination; his cousin was only about nine. Is it probable the grandmother could make a mistake in their ages, there being such a disparity. Beauchamp Urquhart had a second name; if he was meant, his name, at least, would be given correctly.

Warren, Q.C., for the respondents.—Bridget Colclough was the person who named the life in the lease. It is the tenant's part to prepare the renewal. If there is any uncertainty, she is to blame, and those who claim under her must suffer by her error. If there be any ambiguity in this case, is it not those who were the authors of it that should suffer by that ambiguity? It is clear that this lady must have known the names of her own sons; she may have been mis-

taken in their place of residence, but it is not credible that she did not know their names. The mistake which she made was a natural one, residing as she did at some distance. As to the question of landlord and tenant, must not the tenant who was guilty suffer, and not the landlord. As to hearsay evidence it cannot be admitted in this case to prove the age of either. In *Rea v. the Inhabitants of Erris* (8 East. 538), hearsay evidence was held not admissible to prove a person's age. It may be admissible in the question of pedigree, but not in a case of this kind which is one of identity. The appellants come into this Court, asking for the benefit of their own wrong. Everything must be presumed against them, and this Court cannot sanction their conduct.

May for respondents.—Beauchamp Urquhart was the life nominated. In the nomination, the word "younger" is used; that directly points to the mention of the father in the same instrument, for the word is never used in a deed unless where a person is placed in contradistinction to his father. So in this case is Beauchamp the younger, son of Beauchamp. The father is clearly meant, and as clearly expressed. Beauchamp had a second name, but it is very improbable that his grandmother would have thought of it just at that time. There is a false description in only one particular in this view of the case, the word *Sion* being used instead of *Kildavin*. The residence is quite immaterial, when every other part of the description is correct—*Fowler v. Fowler* (4 De G. & L. 250.). It is not fair to the landlord for the tenant to name a life so craftily, that when one life dies, he can put in another life, of whom the landlord heard or knew nothing until he was made use of to defraud him of his renewal fines, &c. It is the duty of the tenant to name the life distinctly and clearly, and if he does not do so he must abide the consequences of his duplicity. The landlord is surely not to be punished for the fraud of the tenant.

Walsh, Q.C., in reply.—These words must be read strictly according to the rules of construction. In the case of *Garner v. Garner* (29 Beav. 114), Lord Wensleydale says that deeds are to be construed in the same way as wills. If so then the correct name must override a false description. There was no wrong or fraud on the part of the tenants. They did not want to mislead the landlord; everything in the way of description was given as fully and freely as possible, and the landlord must be taken to have known well which of the lives was in the lease, for on the death of Beauchamp Urquhart in 1845, no application was made by him for renewal fines, and it was not till a renewal was sought after the death of Beauchamp, the third in 1858, that this resistance was ever contemplated—*Newbold v. Price* (14 Sim. 354).

LORD CHANCELLOR.—I am of opinion that this order must be affirmed. If this was a question as to the construction of the clause, I might have some hesitation in thus pronouncing my judgment; but taking all the facts, even as relied on by the appellant, and I still would have great difficulty in coming to the conclusion which we are asked to arrive at. If we are to reverse the decision of the Master of the Rolls, it must not be on doubt or on conjecture, but on clear grounds. In this renewal it recites that Mrs. Bridget

Colclough had named Beauchamp, the younger, son of Beauchamp, as the life; by that deliberate statement she must be bound. The landlord was bound by his covenant to take any life that was named to him; he had no choice in the matter; he was not to know whether the exact description in the life was given. It was the business of the tenant to name the life, and to do so distinctly and unequivocally. Is the tenant then, not to be bound by his description, and is he to be allowed to form his description so ambiguously, that he is to have the choice of two lives as it may afterwards suit him? Even admitting the question of age, it does not help the appellant's view; for it is admitted by them that there is a mistake as to the residence of the father; may there not also be a mistake in the age of the grandson? then Beauchamp is called Beauchamp the younger, that would be internal evidence in the deed, that the son of Beauchamp was meant, for that is the usual way of naming father and son together. It has been said that Beauchamp Urquhart had a second name, and that name is not mentioned, but many persons have a second name, which is never used by any third person, and perhaps not by the parties themselves. Under all these circumstances, I see no good reason for reversing the order of the Master of the Rolls; therefore, that order must be affirmed with costs.

THE LORD JUSTICE OF APPEAL.—I do not think that the tenant can now take advantage of the misdescription which she had given to the landlord after the lapse of 56 years. The landlord was bound to take any life offered. His acceptance of the life was merely formal.

Order below affirmed.

IN RE PURCELL, A BANKRUPT—May 2.

Jurisdiction of the Court of Bankruptcy—Precatory words imposing a trust.

Where A. equitably mortgaged his property to B.'s creditors as a security for the debt of B., who afterwards becomes bankrupt, the Court of Bankruptcy ought not to order the sale of A's property, and cannot adjudicate upon the rights of third parties to, or the trusts upon that property.

THIS was an appeal from an order for the sale of property of Martin Purcell, brother of the bankrupt, made by Judge Lynch, bearing date 12th February, 1864. It appeared that the bankrupt, Michael Purcell was a person trading at Kilkenny. In the month of October, 1862, he procured an advance from the Bank of Ireland of £1500, giving the bank some security, and getting his brother Martin to give collateral security, by equitably mortgaging a certain leasehold house and premises, to which Martin had become entitled under his father's will. In that will, after some other bequests was the following clause, "And as to my wife Judith Purcell, otherwise Murphy in case she shall survive me, I will and direct that she, and my said

children shall live and remain with my said son Martin Purcell, in the dwelling-house and concerns in which I now reside, and be supported and maintained by him in all manner and manner of ways, befitting their condition in life, as they have been accustomed to during my life, without any charge being made for or on account of same; and in event of my said wife being minded or desirous of leaving my said child or children, and living separate and apart to herself, then I will and direct that the interest on a sum of £500 be paid to her during her life." In July, 1863, Michael Purcell was declared a bankrupt, and in August following, by an arrangement with the mortgagees, Martin Purcell consented to the sale of this house and premises, which he had mortgaged for the payment of the debt due by his brother, and accordingly they were advertised for sale under the Court of Bankruptcy. Thereupon the appellants, the sisters of Martin, and children of the testator, put in their claim to an interest in said house and premises, which was disallowed by the judge, who held, that the wife of the testator having died in his lifetime, Martin Purcell became entitled to the property devised to him free from any condition whatever, and that as the testator had in a previous part of his will made provision for all his children, it appeared to him that in the clause relating to the maintenance, the testator meant to make provision for his wife in the event of her surviving him, on which event alone it was his intention that the family should reside together, and that as his wife did not survive him, the devise in favour of his children, in respect of the house left to the said Martin Purcell, became inoperative. The learned judge also expressed his belief that the bequest in the will was vague and uncertain, and that the most equity would do would be to make a personal decree against Martin Purcell, which would not prevent a sale of the premises, free from any condition or trust, and an order for sale was made accordingly. From this order, the present appeal was brought.

Heron, Q.C., (with him *Ryan*) for the appellants. —The appellants are entitled to an interest in this property; it is not competent for the Court of Bankruptcy to order a sale when there is a trust over the property, unless sold subject to the trusts. The appellants claim their right under the will of their father. The Court below cannot make this order; it is not a Court of original jurisdiction, either of law or equity, *vide* 19th & 24th sections of the Act which constitutes that Court, and, therefore, it had no right, even with the consent of the owner, who was not a bankrupt, to make such an order. To do so would be encroaching on the functions of the Landed Estates Court; much less had it any jurisdiction to entertain the question of the construction of the will, and the rights of the parties. The consent of Martin Purcell could not operate to release the parties from the trusts, and besides one of the children is a minor—*Ryan v. Ryan* (12 Ir. Eq. 226.)

Brewster and Darley, Q.C., for the respondents.

THE CHANCELLOR, without hearing the other side. —The order of the Court below ought to have been made without prejudice to the rights of the appellants. That Court has no jurisdiction to settle the rights of the parties by an order. One of the children is a

minor, therefore, no order of that Court could bind him. It strikes me that the parties had a joint tenancy in the house, as it seems to me to have been given to Martin and his sisters together. The order of the Court below must be amended by the addition of the words, "saving the rights of the parties who may be entitled," and I order that any sale that may be had, be made without prejudice to the rights of the appellants.

THE LORD JUSTICE OF APPEAL concurred.

Court of Chancery.

Reported by R. Baxton Bolton, Esq., Barrister-at-law.

KYLE AND OTHERS v. O'CONNOR AND OTHERS—
April 26.

Profit à prendre—Lapse of time—Renewal—Laches—Purchaser for value—Notice.

An owner in fee demised to A. for lives renewable for ever, the right of quarrying mill-stones, &c., over a manor, part of which manor was afterwards sold to B. in fee, (and on which there were open quarries worked by A.) without any mention of this right. A. and B. never were privies; no renewals were ever had from B., but they were regularly given by the owners of the principal part of the manor. Held, that though 120 years had elapsed, A. was entitled to a renewal from B. on paying a proportional part of all previous renewal fines.

THIS was a suit arising out of proceedings in the Landed Estates Court, to try the right of quarrying and hewing freestone, over lands, part of the manor of Hastings, in the County Tyrone. The petition prayed for a reference to the Master to ascertain the amount due by the petitioners for rent and renewal fines to the respondents, and that the respondents might be ordered to execute a renewal to the petitioners, pursuant to a covenant for perpetual renewal, contained in a lease bearing date 16th April, 1863. It appeared that on that date Edward Edwards, who was seised in fee of the manor of Hastings, demised to John and Robert Kyle, together with a corn mill and garden, the right of quarrying, hewing and digging out freestone, in any quarries that were then open, or that might be thereafter opened or found over the whole manor of Hastings (reserving to the lessor and his tenants on the manor the right of taking stones for their own use) to hold for three lives renewable for ever, at the yearly rent of £21, and 10 guineas renewal fine. In 1710 this lease was renewed. In 1744, about one-fourth of the manor was sold by trustees, under a devise for the payment of debts, to a person named Colquhoun, through whom the respondents derived, to whom a conveyance was made in fee, and granting the right of quarrying on that part without any reservation or mention of the lease of 1683. The remaining three-fourths of the

manor continued in the family of the original lessor, from whom renewals of the entire lease were obtained from time to time, by the lessees, the last renewal being granted on the 1st June, 1812, and one of the lives mentioned in that renewal being still in existence. The lessees exercised and enjoyed their right of quarrying over the whole manor undisturbed up to 1862, when a petition was filed by O'Connor in the Landed Estates Court for a partition and sale of that portion of the manor which had formerly been purchased by Colquhoun. The petitioners attended the Landed Estates Court, and lodged their claim to the right of quarrying, which was resisted by the respondents. An Order was made by that Court, directing a conveyance to be made to the purchaser of the lands subject to any decree for renewal which might be obtained in this Court by the petitioners. Hence this suit. Affidavits were read proving that the petitioners had exercised their right over the whole of the manor, this part included, undisturbed and unquestioned for upwards of sixty years; it also appeared by these affidavits that many years back the petitioners had summoned a man, who was not tenant on the manor, and who had taken away stones, and that they prevented him from doing so again.

The Solicitor General (with him *Brewster*, Q.C., *McCausland*, Q.C., *Dowse*, Q.C., and *Carson*,) for the petitioners.—The right of the petitioners having been continuous and uninterrupted, as regards the open quarries, is evidence of their title, for an action of ejectment might have been brought against them—*McDonnell v. McGinty* (10 Ir. L.R. 514.) Nor have they waived or lost their right to the unopened quarries by non-user, for in *Seaman v. Vaudry* (16 Ves. Jun. 390) it was expressly laid down that the relinquishment of the right to mines cannot be presumed from the non-exercise of it. This Court will not presume a trespass; must it not presume from undisturbed use, within and beyond living memory, that those from whom the petitioners claim exercised this right up to and prior to 1744, by virtue of their lease of 1683. Then was not this time, notice to the purchaser that they had such a right, or a claim to such right. Must it not be held that the purchaser had constructive notice of their claim. In *Harvey v. Smith* (22 Beav. 299) this doctrine was carried much further.

Serjeant Sullivan (with him *F. Walsh* Q.C., *Pilkington*, Q.C., *Shaw*, Q.C., *Wm. Smith* and *J. S. Townsend*) for the respondents.—The respondents stand here as purchasers for valuable consideration without notice, the strongest title which any one can have in this court. In the deed of 1744, under which the respondents derive, there is no mention of any reservation of mines or quarries, on the contrary, the right of quarrying is expressly conveyed. The purchaser became the owner in fee under that deed. At the date of the lease there was no registration, but why were not the subsequent renewals registered unless for the purpose of fraud. Were they afraid their claims would not bear investigation? The purchasers had no notice, constructive or otherwise. The case of *Harvey v. Smith* has been cited, but Lord St. Leonards, in the last edition of "Vendors and Purchasers," disapproves of that decision. In *Ware v. Egmont* (4 De Gex. M.N. & Gor., 473) it is laid down, that

this doctrine of constructive notice cannot be extended. If the petitioners have not been guilty of fraud, are they not guilty of gross laches, in not making their claim long before. Have they not lost their right? In *Bateman v. Murray* (1 Ridg. Par. Cas. 187) (which by the way was connected with this very manor) it is laid down by Lord Chancellor Thurlow, that a Court of Equity will never assist a lessee, when he has lost his right by gross laches and neglect.

Pilkington and *Walsh* were heard on the same side. The petitioners never were in exclusive possession of the open quarries, they were used by the respondents and many others, their possession was no more notice of a right, than that of any other tenant on the manor. If petitioners ever had such a right, they have lost it by laches, and lapse of time—*Brophy v. Evans* (2nd Sandes.).

Brewster, Q.C., for petitioners.—The petitioners were in possession, but not in exclusive possession of these quarries; but they do not claim a right to the exclusive possession of these quarries, there is a distinct reservation in this grant, of the right of the other tenants on the manor. This is a case for the common-sense of the Court. Is it reasonable to suppose that any person would consent to allow a stranger to come on an estate, and to hew out and carry away stone from the lands unless they had some legal right so to do? and this user continued beyond living memory must be presumed to have been exercised at the time of the purchase of this part of the manor. Therefore the purchaser must be inferred to have had notice, and the enjoyment has been for such length of time, that the respondents must be taken to have acquiesced in it. The question of notice where there are open quarries is different from that of the closed quarries.

McCausland followed on the same side.—There is no laches here in this case, for by the Landlord and Tenant Act there is no laches on the part of the tenant where they were in possession of the land, or where they were not put in motion by the landlord. In this case the petitioners had possession of their right of quarrying, and it was the respondents who have been guilty of laches; if they had put the petitioners in motion, then they might have showed their title; their right was undisputed; they exercised it boldly, and without any interruption time out of mind.

LORD CHANCELLOR.—The very peculiar incident in this case is, that the Court is asked to grant a renewal of a lease against parties who had not been privies since 1744. The property itself was strangely circumstanced. The last renewal was made by the owner of the largest portion of the manor of Hastings. The evidence that is propounded is far stronger, that the Kyles have exercised their right of quarrying for a longer period than the evidence to prove that they have not done so. Were it not that there is evidence to show that there was some mixed possession and user of these quarries, the lengthened possession of the petitioners, might amount to a total bar of the respondent's title in this case; but there is some evidence that other parties did intermeddle in these quarries, and unless the petitioners can make out their case, I am bound to withhold my sanction from the establishment of their right. What case have they

made? They claim under the lease of 1683, a lease for lives renewable for ever, which in terms very large indeed granted the right of quarrying in all the quarries then open, or to be thereafter opened, in the whole manor of Hastings. This grant was not only unusual, but may have been very imprudent, but with that we have nothing to do. The first renewal took place in 1712; in neither that renewal nor any subsequent renewal is there any mention of any particular quarry. In 1744 some portion of these lands were devised to trustees to sell for the payment of debts, and they sold accordingly. These several deeds were not registered, so that the Registration Act does not apply; and the question of notice must be ruled by analogy to the English law. The question then comes in of notice from the working of those quarries. I may here remark that the right claimed by the petitioners is not inconsistent with the rights of others; they had not the exclusive right of quarrying, that right was also in the tenants of the manor. The respondents claim a right to the exclusion of all others. This right has been exercised by the petitioners as long as living memory goes back, and the Court is asked to stop short, and say we will not go back further than living memory, and that we are to infer nothing from that long-continued user. This is not what this Court or any Court of law will say, having regard to the facts and the evidence in this case; and I will conclude and presume, therefore, that there was continuous user, and that this right must have been exercised in accordance with the lease of 1683, and by virtue of the several renewals of that lease. I will also conclude that the respondents had notice of the claim of the petitioners, by the fact of their working the quarries. Each party seemed to me to have notice of the proceedings of the other party in 1744—the respondents, by the fact of the petitioners working the quarries—the petitioners, by the fact of the respondents becoming entitled to this land by purchase; but I think that the petitioners were misled by the renewals, which they received from the persons whom they thought to have been the owners of the entire reversion, but who, in fact, were not so. A more difficult question, it occurs to me, is that of the quarries which have not been opened or worked; lands in which such may be found, have been the subject of marriage settlements, &c., and I do not think that this Court should say that these parties should be disturbed in their rights after such a lapse of time. I think that the equity of this case will be sufficiently met by securing to the petitioners the rights that they have so long enjoyed, and by taking from the respondents nothing that they had. As to the question of costs, this is not a case of ordinary renewal, it is not a question of laches, it is, in fact one of title, though both parties have been guilty of laches in proving their title. I will not visit either party therefore with costs. Third parties get their costs. As to renewal fines that is a question for the Master; he will arrange matters between the several parties equitably, and I refer all these matters to him for settlement.

Order accordingly.

NOTE.—In this case a lengthened discussion took place as to whether the counterpart of a lease which was signed by

but one of the parties, could be received in evidence against third parties, the loss of the original not having been proved, or search having been made. The Court, citing the case of *Hall v. Ball* (3 Man. & Gr. 242) held that such was not admissible.

BARBER v. TULLY—April 19.

Practice.

Two, g moved that the officer of the Court be directed to set down this cause for hearing. The cause petition was filed on the 21st March, 1863. A suggestion was entered on the 25th April, 1863. The answer was filed on the 30th May, 1863. On the 3rd November, an order was made to amend the petition, giving respondent four weeks to answer the amendments, and the petitioners three weeks to reply. Respondent's affidavit in answer to the amendments was filed 1st December, and petitioners affidavit in reply on the 11th February, 1864. The officer of the Court declined to set down the cause, as two whole terms had elapsed from the time when such might have been done, and as petitioners had no order for an extension of the time.

Counsel contended that the order to amend of the 3rd November was impliedly an extension of the time for setting down the petition.

The Court granted the order.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

[BEFORE O'BRIEN, HAYES, AND FITZGERALD, JJ.]

LUNHAM v. WAKEFIELD AND NASH.—Dec. 7, 1863;
Jan. 12, 1864.

Stat. 20 & 21 Vict., c. 60—Action for maliciously taking civil proceedings—Special damage—Trader, debtor summons.

An action does not lie for maliciously causing to be issued and served a trader debtor summons under "the Irish Bankruptcy and Insolvency Act, 1857," upon foot of a debt falsely alleged to exist, and so causing the plaintiff to attend publicly in the Bankrupt Court, whereby the plaintiff was injured in his credit, and was prevented from attending to his business, and incurred costs in resisting said proceedings. (Hayes, J., dissentiente).

DEMURRER:—The summons and plaint stated, That at the time of the committing of the grievances therein-after mentioned, the plaintiff was not indebted to the defendants in the sum of £220 7s., or in any sum amounting to or extending to the sum of £50, or in any sum whatsoever; yet the defendants, maliciously contriving and intending to injure the plaintiff, and to

make him commit an act of bankruptcy, and to sue out a commission of bankrupt against him, and to have him thereupon adjudicated bankrupt, or by reason of the fear of such proceedings to compel him to submit to the unjust demand made on him for the sum of £220 7s. therein-after mentioned, and falsely alleged to be due by the plaintiff to the defendants, falsely and maliciously, and without reasonable or probable cause, to wit, on the 8th day of October, 1862, made, or caused to be made, an account in writing of the pretended particulars of a pretended demand of the defendant on the plaintiff for the sum of £220 7s. for goods falsely pretended to have been sold and delivered by defendants to plaintiff, with a notice thereunder requiring immediate payment thereof, purporting to be in the form or to the effect specified in the Schedule (F.) to a certain Act of Parliament passed in the 21st year of the reign of her present Majesty, intitled, "The Irish Bankrupt and Insolvent Act, 1857," and afterwards, on the 7th day of November, 1862, falsely and maliciously, and without any reasonable or probable cause, caused the said particulars of demand and notice requiring payment to be served at the plaintiff's place of abode, and afterwards, falsely and maliciously, and without reasonable or probable cause, caused to be filed in the office of the said Court of Bankruptcy and Insolvency in Ireland an affidavit subscribed and sworn on behalf of the defendants by said George Henry Wakefield, one of the defendants, and one Michael Collins, purporting to be in the form required by the said Act, in which said affidavit the said George Henry Wakefield, on behalf of said defendants, and with the privity and assent of said Joseph Gadsdon Nash, amongst other things, falsely and maliciously, and without reasonable or probable cause, swore that the plaintiff was justly and truly indebted to the defendants in the sum of £220 7s., for goods sold and delivered, and thereupon the defendants, falsely and maliciously, and without reasonable or probable cause, procured the Honorable Judge Lynch, being one of the judges of the Bankruptcy and Insolvency Court, to issue a summons in pursuance of the said Acts, whereby the plaintiff was required personally to be and appear before the Court of Bankruptcy and Insolvency at the said Court, Four Courts, in the city of Dublin, on the 14th day of November, 1862, at 12 o'clock, for the purpose of ascertaining in manner and form prescribed by the Irish Bankruptcy and Insolvency Act, 1857, whether or not the plaintiff admitted the said demand of the defendants, who claimed of him the sum of £220 7s. for a debt, or any or what part thereof, or whether the plaintiff verily believed he had a good defence upon the merits to the said demand, or to any and what part thereof; and the defendants, falsely and maliciously, and without any reasonable or probable cause, caused a copy of the said summons to be served on the plaintiff; and the plaintiff said that he attended in pursuance of the said summons at the said Court before the Honorable Judge Lynch, one of the judges of said Court, on the said 14th day of November, said Courts being then open to the public, and there being divers persons therein, and did then and there, pursuant to the provisions of the said Act, make a deposition upon oath that he verily believed he had a good defence on the merits to the said, as by same filed of

record in said Court appears, and afterwards such proceedings were had, that the said proceedings so as aforesaid instituted by the defendants against the plaintiff in the said Court of Bankruptcy and Insolvency had wholly ceased and determined in favor of the plaintiff; and the plaintiff averred that by being compelled publicly to appear in the said Court of Bankruptcy and Insolvency, and by said several grievances so as aforesaid committed by the defendants, the plaintiff was greatly injured in his credit, and was for several days prevented from attending to his business, and incurred great costs and expenses in and about attending at the Bankrupt Court, and resisting the said proceedings, and making the said depositions, to the plaintiff's damage of £1,000.

To this summons and plaint the defendants demurred, on the grounds that all persons having or claiming a debt to be due to them by a trader, are entitled to take the proceedings in summons and plaint mentioned, without being liable to be sued in any action for maliciously taking such proceedings, and that this action was at all events not sustainable without alleging and proving that legal damage resulted therefrom to the plaintiff, and there was no actual or sufficient legal damage laid or alleged in or by said summons and plaint, or thereby shewn to have been sustained by reason of, or as the result of the grievances alleged in the said writ of summons and plaint; and that the said writ of summons and plaint in substance and fact alleged that the defendant, George Henry Wakefield, in committing the grievances in summons and plaint mentioned was guilty of felony, by committing wilful and corrupt perjury, and the civil wrong alleged merged in such felony, and that unless the said defendant feloniously swore a false affidavit of debt, he was entitled to take the proceedings in summons and plaint mentioned, without being liable to be sued in an action for damages for so doing.

Devitt (with him *Barry*, Q.C.,) in support of the demurrer.—The action here does not lie; and supposing that it does, there is no sufficient averment of special damage flowing immediately from the acts of the defendant. The proceedings complained of here were taken under the Bankruptcy and Insolvency Act, 20 & 21 Vict., c. 60, ss. 105 to 113. There is no averment in the summons and plaint that any award of costs was made by the Court of Bankruptcy. The proceeding by trader debtor summons has its origin in 5 & 6 Vict., c. 122. Then came the English Bankruptcy Act of 1849, ss. 78 to 86. The trader debtor summons is thereby a mode of proceeding to recover a debt, like an ordinary action. *Pim v. Wilson* (2 Ph., 653.) is an authority in favour of the defendant. An action might as well be brought for maliciously bringing an action, as for issuing the trader debtor summons. No instance of such an action can be found. No action lies for a mere civil proceeding.—*Savile v. Roberts* (1 Sal., 14; s. c., 1 Lord Raymond, 374, Carth., 446); *Purton v. Honnor* (1 B. & P., 205). It is true that an action would formerly have lain for maliciously suing out a commission of bankruptcy; but there a party was deprived of his liberty and property: there is no analogy between that case and the present.—*Chapman v. Pickersgill* (2 Wils. 145); *Farley v. Danks* (4 E. &

BL. 493). There is no case to be found in which the mere presenting of a petition to make a man a bankrupt, or striking a docket under the old system, was made the subject of an action. This case cannot be put higher than that. The next point is whether there is a sufficient averment of special damage in the plaint here. The averment that the party was put to costs is not sufficient special damage. Section 113 of the Bankruptcy and Insolvency Act enables the Court to award costs, which in a civil proceeding are sufficient compensation for the vexation.—*Cotterell v. Jones* (11 C. B., 713). The question then comes to the damage arising from the attendance in Court. No particular instance of this is averred. The sittings in these cases of trader debtor summonses are always private.—*Marshall v. Sharland* (15 Q. B. 1051); *Pratt v. Gosnell* (9 C. B., N. S., 711); *Fitzpatrick v. O'Brien* (Not reported).

Waters and Heron, Q.C., contra.—This action is not a novel one, but the question whether it lies is novel. The various averments in the summons and plaint must be taken to be true, and it would be lamentable if there was no redress for a man making a false claim, and bringing a trader into the Bankrupt Court. The argument on the other side went on the supposition that the claim made was true. An action lies for maliciously suing out a judge's fiat. There is a great difference between suing a man and bringing him into the Bankrupt Court. The mere bringing of an action against another does that other no injury. The allegation that he owes money does him no harm, and the costs which he recovers are a sufficient compensation to him; but his name being connected with the Court of Bankruptcy does a considerable injury to a trader. In civil actions a man is not bound to attend in Court: he must do so on the proceedings under a trader debtor summons; and if he does not attend, he commits an act of bankruptcy—s. 108 of the Bankruptcy and Insolvency Act. To say to a man, "You are bankrupt," is actionable. 2nd BL. Comm., 285, shews what is the effect of the bankrupt code;—it is meant to apply to dishonest or insolvent traders, so that to take proceedings for the purpose of making a man a bankrupt, is in effect to say, "You are a dishonest and insolvent trader." There is authority to shew that an action will lie for maliciously taking civil proceedings.—*Hargreave and Butler's Co.* Litt. 161, a, n. 4; *Waterer v. Freeman* (1 Hob., 205 & 266); *Chapman v. Pickersgill* (ubi supra); *Gosling v. Wilcock* (2 Wils. 302). The proceedings in bankruptcy are not meant as the ordinary means of recovering a debt. The object of the trader debtor summons is to make the trader commit an act of bankruptcy, and we allege in the summons and plaint that it was with that object that the proceedings here were taken.—*Churchill v. Siggers* (3 El. & Bl., 929). The report of *Savile v. Roberts*, in 1st Lord Raym. 374, contains passages strongly in favour of the position that an action will lie for maliciously taking civil proceedings.—*Hilliard on Torts*, 466. As to the costs, they are in the discretion of the Bankruptcy Court; the trader cannot claim them as matter of right, and they, therefore, cannot be said to be a sufficient compensation to him for the vexation caused by the proceedings. They also referred to *Granger v. Hill* (4

Bingh. N.C. 212); *Heywood v. Collinge* (9 Ad. & Ell. 268); *Oldfield v. Dodd* (8 Exch. 579); *Rolin v. Stuart* (14 C. B., 595); *Martin v. Lincoln* (Bul. N. P. 12).

Devitt, in reply, referred to *Fivaz v. Nichols* (2 C. B., 501); *Scott v. Bye* (9 B. Moore, 649); *Reynolds v. Kennedy* (1 Wils. 232). The schedules to the Bankruptcy and Insolvency Act shewed that the Legislature, in this proceeding by trader debtor summons, had in view the claim of a debt which might become the subject of dispute.

Jan. 12, 1864.—FITZGERALD, J.—This case came on on the 7th December, and as the question was one of practical importance, we took time to consider the case and the authorities. The question arises on demurrer, and the summons and plaint states—(his Lordship read the summons and plaint). The complaint is, therefore, in substance, that there being no debt due to the defendants by the plaintiff, they took the proceedings in question maliciously, and without reasonable or just foundation. The plaint contains some strong expressions, and imputes criminal motives to the defendants; but this is not material, save to shew malice in the defendants, and want of probable cause. I may observe, too, that the defendants' proceeding could not be the means of compelling the plaintiff to commit an act of bankruptcy, if there was no debt. If there was no debt due, whatever their intentions may have been, the proceedings could not have been the means of compelling an act of bankruptcy, and as to suing out a commission of bankruptcy, there is no such proceeding at present. The point raised is, whether the action lies, either without an allegation of any special grievance to the person or property of the plaintiff, or with such damage as is alleged in the plaint here. In order to approach the question properly, it is expedient to consider shortly the history, character, and effect of the proceedings by trader debtor summons. Prior to the passing of the 1 & 2 Vict., c. 110 (Engl.), and the 3 & 4 Vict., c. 105 (Irel.), every person possessed a summary power of imprisoning his debtor, and suing out a *capias*, which was known as a marked writ. The statutes abolished arrest by mesne process save in certain cases, but in abolishing arrest, it gave additional facilities against the property of the debtor. Before arrest on mesne process, the commission of acts of bankruptcy was commonly procured by the issuing of a marked writ, a proceeding which was originally adopted to coerce traders to commit an act of bankruptcy, and compel the distribution of his effects. When, therefore, the arrest was abolished, the Legislature thought it right to give additional means of forcing a trader to commit an act of bankruptcy; and accordingly, by the 8th section of each of the statutes to which I have referred, a creditor is empowered to file an affidavit of debt in Chancery, and to serve a notice requiring payment of his debt; and if the trader does not, within forty-one days, pay, compound for, or secure the debt in the manner mentioned in the section, he shall be deemed to have committed an act of bankruptcy on the forty-second day after service of the notice and affidavits upon him. That was not found to be effectual in operation, and it was not difficult to evade it, and therefore, when Lord

Brougham's Bankruptcy Act was passed, by the 11th and 19th sections of that Act, the increased remedy of the trader debtor summons was added in England, and the statute 12 & 13 Vict., c. 107, extended it to Ireland. The 12 & 13 Vict., c. 107, is repealed by the present Bankruptcy Act, but many of its provisions are re-enacted, especially those as to the proceeding by trader debtor summons, save s. 19, which is not re-enacted. The general policy of the 19 & 20 Vict. is to protect traders, and relieve them from fraud, and to procure an equal distribution of the trader's effects, if the trader himself could not or would not himself effect it. By section 98, "If any plaintiff shall recover judgment in any action for the recovery of any debt or money demand in any of her Majesty's Superior Courts against any such trader, and shall be in a situation to sue out execution upon such judgment, and there be nothing due from such plaintiff by way of set-off against such judgment, and such trader shall not, within fourteen days after notice in writing personally served upon such trader, requiring payment of such judgment debt, pay, secure, or compound for the same to the satisfaction of such plaintiff, every such trader shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such notice." Section 99 places a decree of a Court of Equity on the same footing as a judgment, and section 103 provides an analogous remedy in the case of a trader having privilege of Parliament. Section 104 is analogous to section 8 of the other statute, but it fixes fourteen days in place of forty-one. Sections 105 to 113 regulate the procedure by trader debtor summons. It may be described thus—If a creditor has a demand on a trader, he may serve a notice of demand, and if the demand is not paid, he may make an affidavit of the debt, and of the demand of payment, and thereupon obtain out of Court a summons requiring him personally to appear, and state whether or not he admits or denies the demand. If he admits the debt, he is under no necessity to appear in Court, for he may, under section 112, file an admission; but if he denies the debt, he must attend the Court in person to make and file a deposition that he believes he has a good defence on the merits. The Court may examine him, and may make him enter into a bond with two sureties to pay such amount with costs, as may be recovered in any action against him for recovery of the demand. The trader who admits a demand, but does not pay it, or compounds for it within seven days, commits an act of bankruptcy; and if he appears and refuses to admit the debt, and declines to make an affidavit of merits, and does not, within seven days, pay or compound for the demand, he thereby also commits an act of bankruptcy. It is to be observed in relation to this class of acts of bankruptcy, that the foundation of the whole proceeding is, that the creditor has a debt really due to him. If the debt is not due there is no act of bankruptcy; if the creditor afterwards seeks for an adjudication, he must prove that there is a debt due. The essential character of the proceeding is to enforce payment of a debt. If the debt is admitted and not paid, or if it is disputed, and the trader does not make an affidavit of merits, the creditor is entitled to proceed in bankruptcy. I am not aware of

any authority except the opinion of Lord Cottenham in *Pim v. Wilson* (2 Ph. 653), to which Mr. Devitt referred. The suit there was instituted to restrain the analogous proceeding under the 1 & 2 Vic., c. 110; the bill was demurred to before the Vice-Chancellor, and the demurrer overruled. From that there was an appeal, and Lord Cottenham, without hearing a reply, said "there was no more reason, but rather less, for interfering with the proceeding of which the plaintiff complained, than there was before the statute, 1 & 2 Vic., c. 100, for interfering with the right of arrest on mesne process. The Act had introduced no new hardship, but, on the contrary a great benefit to the debtor, by substituting the present proceeding against his property, for the former power of arrest of his person, by which he was liable to be thrown into prison, and thereby incapacitated for proceeding for the payment of his debts. If the proceeding sought to be restrained had been a mere action, there could have been no doubt, the only equity suggested being that no debt was, in fact due. Yet where was the difference between the two proceedings? Both were remedies for the recovery of a debt, and in both the law must take its course in the absence of equitable grounds of interference. In *Atwood v. Banks*, there was a clear equity; here there was nothing, but the allegation of the debt not being due." The demurrer to the bill was therefore allowed. Such being the character of the proceeding, the plaintiff contends that the action lies and is maintainable, whether there is special damage or not. The defendant alleges that the present action is one without precedent, and that it would lie only with respect to some special grievance which does not appear here. Many authorities were cited. It may be said that an action on the case lies against any one who maliciously, and without probable cause, prosecutes another criminally, whereby the other suffers in character person, or property, and this is termed in the old cases, an action on the case in the nature of a conspiracy, as in *Mills v. Mills* (Croke Car. 239). The grounds of the action are malice, want of probable cause, and injury to the plaintiff by reason of the prosecution, either in person by imprisonment, in character by the scandal, or in property by the expense. As may be seen in the case of *Jones v. Given* (Gilbert's Report, 185). In analogy the law in modern times allows of an action for maliciously arresting or holding to bail, and as is said by Lord Camden in *Goslin v. Wilcock* (2 Wilson, 305), "Of late years where a man is maliciously held to bail, where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and put him to the difficulty of getting bail for a larger sum than is due. In *Savile v. Roberts*, Lord Holt gives the reasons of the rule as to civil cases thus—"So to bring an action, though there be no good ground, is not actionable, because 'tis a claim of right, and he has found pledges, and is amerciable *pro falso clamore*, and is liable to costs; but yet if one has a cause of action to a small sum, and take but a *latitat* to a very great sum, or has no cause of action at all, and yet maliciously sues the plaintiff to the intent to imprison

him for want of bail, or do him some special prejudice an action of the case lies; but then 'tis not enough to declare generally that he brought an action against him *ex malitia et sine causa, per quod* he put him to great charge, &c. but he must shew the grievance specially as in 1 Sid. 424, a.c., whereas he owed the defendant £100, he sued him for £500, and to hinder him from bail affirmed to the sheriff £500 was due, *per quod* he was imprisoned for want of bail; or 1 Saund. 228, for that the defendant intending to procure his imprisonment where there was no cause of action, or without any cause of action, sued him in an action for £300, whereupon he was arrested and imprisoned," &c. So in both the instances given by Lord Holt, there was an actual imprisonment, or a holding to bail. The case is also reported in 1st Lord Raymond, p. 374, and 12th Mod. The plaintiffs here relied on the report in Lord Raymond, in which the matter is thus stated:—"There is a great difference between the suing of an action maliciously, and the indicting of a man maliciously. When a man sues an action, he claims a right to himself or complains of an injury done to him; and if a man fancies he has a right, he may sue an action. If A. sues an action against B. for mere vexation, in some cases upon particular damage, B. may have an action; but it is not enough to say that A. sued him *salvo et malitiose*, but he must show the matter of the grievance specially, so that it may appear to the Court to be manifestly vexatious." And by these terms is obviously meant that the proceeding has caused some special vexation or grievance. In *Purton v. Honner* (1 B. & Pol. 205), the authority of *Savile v. Roberts* was recognised, and it was held in accordance with that case, that an action did not lie for a malicious ejectment. It was admitted by the plaintiff that there was no decision, that an action would lie merely for bringing an action for a debt where no debt was due, but he relied on *Waterer v. Freeman*, Hargreave's note to Co. Litt., and the case of *Martin v. Lincoln*, in Buller's Nisi Prius, p. 12. Buller gives a reference to M. 27, Car. 2, but I have not been able to find any report of the case in Vaughan, Carthew, Sir Wm. Jones, or any other of the reports of the period. The note in Buller is this: "Case for that the defendant *machinans* to deprive him of his liberty, *absque aliquâ probabili causâ prosecutus fuit quoddam breve de privilegio* out of the Court of C.B., and after he had put in an appearance, that the defendant knowing he had no probable cause, suffered himself to be non-suited. After verdict in not guilty, it was moved in arrest of judgment that the action would not lie. North, C.J. said the contrary is adjudged in *Waterer v. Freeman* (Hob. 266), and that upon good reason; and it is in the discretion of the judge to direct the jury, if there be manifest proof that there is no cause of action; and Ellis, J. said that the cause was tried before him, and that it was apparent *the suit was merely vexatious*." That is the whole statement in Buller's Nisi Prius. There can be no doubt that the writ of privilege referred to there was the old attachment of privilege under which the defendant was arrested, and held to bail, and, indeed, it appears that the suing it was intended to deprive the party of liberty, and if so the case does not conflict with the statement of Lord

Camden in *Goslin v. Wilcock*, because it shows there was a specific grievance. *Waterer v. Freeman* is frequently referred to in the earlier books, and though the proposition laid down there is but the dictum of Lord Hobart, it is deserving of great attention. The case is given in Buller's Nisi Prius, 12, from which I now quote. *Waterer v. Freeman* was for maliciously suing a second *feri facias*, and having the plaintiff's goods taken in execution thereupon, after goods taken upon a former *feri facias*, and in the course of Lord Hobart's judgment he thus expresses himself:—"Now to the principal case; if a man sue me in a proper Court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have case against him for the undue vexation and damage that he putteth me unto by his ill practice; but two cautions are to be observed to maintain actions in these cases:—1, the new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust. 2, that there must be not only a thing done amiss, but also a damage, either already fallen, or else inevitable." To that passage I particularly refer. It will not be necessary for me now to criticise the principles laid down by Lord Hobart; if what he says is to be taken with this qualification that the damage to which he refers is somewhat other than the costs of defending, and that must be Lord Hobart's meaning, for there are other cases expressly deciding that no action will lie if the only damage is the costs of the action. Hargreave's note to Coke Litt., contains only the position "I apprehend, too, that such an action lies, as well where the vexation is practised by a civil suit, as where it is carried through the medium of a criminal process;" but I observe that other parts of the note seem to convey doubts of this portion of which indeed he gives no authority. He relies on *Waterer v. Freeman*, and Styles, 379, where Rolle, C.J., says, "I hold that an action on the case will lie for maliciously bringing an action against one where he had no probable cause." I pass over these dicta, but the plaintiff further contended that the proceeding by trader debtor summons was not to be likened to a suit at law, but was peculiar in its nature, imputing insolvency to the trader, and therefore that an action lay for the wrong, even though there was no damage; he likened it to the old proceeding of suing out a commission of bankruptcy, and relied on *Chapman v. Pickergill* (2nd Wils. 145), where the marginal note is, "Case for falsely and maliciously suing out a commission of bankruptcy, which was afterwards superseded, is a very proper action at law, though the Chancellor has power to give £200 damages by statute." It appears, however, on examining the report that there had been an adjudication of bankruptcy in that case under the commission, and that the commission was subsequently superseded, no act of bankruptcy having been committed. When we call to mind the nature of the old commission, and its consequences, it would be strange if an action did not lie. As illustrating how the bankruptcy law was carried out at the time of *Chapman v. Pickergill* we find that R. Downs, a bankrupt, was executed in 1702, for concealing effects; that in 1761 John Perrott was executed for concealing his effects,

as will be found in the note to 2nd Burr., 1215. The bankrupt law now is different. A bankrupt trader is no longer a criminal. The great objects of the law are to protect the trader. According to the old law a commission could be obtained only on a petition to the Chancellor, verified by affidavit, stating that the trader was bankrupt, so that the proceeding was itself defamatory, and the effect was to deprive the trader of all rights, and to impose on him all the consequences of an act of bankruptcy. It was therefore necessarily defamatory, and worked grievous wrong to him; and therefore I thought it strange that it should be doubted that the action lay in *Chapman v. Pickersgill*. All this is now changed in the case of proceeding by trader-debtor summons, where there is no allegation that the trader is bankrupt, and where the trader can dispute the demand made against him, and make an affidavit of merits. Now with respect to damage the allegation of damage in the plaintiff in this case is: "that by being compelled publicly to appear in the said Court of Bankruptcy and Insolvency, and by said several grievances so as aforesaid committed by the defendants, the plaintiff was greatly injured in his credit, and was for several days prevented from attending to his business, and incurred great costs and expenses in and about attending at the Bankrupt Court, and resisting the said proceedings, and making the said depositions." The allegation may be stated as threefold; first, the injury to credit by the proceeding; but this seems to me to be an allegation of damage which the law cannot recognise as the consequence of the plaintiff's proceeding. The summons does not contain any allegation against the plaintiff. It is a proceeding which may be adopted against the most solvent merchant in the community, and if we held the action maintainable in this respect, we must necessarily apply the same rule in the case of any suit against a trader for any large unfounded claim, for it may be, in one sense, injurious to a trader if an action is brought against him though unfounded, for a large sum, and yet it will not be damage legally speaking. Secondly, the plaintiff alleges that he was prevented for several days from attending to business. This appears to me not to aid the plaintiff. In most cases of civil proceedings a similar loss of time is occasioned, as where a trader is compelled to appear as a witness, and that now commonly happens, where he is a party to an action; he has often to attend and answer interrogatories administered to him. It is difficult to imagine an unfounded action, in which, in the course of the action his own attendance is not required; but it has never yet been alleged that the defendant in a civil suit could maintain an action for loss of time in substantiating his defence. The third allegation of damage is as to the expenses and costs incurred in resisting the proceeding. The passage which I have already read from Lord Holt's judgment in *Savile v. Roberts* is applicable here; he says, in reference to such actions, "It is not enough to declare generally that he brought an action against him *ex malitia et sine causa, per quod* he put him to a great charge, but he must shew the grievance specially;" and he gives two instances, one being the holding to bail, and the other arrest where there was no debt. The trader-debtor summons does not necessarily involve a trader in any ex-

pense; he does not need the aid of either counsel or attorney; he is not subject to any fees of Court. If he does incur costs, section 113 of the Act amply provides for them. There is, to be sure, a judicial discretion given, but the language of the Act is, "*shall have such costs as the Court in its discretion shall think fit.*" The Court of Bankruptcy is constituted the tribunal to determine as to costs. If the trader was to get any, he might have them on application to the Court, but it does not appear whether he made such an application, or if any rule was made on it if made. I may illustrate (His Lordship then referred to and commented on *Cotterell v. Jones* (11 C. B. 713), which had been very much pressed on the Court in argument, and continued)—Upon the whole case it seems to me that the proceeding by trader-debtor summons, followed up only to the extent of forcing the alleged debtor to make an affidavit, is to be regarded as a proceeding to enforce payment of an alleged demand, that the present case is of the first impression, and that the action does not lie, and that if it does lie, it can only be on the ground of special grievances, the consequence of the proceedings, and that none such are alleged here. I am of opinion that the defendant is entitled to judgment, but I have not arrived at that conclusion without hesitation, and somewhat of regret. I am sorry that this proceeding has frequently been oppressively adopted to compel a trader to yield to a claim which he disputed, and I agree with the opinion of Rolfe in *Style*, 579, that "if such actions were used to be brought, it would deter men from such malicious courses as are too often put in practice." It would seem, however, as if the Legislature had intended here to relieve the party from the consequences in proceeding thus. By the 12 & 13 Vict., c. 107, s. 19, it was provided that if a creditor should not recover the full amount of his claim, the debtor would be entitled to full costs if it should appear by affidavit that the plaintiff had not reasonable or probable cause for making his affidavit of debt in the amount claimed by him. So that, according to that law, if a party, having demanded £100, had recovered, in the action brought as provided by the Act, £99 only, he might be liable to pay the whole costs of the suit. Stat. 12 & 13 Vict., c. 407, has been wholly repealed, and section 19 has not been re-enacted. Section 19 was taken from the English Bankruptcy Act, 12 & 13 Vict. c. 106, s. 86, and that special provision is in force in England, and an instance of its operation will be found in *Pratt v. Goswell* (9 Sc. N.S., 710). The omission of the enactment from the new Irish Act was not accidental, but the result of deliberation, and we may assume that the Legislature, having in view the decision in *Pratt v. Goswell*, repealed and did not re-enact that section with the intent to relieve the creditor from all but the costs in the discretion of the Court. I have said that I have come to this conclusion with regret, but of course it will be seen that there is a difference amongst us. It may be that the decision of the majority will be in favour of the plaintiff. My opinion is for the defendant; but I have the satisfaction of knowing that the case will probably be brought to the Court of Appeal. It may be desirable that an action should be allowed to prevent oppression, but it may be on the

other hand better that the proceeding should be unshackled, leaving the debtor to bring his action if he can shew any grievance besides being put to costs, and for the costs leaving him to the Court of Bankruptcy.

HAYES, J.—The complaint of the plaintiff in this case, who is described as residing at Tralee, is in substance that—(His Lordship stated the summons and plaint). To this the defendant's answer is, that no doubt this may be true, but that the plaintiff has no remedy at law. The question for us is whether that is so or not, and if it be that the plaintiff is remediless in the premises, then the plain consequence will be, that a most effective and successful contrivance shall have been discovered, by which any respectable trader may be worried in time, property and person, almost to ruin, and that with perfect safety. I take it that that is not so, and that the plaint discloses a good cause of action. Many authorities have been cited to which I shall not refer. There is enough of authority to sustain this as a legal proposition, that when any person, maliciously, and without probable cause, resorts to a legal tribunal, and takes proceedings so as thereby to cause special damage, he is liable to an action. In *Savile v. Roberts* it is laid down, that the mere bringing of a groundless action is not actionable, and for this reason, that though general damage ensues thereby, the law presumes that costs are a sufficient compensation. In that very case it is also laid down that if a person has no cause of action, and maliciously sues with intent to do some special prejudice, an action on the case lies. The same law is stated in *Waterer v. Freeman* in Hobart's Reports. But is the Court of Bankruptcy a legal tribunal, and is the taking proceedings there within what I have stated? In *Pim v. Wilson* the Lord Chancellor at page 656, likened the proceeding in that case to an action. In *Farley v. Danks* (4 El. & Bl., 493), it is assumed as actionable for a person to file a petition for adjudication against a man to be made a bankrupt. But it has been argued that there is no special damage in this case. That, I think, is answered by *Craig v. Hasell* (4 Q. B., 481), and by *Churchill v. Siggers*. In the former case the declaration averred that the defendant had maliciously, and without probable cause, filed an affidavit of danger, and issued an extent under which the plaintiff's goods were seized, alleging damage from being deprived of the use of his goods, from loss of credit, and from being obliged to pay costs and expenses in defending himself. This was held on demurrer to shew a good cause of action, and in *Churchill v. Siggers* the averment of injury was almost in the terms used by the pleader in the present case. On the whole, I believe that the authorities I have cited do sufficiently sustain the plaintiff's case. The special damage is sufficiently made out, and I think that the costs here, which are in the discretion of the Court, are not and ought not to be an adequate compensation. I concur with the Court of Common Pleas in *Churchill v. Siggers*, where Pratt, J., says, that where there is an injury to a man's property, an action lies for him to repair himself. I therefore think the demurrer ought to be overruled.

O'BRIEN, J.—I have come, not without doubt, to the conclusion in favour of the defendant, that the summons and plaint does not disclose any cause of

action, and that the demurrer should be allowed. The authorities have been so fully gone into and cited, that it would be unnecessary for me to state them in any detail; but it appears to me the questions are, first, will an action lie against a party who institutes an unfounded action in a court of law without probable cause, and who even does it maliciously? Will such an action lie without shewing any special damage—I mean special damage of that character that has been held necessary? The next question is, whether a sufficient injury appears on the face of the summons and plaint here. As to the first question, I own I view the proceeding here in the light of a proceeding to recover a debt. The very high authority of Lord Cottenham in *Pim v. Wilson* sustains that proposition. No analogy exists between the present case and those where a commission of bankruptcy was sued out. This, then, being a proceeding to recover a debt, it is clear that an action will not lie where a party takes such a proceeding, even though he does it maliciously, unless special damage has ensued. That is the opinion of Lord Holt and of C. J. Hobart. Between them it will be seen that to sustain such cases they held that some special damage shall appear to have been incurred; and in *Savile v. Roberts*, as reported in Lord Raymond, the Chief Justice refers to the case in 1st Siderfin, 424, where the grievance was the holding to excessive bail. Now, in every one of the cases cited, it will be found when an action is maintainable, that the injury complained of was either that the party was arrested and obliged to give bail, or that he was injured in his character, or that his goods were seized more than sufficient to discharge the debt due by him. *Craig v. Hasell* was a case of that description. There it was stated, on the face of the declaration, that the claim made exceeded what was due. *Churchill v. Siggers* is a case of bankruptcy where a man was held to bail, and kept in custody for a larger sum than was really due. It is only necessary to refer to this case to see that the damage suffered there was the substantial ground of the action, and that it affords no authority for the present case. Now, it is true that the actual decision in *Cotterell v. Jones* is no authority here for the defendants, because that case was decided on the ground that it did not appear that any award of costs was made by the Court; but without going through the case in detail, it is sufficient to refer to the observations of the judges there to shew that the proposition contended for is right, that this action is wholly unsustainable except on the ground of special damage of that character, that would entitle the party to bring an action. Chief Justice Jervis says that where an action is wrongfully brought, costs are a compensation, but in a criminal case there are no costs. So Williams, J., says the costs must be assumed to be a full compensation for the vexation; and Maule, J., speaks to the same effect, and similar passages elsewhere. Then the question is, is there a sufficient statement of damage here? What is it? That he was obliged to attend the Bankrupt Court. Cases will be found in numbers where persons are obliged to come to Dublin, and have interviews with their professional advisers. If we held what is averred here to be a sufficient damage, we should extend it to cases of that kind. Well, it was also suggested that the very ap-

pearance of the man in the Bankrupt Court was a discredit to him. The facts do not sustain that. A claim is made against a man. He disputes it. There is no insolvency in that, no discredit in it. The bringing of an action against a trader, serving him with a writ, could be alleged on the same principle to be an injury to a trader's credit, and a ground of action. What else have we? The costs. That has been disposed of already; and, therefore, I am opinion that it is necessary for a plaintiff to shew some special damage, and that that has not been done. I concur that it is satisfactory to us that the parties can go to another Court.

Judgment for the defendants.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

SULLIVAN V. WATERS.—April 18.

Pleading—Summons and Plaint—Master and servant—Action by personal representative of servant against master for negligently permitting an aperture to remain unguarded in a floor, through which the servant fell and was killed. Demurrer allowed—Plaint not stating facts from which the presumption of duty would arise.

A summons and plaint which complained—that the defendants were in the possession and occupation of a certain distillery, and lofts and stores connected therewith; that P.S. deceased, was employed by the defendants as a labourer, to do certain works in and about the said distillery at night; averment, "that at the time aforesaid, the said P. S. deceased, as such labourer, had, whilst so employed, access by the license of the defendants to one of the said lofts at night, and by such license as aforesaid used one of the said lofts for the purpose of sleeping during the intervals of the night, when he was not actually engaged in his employment; yet the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture then being in the floor of the said loft to remain open, without being properly guarded and lighted, by reason whereof the said P.S., while passing in the night along the floor of the said loft, in pursuance of the said license, fell through the said aperture, and was thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to him, as aforesaid, the said P. S. afterwards died." Held bad on demurrer, inasmuch as no facts were disclosed on the plaint which would cast the duty of guarding and lighting said aperture on the defendants.

THIS was a demurrer to the plaintiff's summons and plaint. The action was brought under Lord Campbell's Act, 9 & 10 Vict., c. 93, by Bridget Sullivan, the widow and administratrix of Patrick Sullivan,

deceased. The summons and plaint was as follows:—"Victoria, &c. Thomas Waters and John Waters, the defendants, are summoned to answer the complaint of Bridget Sullivan, the administratrix of Patrick Sullivan, deceased, who complains that before and at the time of the committing of the grievances herein-after mentioned, the defendants were in the possession and occupation of a certain distillery, and lofts and stores connected therewith, and that the said Patrick Sullivan, deceased, was employed by the defendants as a labourer to do certain works in and about the said distillery at night; and the plaintiff avers that at the time aforesaid, the said Patrick Sullivan, deceased, as such labourer, had, whilst so employed, access, by the license of the defendants, to one of the said lofts at night, and by such license as aforesaid, used one of the said lofts for the purpose of sleeping during the intervals of the night, when he was not actually engaged in his said employment; yet the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture then being in the floor of the said loft to remain open without being properly guarded and lighted, by reason whereof the said Patrick Sullivan, whilst passing in the night along the floor of the said loft in pursuance of said license, fell through the said aperture, and was thereby wounded and injured; and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said Patrick Sullivan afterwards, and within twelve calendar months before this suit, died, and the plaintiff, as administratrix as aforesaid, for the benefit of herself, as the widow, and Patrick Sullivan as the child of the said Patrick Sullivan, deceased, according to the statute in such case made and provided, claims £200 as her damages in respect of the said wrongful act of the defendants; and the plaintiff, as such administratrix as aforesaid, prays judgment against the said defendant to recover the said sum of £200," &c. Endorsement—"The following is a full particular of the persons for whom and on whose behalf this action is brought—namely, Bridget Sullivan, the widow, and Patrick Sullivan, the child of said Patrick Sullivan, deceased; and the following is a full particular of the nature of the claim in respect of which damages are sought to be recovered in this action—namely, the pecuniary loss which the plaintiff and the said Patrick Sullivan sustained by reason of being deprived of the means of support derived from the earnings of the said Patrick Sullivan, deceased."

To the above summons and plaint the plaintiff demurred, and the following were the points for argument:—1st. That it appears that the relation of master and servant existed between the defendants and the said Patrick Sullivan, and it is not averred that the defendants had knowledge of the existence of the aperture in the summons and plaint mentioned. 2nd. That it is not averred that the said Patrick Sullivan was ignorant of the existence of the said aperture, and the danger connected therewith. 3rd. That it is consistent with the summons and plaint that the defendants provided for the safety of the said Patrick Sullivan to the best of their knowledge. 4th. That it is also consistent therewith that the said Patrick Sullivan may have, on entering the said employment, seen and known the said aperture, and the danger

connected therewith, and accepted the said employment with such knowledge. 5th. That it is not averred that the defendants held out any inducement to the said Patrick Sullivan to use the said loft. 6th. That it does not appear that the injuries which caused the death of the said Patrick Sullivan occurred without rashness or negligence on his part. 7th. That it is not averred that the defendants were guilty of any personal or superadded negligence other than that of not guarding or lighting the said aperture. 8th. That the facts stated in the summons and plaint do not shew that it was the duty of the defendants to guard or light the said aperture.

Waters, in support of the demurrer.—The question that is now for the consideration of the Court is the liability of a master for the injuries which the servant had sustained while in his master's employment. The law on this subject is clearly laid down by Lord Abinger in his judgment in the case of *Priestley v. Fowler* (3 M. & W., 5). The principle of that case is, that a servant runs all the risk in the ordinary course of his employment, and the master is not in general bound to indemnify him against the consequences of injuries sustained in the ordinary discharge of the duties for which he was hired; and if any defects exist in the place, it is the duty of the master to acquaint the servant with the defects, and if he fail to do so, he is liable for any injury resulting therefrom; but if the defects be open to ordinary observation, then for any accidents resulting therefrom, when patent, the master is not liable. This last-mentioned case, decided in 1838, has ever since been followed as the leading case on the point now before the Court. The summons and plaint is ambiguous, and is open to a double construction—firstly, that he had been the servant of the defendants, and his frequenting the loft may have been compulsory upon him in the discharge of his duties; secondly, he may have used the loft merely by the license of the defendants, and in no way connected with his duties. If in the latter capacity, then clearly the defendants are not liable. But assuming that the deceased was using the loft in the discharge of his duties, even so the defendant is not liable, for there is no averment that the defendant was aware of the existence of the aperture. The plaint alleges that the defendant permitted the aperture to remain open, and it is quite consistent with the declaration that the defendant knew nothing whatever of the aperture—that it remained open without his knowledge. In the form of a count given in the first edition of Bullen and Leake, p. 214, by a servant against his master for employing him to work upon an unsafe scaffolding, the declaration makes the averment which is absent in this case—namely, that the defendant was aware of the danger—"That the plaintiff was employed by the defendant as a bricklayer to do certain work for the defendant upon a scaffolding constructed by the defendant for that purpose which said scaffolding was, by the negligence and default of the defendant, constructed unsafely, and with defective and improper materials, and was in an unsafe condition, and unfit for the purpose aforesaid, which the defendant well knew, but of which the plaintiff was ignorant." The marginal note of the

case above cited of *Priestley v. Fowler*, is as follows—"Declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; and that the defendant had desired and directed the plaintiff so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants in carrying goods for him upon a certain journey; that the plaintiff, in pursuance of such desire, accordingly commenced, and was proceeding, and being carried and conveyed by the said van with the said goods; and it became defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; that in consequence of the neglect of such duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured," and it was there held on motion in arrest of judgment, after verdict for the plaintiff, that it was sufficiently to be collected from the declaration that the defendant had directed the plaintiff to go in the van; but secondly, that even in that case the action was not maintainable. And Lord Abinger observed, in giving judgment, that "in most of the cases in which danger may be incurred, if not in all, the servant is as likely to be acquainted with the probability and extent of the danger as the master." Had there been an averment that we were aware of the danger, then the case would be different, but no averment of our knowledge having been made, the presumption arises that the defendant was himself ignorant thereof, and it is a maxim of pleading that everything shall be taken most strongly against the pleader—per Coleridge, J., in *Howard v. Gosset* (10 Q. B., 359); *Galway v. O'Meagher* (1 L. C. L. 235). I admit that the servant has a right of action when the injuries are caused by the negligence of the master; it was so held in *Mellors v. Shaw* (1 Best & Smith, 446). *Crompton, J.*, says, when commenting on *Priestley v. Fowler*, "There the declaration contained no allegation that the defendant knew the defects in the van in which the plaintiff was placed. I conceive that the rule laid down in that case, that a servant on entering the service of an employer, takes upon himself the risks of the service, does not apply where there has been personal negligence in the master which causes the injury to the servant." *Holmes v. Clarke* (6 Hurl. & Nor. 349) is distinguishable from the present. That was an action brought by an overlooker employed in a cotton mill against his employer for injuries sustained by him while oiling the machinery. The mill-gearing was there sound when plaintiff entered the defendant's service; it soon after became worn and broken, and plaintiff drew the manager's attention thereto, and the defendant, it was proved, saw the defect; but here it must be presumed as against the pleader that the defendant was wholly ignorant of the aperture. In *Potts v. Plunkett* (9 L. C. L., 290) in 1859, four propositions are laid down. The marginal note there says that in general a master is not responsible for the injuries occurring to his servant in the course of his employ-

ment, although resulting from that employment, the servant being supposed to take the service subject to all the risks which may occur during its continuance. 2nd. That where a servant is employed in a work which, equally within the knowledge of master and servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant, in the course of that employment, unless there be the existence of negligence on the part of the master, and the absence of rashness on the part of the servant. 3rd. That a servant is bound to exercise his own skill and judgment so as to protect himself in the course of his employment, there being no obligation on the part of his employer to warrant generally his safety. 4th. Although a plaintiff is not bound to negative in his pleading every matter which would constitute a defence, yet he must shew upon his pleading everything necessary to constitute a liability on the part of the defendant. *Seymour v. Maddox* (16 Q.B., 326); *Riley v. Baxendale* (39 L.J., Ex. 87); *Wilkinson v. Fairrie* (1 Hurl. & Colt. 633); *Southcote v. Stanley* (1 Hurl. & Nor. 247). An owner of land is under no legal obligation to fence an excavation, unless it is made so near the public road or way as to constitute a public nuisance. —*Hounsell v. Smyth* (7 C.B.N.S. 731); *Corby v. Hill* (4 C. B., N. S., 556).

A mere licence to the deceased to use the loft, as alleged in the summons and plaint, would not throw on the defendants the obligation of fencing it. Per Cockburn, C. J., in *Gallagher v. Humphrey* (6 L. T., N. S., 685). "A person that merely gives permission to pass and repass along his close, is not bound to do more than allow the enjoyment of such permissive right; he is not bound; for instance, if the way passes along the side of a dangerous ditch, or along the edge of a precipice, to fence off the ditch or precipice; the grantee must use the permission as the thing exists. It is a different question, however, when negligence on the part of the person granting the permission is super-added." *Robbins v. Jones* (33 L.J., N. S., Com. Pleas, 1); *Ormond v. Holland* (1 El. Black. & El., 102); and *Metcalf v. Hetherington* (11 Ex. 257), is cited with reference to the last point for argument. The plaint is for negligently permitting the aperture to remain open; but no facts are stated on the record which would cast the duty of keeping same fenced upon the defendant. The plaint is most *iisdem verbis* with the declaration in *Metcalf v. Hetherington*.

Jellat (with *Serjeant Sullivan*) contra.—The demurrer to this plaint must be overruled. There is a sufficient averment of the knowledge of the existence of the aperture by the defendant according to the authorities. I admit the principle enunciated on the other side, that if it did not appear on the plaint that defendant knew of the aperture, the action would not lie; but the proposition submitted is, that the allegation in the summons and plaint is, that the defendant negligently permitted an aperture in the floor to exist without being guarded and lighted: and the negligence of the defendant consisted in the omission of having an aperture in the loft, and that unprotected and unlighted. This averment of negligence was held sufficient without an aver-

ment of knowledge in *The Submarine Telegraph Company v. Dixon* (3 New Rep., 572), a case decided in the Common Pleas in England on 20th January of the present year. The head note in that case is as follows:—"To a declaration for injury, through negligent navigation to a submerged electric cable, the defendants pleaded that they were navigating the seas in the usual manner, and that they had occasion to let down their anchor near the place where the cable was injured as alleged, and that without default, and by means of the action of the winds and waves, the cable and the ship's anchor became entangled, and that there was no notice to the defendants of the existence or position of the cable: Replication—that the defendants had the means of knowledge of the existence and locality of the cable, and neglected to make use of such means of knowledge. There was also a new assignment, being an argumentative traverse of the plea, held that the declaration was good, although notice of the existence of the cable was not alleged; that the plea was good as putting in issue the negligence charged, and that the replication was good;" and Chief Justice Erle, in giving judgment, says that the declaration was good—that the whole case turned on that word "negligently," and that that word meant that the act complained of was done wilfully or without due skill; and his Lordship then added, "It is argued that notice should have been alleged in the declaration; but the question of knowledge of the existence of the cable is involved in the question whether there was negligence or not." The doctrine that everything is to be taken most strongly against the pleader, is greatly modified since the passing of the Procedure Act of 1853. *Ruckley v. Kiernan* (7 Ir. C. L. R., 75)—that was an action for libel, which was in substance an accusation made by defendant that the plaintiff had committed perjury. On demurrer to the defence it was held, that though the defence did not in terms admit that the defendant believed the plaintiff to have been guilty of perjury, as complained of in summons and plaint, still the defence was sufficient upon demurrer. *Galway v. O'Meagher* (1 I. C. L. R., 235) was before the Procedure Act. Lord Denman, in giving judgment in *Williams v. Wilcox* (8 A. & E., 332), says, "The certainty or particularity of a pleading is directed, not to the disclosure of the case of a party, but to the informing the Court, the jury, and the opponent of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to an issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point." The law then is, that a master is bound to take all reasonable precautions to secure the safety of his workmen, and if he do not, as it is alleged he did not in the plaint before the Court, take those precautions, the master will be held responsible.—*Patterson v. Wallace* (1 Macqueen's H. L. C., 748); *Ashworth v. Stanwix* (30 L. J., N. S., Q. B., 183). The marginal note there is, that where by the negligence of the master an injury is caused to a servant in the course of his employment, the master is liable. As to *Priestly v. Fowler*, relied on upon the other side, that was a case decided in England in 1832, long before the

Procedure Act had introduced into Ireland new rules of pleading; and no question there turned on the pleading, nor is there a single case bearing on pleading cited by the defendants. *Seymour v. Maddocks* (16 Q. B., 326), also relied on on the other side, was decided so long ago as 1851, before the law of master and servant was developed as much as it has been by recent authorities. In that case there is no averment of negligence from the beginning to the end of the plaintiff. In none of the cases relied on was there any contention on the pleading.

John O'Hagan replied.

May 3.—*PIGOT, C.B.*—This was a demurrer to the summons and plaint brought by the widow and administratrix of Patrick Sullivan, deceased, against the defendants, Thomas Waters and John Waters, claiming damages on account of the death of her husband from injuries he had received while in the defendants' employment; it appears that Patrick Sullivan was employed by the defendants as labourer, to work in their distillery at night; that while employed as such labourer, he had access by the license of the defendants to one of their lofts at night, and by such license used one of the lofts for the purpose of sleeping during the intervals of the night, when he was not actually engaged in his said employment; the plaintiff then alleges that the defendant well knowing the premises, wrongfully and negligently permitted a certain aperture then being in the floor of the said loft to remain open without being properly guarded and lighted, by reason whereof the said Patrick Sullivan, whilst passing in the night along the floor of the said loft, in pursuance of said license, fell through the aperture, and was thereby wounded and injured, by reason whereof the said Patrick Sullivan died. The negligence relied upon is the defendant's permitting to exist an aperture in the floor without being fenced and lighted. If there was a duty in the defendant to fence and light the aperture, then the negligence alleged was a breach of that duty; but I find no facts stated in the summons and plaint to shew that there was such a duty—consequently there was no breach of duty. In *Metcalf v. Hatherington* (11 Ex. 257), which was an action against the trustees of the harbour of Maryport, the third count of the declaration was for neglect in the preservation and keeping of the harbour, and improperly suffering and permitting rubbish to accumulate therein contrary to their duty; Baron Parke laid it down that the count was bad for the want of facts on the record, which would cast the duty of clearing out the harbour on them. *Dutton v. Powles* (2 B. & S. 174) was where the declaration stated that, by charter party between the plaintiff's (owners of the ship P.), and the defendant (a merchant at Liverpool), it was agreed that the ship should receive on board from the defendant a cargo, and should proceed to C. & C., and there deliver it agreeably to bills of lading; that the defendant should deliver the cargo alongside, and receive it at the port of discharge, and that the master should sign the bills of lading. It then alleged that the defendants put up the ship as a general ship, that the goods were shipped by him, and eight bills of lading were made out by the shippers, and signed by the captain; that it was

usual at Liverpool for the shippers of goods by vessels to make out for the captain a correct copy of each bill of lading; that the shippers made out copies of the eight bills of lading and delivered them to the defendant for the captain; that the defendant kept the copies, and the plaintiff had no copies; nor was it in their power to obtain copies except from the defendant; that it was necessary, as the defendant well knew, for the purposes of the voyage, and to secure the goods from being confiscated abroad, and to enable the plaintiffs to deliver them to the consignees, that a consular manifest should be made out, in which an accurate account and description of the goods included in the eight bills of lading should be given; and that it was necessary, as the defendant well knew, for the purpose of making out a complete and accurate consular manifest; that the person employed to make it out should have the bills of lading or copies thereof; that it was the duty of the defendant as charterer, and under the charter party, upon request of the owners of the vessel, to hand over the captain's copies of the bills of lading for the purpose of enabling a complete and accurate consular manifest to be made out; and that the defendant was required by the plaintiffs to hand over the copies to K., their agent at Liverpool: but the defendant negligently, improperly, and carelessly only handed over to K. six out of the eight copies of the bill of lading, as and for the whole of the bills of lading relating to the goods, whereby and by reason of such negligence, improper conduct, and carelessness, an incomplete and inaccurate consular manifest was made out. Special damage was averred; and it was held by the Court of Queen's Bench and affirmed by the Exchequer Chamber, that the declaration was bad for not showing that either by express contract or mercantile usage, or from circumstances, there was a duty on the defendant to hand over the copies of the bills of lading to the plaintiff." And Chief Justice Erle, at p. 193, in delivering judgment in the Exchequer Chamber, says, "Negligence does not of itself create a cause of action unless it amounts to a breach of duty. If there was a duty in the defendant to take care to deliver up all the copies, then the negligence alleged was a breach of that duty; but in this declaration I find nothing to show that there was any such duty, consequently there was no breach of duty in the defendant for which an action lies." In this case we have to consider whether the statements in the summons and plaint show that the defendants were bound to keep the aperture which was in the floor properly guarded and lighted. The plaint in substance alleges that Patrick Sullivan was engaged to do certain things; and that by the defendant's leave and license he used one of the lofts, and when using same he fell through the aperture and received such injuries that he died therefrom soon after. Whether the use of the loft formed part of his employment, and whether he did or did not accept the employment with the risks attached thereto is not set forth in the plaint; but from the mere relationship of master and servant no contract, and therefore no duty, can be implied on the part of the master to provide for any defects in the flooring of the loft when the existence of the defects were unknown to the defendants, the employers of the deceased.—*Priestly v.*

Potter (3 M. & W. 5). In *Holmes v. Clarke* (6 Hurl. & N. 349) facts are stated which cast a duty on the defendant to protect dangerous machinery, and there the defendant neglected to do so; and the plaintiff, who was actually in the employment of the defendant, was drawn into the machinery and had his arm torn off while oiling the works, and the defendant was there held liable for the injuries sustained. Again, in *Ashworth v. Stanwix* (30 L. J., N. S., Q. B., 183), the master was held liable for injuries sustained by his servant when employed in actually working a shaft in a coal pit. Now, in the case before us the summons and plaint makes no mention of any necessity for the deceased to be on the loft in the course of his employment. It merely states that he had access to the loft, which access, by the license of the plaintiff, goes to negative the supposition that the deceased was on the loft in the discharge of his duties as servant. How far the owner of the premises who gives licence to use premises to persons who use them is liable, is not clearly defined. There is a distinction between those who use premises by the owner's express invitation, and those that frequent them for business purposes, and mere visitors—*Corby v. Hill* (4 C. B., N. S., 564) is another case. The owner of land in that case having a private road running through it gave permission to a person to leave a quantity of slates upon the road without a light or signal, and by reason thereof the plaintiff's horse was driven against the obstruction and injured. And Cockburn, C.J., in delivering judgment, says, It was enough for the plaintiff to aver that there was a road which he was entitled by the owner's permission to use, and that the defendant negligently and improperly placed an obstruction there, whereby the plaintiff sustained an injury. There there was an act of commission. In *Chapman v. Rothwell* (1 Ell. Bl. & Ell. 168), the marginal note is as follows:—"The plaintiff, as administrator to his deceased wife, declared that defendant was in occupation of a brewery and office, and a passage leading thereto from the public street, used by the defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet the defendant wrongfully and negligently permitted a trap-door in the floor of the passage to remain open without being properly guarded and lighted; and his wife, who had been to the office as a customer of the defendant, and otherwise in the defendant's business, and was lawfully passing along the passage on her way, returning from the office to the street, fell through the aperture, caused by the trap-door being and remaining open and not properly guarded and lighted, whereby she was killed." On demurrer to the declaration it was held that the duty of the defendant and breach sufficiently appeared in the declaration; and Chief Justice Erle there observes, "that if you invite a customer to come into your shop, and have a pitfall open, or a large iron peg in the middle of the floor, over which the customer is likely to tread, is not that a duty and a breach if an accident ensues?" There is a distinction between that class of cases where there is a duty cast upon one as the owner of the shop who invites in customers and the case of a mere visitor, who must take care of himself. Chief Baron Pollock,

in delivering judgment in the case of *Southcote v. Stanley* (1 Hurl. & N. 249), says "that the mere relation of master and servant does not treat any implied duty on the part of the master to take more care of the servant than he may reasonably be expected to do of himself." That case has been followed by several cases—vide *Hutchinson v. Newcastle, York, & Berwick Railway Company* (5 Ex. 343); *Wigget v. Fox* (11 Ex. 832). The same principle applies to the case of a visitor at a house. Whilst he remains there he is in the same position as any other member of the establishment so far as regards the master or his servants, and he must take his chance for the rest. *Southcote v. Stanley* was where a declaration alleged that the defendant was possessed of an hotel, into which he had invited the plaintiff to come as a visitor, and in which there was a glass door, which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff, by the permission of the defendant and with his knowledge, and without any warning from him, lawfully opened for the purpose aforesaid, as a door which was in a proper condition to be opened, nevertheless by and through the carelessness, negligence, and default of the defendant the door was then in an insecure and dangerous condition, and unfit to be opened; and by reason of the said door being in such insecure and dangerous condition, and of the then carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff and it was held that the declaration disclosed no cause of action. Baron Alderson there says—"If a person asked another to his house or to walk in his garden, in which he had placed spring guns or man-traps, and the latter not being aware of it was thereby injured, that would be an act of commission; but if a person asked a visitor to sleep in his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission but simply omission; the declaration merely alleges that by and through the negligence, carelessness, default, and improper conduct of the defendant the glass fell from the door. The words are all negatives, and under these circumstances the action is not maintainable." *Hounsell v. Smith* (7 C. B., N. S., 731) was a case where the defendants were owners of waste lands, upon which was a quarry which was unenclosed; and the declaration averred that all persons having occasion to pass over the waste had been used and accustomed to go upon and across the same without interruption or hindrance from and with the license and permission of the owners of the waste; that the quarry was situate near to and between two public highways leading over the waste, and was precipitous, &c., and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one road to another beside or near the quarry; that the defendants, knowing the premises, negligently and contrary to their duty left the quarry unfenced, and took no care and used no means for protecting the public or any person so accidentally deviating from such roads or passing over the waste from falling into the quarry; and that the plaintiff having oc-

casian to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken the wrong road was crossing the waste for the purpose of getting into the other, and not being aware of the existence or locality of the quarry, and being unable by reason of the darkness to perceive the same fell in and was injured. It was there held that the declaration disclosed no cause of action; and Williams, J. says that it was not the fault of the defendant's that he was ignorant of the existence and locality of the quarry, and of the danger he incurred in crossing same in the dark; the defendant held out no inducement to him to cross it. The next case that I shall notice is one of omission—*Barnes v. Ward* (9 C.B. 392). It was where a man being possessed of land abutting on a public footway, in the course of building a house on such land excavated an area, which, by the negligence of his workpeople, was left unfenced, so that B., who was lawfully passing along the way, the night being dark, without any negligence or default of his own, fell into the area and was killed; and the declaration, after stating the facts, averred that the defendant ought to have sufficiently guarded and fenced said area, so as to prevent injury to persons lawfully passing in and along said footway; and it was there held that the defendant was liable to an action; that the duty was cast upon him of fencing the area; and so it was held in *Coupland v. Hardingham* (3 Campb. 398). The cases are conflicting as to the distinction between omission and commission, but in *The Queen v. Hughes* (26 L.J., N.S., Magistrate Cases, 202) Lord Campbell says, "it has never been doubted that if death be the direct consequence of wilful omission of the performance of a duty (as a mother to nourish her infant child) that this is a case of murder." I have now referred to the authorities in detail—I do not risk my own judgment; and from those authorities I am enabled to extract this principle, that a mere license to enter premises which contain no concealed danger creates no obligation in any manner on behalf of the party giving the license. Such is the case in this summons and plaint. Patrick Sullivan had license to use the loft. The plaint does not state that the aperture was concealed, we must therefore presume that it was patent and open. This view appears to me not to conflict with *Gallagher v. Humphreys* (10 W.R. 664). I am of opinion that the summons and plaint here is bad, and that the demurrer must be allowed. In conclusion, I feel called on to acknowledge the valuable assistance given to the court by Mr. Waters in his very able argument. In his opening of the case, Mr. Waters brought forward and fully reviewed all the authorities on both sides, and by so doing greatly assisted the Court.

Demurrer allowed.

Landed Estates Court.

Reported by H. R. Green, Esq., Barrister-at-law.

[BEFORE LONGFIELD, J.]

IN THE MATTER OF THE ESTATE OF RICHARD BLAIR CULLIN, OWNER; GRAHAM LEMON, PETITIONER.

May 2.

A marriage settlement contained a limitation of the

husband's estate to the daughters of the husband as tenants in common in fee. Held, that such a limitation did not come within the doctrine laid down in Clayton v. Lord Wilton, so far as it affected the daughters of a future marriage, because its avoidance, so far as it affected such daughters, did not in any way prejudice its validity as to the daughters of the marriage, and that as regards the former class, it could not, in the absence of special reasons, be deemed to have been stipulated for by the husband, whose estate was being settled, nor by the wife. Held, therefore, that so far as it affected that class, it was voluntary, and therefore void against a purchaser for value.

This case came before the Court pursuant, to the rulings of Judge Longfield, on the abstract of title, whereby he directed the case to be argued before him, on the construction and validity of the settlement, executed on the marriage of the owner with Miss Jane Dooner, and on the law as laid down in *Clayton v. Lord Wilton* (3 Mad. 302). The question arose upon the construction of a limitation in a marriage settlement, and upon the validity of that limitation as against a purchaser for value. The facts of the case were as follow:—By the settlement executed on the marriage of Richard Blair Cullin (the owner) bearing date the 9th day of April, 1851, Mr. Cullin settled certain lands of which he was the owner in fee to the use of himself for life, remainder to trustees to preserve contingent remainders, and then, after providing for a jointure of £250 per annum for his intended wife, to the use of the first and other sons of the intended marriage, successively in tail male, and in default of issue male of the said intended marriage, then to the use of the first and other daughters of the said Richard Blair Cullin, in equal shares and proportions and to their heirs." Provision was also made in the settlement for portions for the younger children of the intended marriage and it contained other limitations and provisos, which it is not necessary to state here. The marriage afterwards took effect, but there was no issue thereof. The said Richard Blair Cullin, on the 13th March, 1862, entered into a contract in writing, with one Graham Lemon, for a sale to him the said Graham Lemon of the lands the subject of the settlement, and in said contract was contained a recital that "subject to the uses and trusts declared in the said recited indenture of marriage settlement, the said Richard Blair Cullin is entitled to said lands and premises;" and it was upon this understanding, viz., that Richard Blair Cullin was entitled to dispose not only of his own estate for life in said lands, but also of the reversion expectant on his death without issue, by the said Jane Dooner, his present wife, that the contract was entered into by Mr. Lemon. A petition was presented by Graham Lemon to the Landed Estates Court, on the 23rd November, 1863, for the purpose of carrying out the contract through the medium of the Court, and praying that a statutable conveyance of said lands might be executed by the Court to the said Graham Lemon, and in the course of the proceedings upon such petition, a question arose upon the limitation in the settlement in favour of the daughters of Richard Blair Cullin, viz., whether it was in-

tended thereby to include the *daughters of any future marriage* of Richard Blair Cullin, and if so, whether such daughters could claim under it against a purchaser for valuable consideration. Pursuant to the rulings of the judge on the title, the case, having been adjourned from a former day by order of the Court, so as to enable the trustees of the settlement to appear by counsel to support the extended construction, now came before him for argument upon the construction of the limitation.

S. W. Flanagan, Q.C., appeared for Graham Lemon the petitioner, and contended that the limitation in its extended construction, was void as against a purchaser for value, as being purely voluntary, without any consideration to support it. In support of this view he cited *Johnson v. Legard* (3 Mad. 283), in which case it was held that limitations may be introduced into a marriage settlement without any consideration to support them. In the case of *Clayton v. Wilton* (3 Mad. 302, note), a limitation in favour of children of a future marriage was held to be good. But Lord St. Leonards distinguishes that case from the present, for he gives as a reason for the decision in *Clayton v. Wilton* (Sug. V. & P. 718, 14th ed.), "that the limitations to the sons of the second marriage were, as the settlement stood, necessary for the support of the limitations to the daughters of the marriage." In this case, however, there are no subsequent limitations which could require such support to render them capable of taking effect; and by favouring the extended construction, the benefit to the daughters of the intended marriage might be materially diminished—for instance, supposing there were but two daughters of the first, and three of the second marriage; they would, under the limitation, each take one undivided fifth part of the estate. Again, are we to suppose that it was the intention of the parties contracting, to prefer the daughters of the second marriage to the sons of the second marriage? Certainly not. Again, is there any evidence that there was any intention on the part of the wife of Richard Blair Cullin, to contract for such a limitation? The very form of the limitation negatives any presumption that there was an intention on the part of the wife to limit the estate to daughters of her husband by a future marriage. It is not to be supposed that a person, whose estate forms the subject of a settlement, contracts for any of the limitations contained in it, or that the other contracting party, having no estate to be put in settlement, stipulated for any such limitation. Again, the Court in this case should restrict the *daughters of the said Richard Blair Cullin*, to the daughters of the marriage then in contemplation; the only parties who come naturally within the intention of a settlement are, the husband, the wife, and the sons and daughter of the marriage. It is evident, having regard to the natural contract of the parties, and from the limitation to the sons, that the limitations to the daughters are intended to be to the daughters of the marriage, and that words to render this intention clear have been omitted through carelessness or unintentionally. The sentence is imperfect, and in order to give effect to the manifest intention we must either strike out further words, or supply words which have been omitted. The following cases were cited by counsel in

support of his arguments, viz., *Clarke v. Wright* (6 H. & N. 849); *Massey v. Travers* (10 I.C.L.R. 468); *In re Browne's Estate* (13 Ir. Ch. R. 289), vide also 3 Davidson's Precedents, 834, note; *Mill v. Hill* (3 H. of L. 828; *Shepherd's Touchstone* by Atherley, page 83, note); *Lord Saye and Seal's case* (10 Mod. 40.)

Gamble for the trustees of the settlement, contra.—From the entire construction of the settlement, all the husband's property became the subject of contract with the wife. This is a matter between parent and child, and no authorities touch this point; they are all cases in which the limitations were to collateral relations, and the question is undecided between parent and child. In *Massey v. Travers* there was no moral consideration between the settlor and his brothers. There is a moral consideration between parent and child; he is bound in law to support the child, and the consideration is a valuable one. In *Browne's Estate* the question was whether the husband was not the purchaser of his own life estate. As to the law as regards creditors, vide *Holloway v. Hillard* (1 Mad. 419). As to the law as regards purchasers, putting aside the reasons given in the case of *Clayton v. Wilton*, that case is in favour of the extended construction.

LONGFIELD, J.—There were no reasons given in the judgment in that case.

Flanagan in reply.—It is sought on the other side to draw a distinction between "brothers and sisters" and "children." There can be no such distinction. There is no moral obligation to make any provision for children of a future marriage. The latter stand precisely on the same footing as collaterals. The important question in this case is, has the limitation in favour of the daughters of the husband by a future marriage been contracted for by that party to the settlement to whom the estate which forms the subject-matter of the settlement does not belong?

LONGFIELD, J.—This case is one of a class which sometimes comes before the Court, and which it would be very convenient to dispose of by saying that although the opinion of the Court be one way, yet because it entertains a doubt, it will refrain from pronouncing a decision. Such was formerly the practice of the Court, but I think it more advisable to give my judgment according to the opinion which I entertain, and to let the parties against whom I decide have the opportunity of appealing from my decision in case they think it proper to do so. It is well settled law that a marriage consideration does not support all the limitations contained in the settlement, but only such as appear to have been contracted for by the form of the deed, or by evidence *aliunde*. The question as to what limitations have been contracted for, is not one to be decided by *ingenious* conjectures of counsel on either side as to possible cases, but by bringing common sense to bear. Was it the case here that the lady contracted that her daughters should take a share with any daughters of her husband by a future marriage? It is impossible to take it so. It was not a *reasonable* part of the marriage contract. The husband may have so contracted; the wife did not. I would not go so far as previous judgments by judges in limiting the consideration, as has been done in previous cases, were it not for the cases in which limita-

tions to strangers were held not to be within the contract. When the estate to be settled belongs to the intended wife, I do not see any incongruity in holding that limitations to her relations have been stipulated for by her, and therefore purchased. Nor would I limit this reasoning to cases where the subject-matter of the settlement is personal estate or fee-simple, and where the limitations in question are in derogation of the husband's absolute right in the former case, and of his right as tenant during the joint lives, and as tenant by the courtesy in the latter. I would apply the reasoning to estates *pur autre vie*, and extend it to every limitation which the wife may be deemed to have stipulated for, in anticipation of the disabilities of coverture, and of the husband's marital rights. *Clarke v. Wright* was a case of this description. But such considerations, even in the absence of authority, would obviously be inapplicable to the case where the estate to be settled belongs to the husband; for there nothing would have prevented the estates limited to his relatives, if reserved to himself, from being limited by him to those relatives during the coverture. There being no material to support the inference that the limitation to the daughters of a future marriage have been duly contracted for, I have looked at the clauses in the settlement to see whether such limitation was in any way necessary to support the provision in favor of the daughters of the marriage, as in the case of *Clayton v. Lord Wilton*. Had the limitation been to the daughters in tail, with cross-remainders between them, such an argument might perhaps have been effectually sustained; but there being no remainders over, and the limitation being simply to the daughters as tenants in common in fee-simple, I am of a strong opinion that I cannot carry the doctrine in *Clayton v. Lord Wilton* farther than it has been already carried, and that were I to apply it to this case, I would be carrying the doctrine to a point to which I do not feel justified in extending it. I feel, therefore, that it is a case in which it is my duty to carry out the contract as sought for by the petition. I must declare the trustees to be entitled to their costs of appearing here on this motion as between solicitor and client, and the petitioner to be entitled to his costs as costs in the matter.

Order accordingly.

[BEFORE LONGFIELD, J.]

ESTATE OF THE ASSIGNEES OF THOMAS BENNETT, AN INSOLVENT, DECEASED, OWNERS; EX PARTE CHARLES TAAFFE, PETITIONER.—May 4, 1864.

Judgment mortgage—Affidavit of registration—Estoppel.

A judgment was recovered by R. W. S. against T. B. in the Court of Queen's Bench for the sum of £1,200 debt, and £3 1s. 11d. for costs. The affidavit to register the said judgment as a mortgage against the estate of the said T. B., pursuant to Statute 13 & 14 Vic. c. 29, stated that the said R. W. S. had obtained a judgment against T. B. for the sum of £1,200 debt, besides ——— for

costs. Held that the affidavit did not comply with the requisites of the 6th section of the statute.

Held also, that a payment to an incumbrancer on account of a judgment badly registered as a mortgage made by the Court in the presence of a subsequent incumbrancer does not in any way prejudice the right of the subsequent incumbrancer to impeach the prior statutable mortgage on the ground of defective registration.

THIS case arose on the settlement of the final schedule of incumbrances in this matter. The facts are these:—Fanny Bennett, the widow of the deceased owner, being entitled to a certain yearly rentcharge of £100 per annum, under the provisions of a certain marriage settlement set out Number 11 on the final schedule of incumbrances, filed an objection disputing the validity of a certain judgment mortgage placed upon the schedule in priority to her demand. This judgment mortgage was vested in Richard William Sparks. From the attested copy of the judgment it appeared that the judgment was a security for two distinct sums, viz., £1,200 debt, and £3 1s. 11d. for costs. The affidavit to register the judgment as a mortgage stated the amount of the debt only, leaving a blank for the costs. It appeared in a former matter of the estate of the assignees of Thomas Bennett, owners and petitioners, that payments had been made by the Court upon the hearing of the final schedule of incumbrances in the matter on the 23rd of May, 1861, to Richard William Sparks, amounting in all to the sum of £493 15s. 6d., on foot of Mr. Sparks' judgment mortgage, his security having been previously allowed by the Court as a charge upon the estate in the presence of Mrs. Bennett, who had notice of the payment, and whose demand was also set out in the schedule of incumbrances in the former matter subsequent to that of Mr. Sparks.

S. Woulfe Flanagan, Q.C., for Mrs. Fanny Bennett, in support of the objection, cited *In re Grippi's estate* (7 Ir. Jur., N.S., 119); *In re Pilon's estate* (7 Ir. Jur., N.S., 68); *In re Farrell's estate* (7 Ir. Jur., 307).

R. Dowse, Q.C. (with him Michael O'Loghlen) for Richard William Sparks, *contra*.—It is not required by the Act that the costs should be stated in the affidavit. It is sufficient to state the amount of the debt. The 6th section of the Act requires the affidavit to state "the amount of the debt, damages, costs, or monies recovered or ordered to be paid by such judgment, decree, order, or rule;" and *reddendo singula singulis*, the word "costs" refer only to costs ordered to be paid by a decree, order, or rule, and not to costs recovered along with a debt by judgment. This judgment mortgage has already been declared by the Court to be a good security, and money has been paid out by the Court to my client on foot of it. The order for payment was made in Mrs. Bennett's presence, and the schedule in the former matter ruled, recognising and establishing beyond dispute the validity of this security. Mrs. Bennett is therefore estopped from raising any question now upon its validity—*Doe v. Oliver* (2 Smith's L.C. 664). There is on the file of the Court a determination for valuable consideration in favour of this statutable mortgage.

It was open to Mrs. Bennett then as now to make the same objection, as she had notice of the schedule; and payments by the Court on account of any demand are sufficient to make it a good and valid charge. The order for payment on account has not been appealed from for two years, so it is now valid and unimpeachable. By a mistake of the officer the costs were stated in the judgment to be £3 1s. 11d., whereas in the cognovit they were stated to be only £2 1s. 11d. What was the creditor to do in this case? He was in a dilemma. Any statement fixing a sum for costs would have been inaccurate, and he was therefore obliged to leave——for costs. The following cases were cited:—*Doe d. Christmas v. Oliver* (2 Smith's L. C. 664); *Outram v. Morewood* (3 East. 346); *Eastmure v. Lawes* (5 Bing. N. C. 450).

Mr. Flanagan was not called on to reply.

JUDGE LONGFIELD.—I cannot hold this judgment mortgage to be valid against subsequent creditors on any grounds. It would be impossible to do so *reddendo singula singulis*; and I feel that I must follow previous decisions, that the costs must be put in the affidavit. At the time of the former payment on account Mrs. Bennett may have had no tangible interest in the funds. No doubt, Mrs. Bennett is bound by the distribution of the funds heretofore made; but I cannot hold that she is therefore estopped from raising any point on the defective registration of a judgment mortgage prior to her demand.

ORDER.—*Allow the objection on the ground that the costs are not mentioned in the affidavit, and declare that Mr. Sparks' judgment is not registered as a mortgage within the meaning of the Statute 13 & 14 Vic. c. 29, sec. 6.*

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYBCH, J.]

RE AN ARRANGING TRADER.

Arranging trader—Concealment of property—Certificate—Untrue statement in affidavits to verify petition.

In an affidavit to verify a petition presented to the court by an arranging trader, he states that the schedule of assets contains a true and full account of the property he has to be made available for the payment of the composition. And where creditors relying on the truth of this, accept the composition offered, and the trader obtains his certificate, the creditors may, long after the certificate is obtained, bring the case by motion before the court praying that the certificate may be withdrawn. The court, on satisfactory evidence that leasehold property was omitted, and that the affidavit to support the petition was untrue, will withdraw the certificate and put the case into bankruptcy.

The arrangement clauses of the Bankruptcy and Insolvency Act range from section 343 to 353, and their scope and tendency are what may be said to be a private bankruptcy, whereby the trader, with the consent of a specified number of his creditors whose debts amount to a specified sum, may, under the superintendence and control of the court, have his assets administered for the payment of the composition he offers, and which the requisite number of his creditors agree to accept; but as to the disclosure and discovery of his estate and effects, and the truthfulness of the account he presents to the court, there is no difference whatever between it and public bankruptcy. The course of proceeding is this: the trader, in the first instance, on making out a *prima facie* case, gets a protection order, and a day is then appointed for a first private sitting, ten days before which the trader is obliged to furnish his schedule and to have it vouched, as in bankruptcy; and at the first private sitting proofs are made, as in bankruptcy, and if everything is there found satisfactory, the second private sitting is appointed, when what was done at the first is confirmed. It is then provided by the 351st section, that if, at any time after the filing of any petition for protection, it shall be shown that the affidavit filed with the petition was wilfully untrue so far as concerned the assets ready to be produced by him, or that he has not made a full disclosure. The court may adjudge him a bankrupt and adjourn the proceedings into the public court. The 352nd section provides that so soon as the resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof, the court shall give to such petitioner a certificate under the seal of the court, and in the following form:—

CERTIFICATE TO PETITIONING TRADER.

Court of Bankruptcy and Insolvency,
Dublin, day of

Whereas A. B., of a trader, unable to meet his engagements with his creditors, did on the day of present his petition to the Court, under the provisions of the Irish Bankruptcy and Insolvency Act, 1857, praying that a certain proposal or such modification thereof as by three-fifths in number and value of his creditors might be determined, should be carried into effect, under the superintendence and control of said court; and whereas the court acting in the matter of said petition, caused such sittings of the court to be held as are directed by the said Act; and whereas a certain resolution or agreement was duly assented to at said sittings, which the court thinking to be reasonable and proper, to be executed under the direction of said court, caused to be filed and entered of record therein; and whereas the said resolution or agreement has been fully carried into effect, the court doth certify the several matters aforesaid.

The facts of the case appear in the judgment of Judge Lynch.

Kernan, Q.C., for creditors, applied to have the certificate annulled or set aside, on the ground that it was obtained by fraud and concealment.

Heron, Q.C., was for the arranging trader.—He contended that in an arrangement case the court had

not power to withdraw the certificate. It was a proceeding which might be said to be conducted by creditors. It was their duty to have investigated the trader's affairs; and in point of fact the alleged suppression could do them no injury as the property was encumbered to nearly what it was worth; and as the trader was not entitled to it at the time he presented his petition, he might have considered that he was not guilty of any suppression. He (counsel) believed there was not a case to be found in bankruptcy where the certificate was withdrawn after the trader had been suffered to trade again; at all events there was not a single arrangement case where such ever was done, although the arrangement clauses were in operation in England upwards of twenty years.

JUDGE LYNCH delivered judgment. He said—In this case an application is made to set aside the certificate granted by me on the 4th of July, 1862, on the ground that it was obtained by fraud and by the suppression of property from the knowledge of his creditors, and by wilful misstatements in his schedule. It is admitted by the trader that the statement of his property in the schedule filed is untrue. The statement in the schedule is "that he had a house under an agreement at a rent of £86 per annum, and that his interest therein is of no value." The truth is, that the agreement under which he held the house was to expire in 1862, and he had a reversionary lease, including a second house, at the rent for the entire of £60 per annum; and, in fact, those houses have lately been sold by him for £290. The composition offered in this case was 2s. 6d. in the pound; and the trader not appearing to possess any property the creditors accepted this sum, believing that it was supplied by a relative. The whole amount of the composition was £93; and now this trader, having procured my certificate—obtained by the falsehood I have above stated—seeks to retain for his own use the property thus fraudulently secreted from his creditors. It was first argued here that this misstatement did not prejudice the creditors; that the property, if really divided, was not of any value; and that the present amount realised arose from some accidental circumstances. It is unnecessary for me to speculate as to the soundness of such an argument in support of perjury and fraud, if it arose on the facts disclosed; but here, in my opinion, it is quite unsupported by the facts of the case. In my opinion the misstatement in this case was wilful, deliberate, and fraudulent—made with the view to save his property from honest distribution among his creditors, and the trader has just been caught in the fact of perfecting his cunningly devised fraud. But then it is argued that I have no jurisdiction to deal with this case. The 352nd section of the 20 & 21 Vic. cap. 60, our Irish Act, directs the granting of the certificate in arrangement cases, and makes such certificate operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy; and it was stated that no certificate in bankruptcy was ever set aside for being obtained by fraud. Now, not only in my opinion is that statement not sustained, but a plain recognised practice to the contrary exists. The books are full of such cases. I may mention a very early one before Lord Eldon, *ex parte Casothorne* (5 Ves.,

261). The Lord Chancellor said that "he recalled the certificate, being satisfied that it was obtained by a very foul fraud; and he would repeat in this case, if the public required the information, that if a commission of bankruptcy is taken out for the mere purpose of giving a certificate, such a contrivance, as a most illegal wicked conspiracy, is the proper subject of indictment or information." I cite this case for the becoming strength of the language of Lord Eldon in dealing with it. I have before me certainly no authority to show the application of the rule to arrangement proceedings, but in my judgment this certificate stands at least on the same ground, in this respect, as the certificate in bankruptcy. It belongs to every court of justice to protect its acts from being used through fraud to protect the wrong doer. This certificate, meant as a protection for the honest trader who discloses his affairs, and thereby procures the substantial majority of his creditors to accept a fair settlement, is now held by a fraudulent trader as means to protect himself in appropriating to his own use the property he concealed, and the concealment of which he effected by misstatements and false swearing. There is inherent in every court the power to prevent its records being converted to so nefarious a purpose; and I willingly assume the jurisdiction of setting aside this certificate as having been obtained by fraud and perjury. I will always, in these arrangement cases, exercise to the fullest extent of my jurisdiction to compel honesty and truth in the disclosures made to the creditors. This new jurisdiction—binding creditors by a majority of three-fifths, that majority composed often of persons having old family charges and debts of persons to lose in *presenti* in the hope of future dealing with the trader if sustained by them—others, besides, with perhaps questionable debts—would be a system capable of being worked to intolerable injustice, unless the court had power to judge of the reasonableness, &c., of the composition offered. But, unless the disclosures are full and honest—unless the court and creditors see all the property existing to answer the liabilities—it is impossible to form a judgment on the reasonableness of the offer made; and if this court were powerless, the moment a certificate was filched from it by a fraud on the principle on which it acts, these provisions would be dangerous and destructive in a mercantile community. It was argued that the creditors should investigate the property; and, no doubt, this court invites the creditors to use its powers for the fullest and most searching investigations. I am always ready to accede to every demand made on me to give every searching power to creditors in these cases which they could have in matters of bankruptcy. I have offered to allow the creditors to name a representative in these arrangement cases; and I will recognise his delegated title to make inquiry and call for examination all these precautions. I try to take, and ask the creditors to adopt, but still men are often negligent in using the powers they possess, and act on mere statements made. But is this an excuse in the mouth of the trader for his fraud and falsehood? Can I have him to say, you were foolish enough to believe me; had you inquired, you could have detected my fraud; therefore let my fraud stand excused, as between third

parties. This allegation may be listened to; but I can harbour no such extenuation for the fraudulent trader himself. One leading principle of this court should be, as far as its influence goes, to instil into trade, as its own best protection, honour and truth in its dealings, and free and full confidence in all its disclosures. The perils of trade are necessarily numerous, the failure of the best founded hopes happen often without blame; but if honesty be observed, and faith kept in trade, the sinking man who needs protection finds always in misfortune forbearance and good feeling in those even who suffer most heavily by him. But when the disclosures show to the court the violations of truth and honesty and the breach of mercantile faith, it is then my duty to act to the extent the law gives me power, and vindicate trade and commerce from the mean, the dishonest, and the fraudulent practices attempted and exposed. I therefore set aside this certificate and remit the case to bankruptcy, the latter order not to take effect for a fortnight.

Court of Appeal in Chancery.

Reported by R. Ruxton Bolton, Esq., Barrister-at-law.

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE OF APPEAL, AND MR. JUSTICE O'BRIEN.]

M'BLAIN v. SWANTON—May 12.

Construction of will—Survivor or survivors read other or others—Vesting of legacies.

Legacies were bequeathed to A., B., C., and D., to be paid to them on their marriage, but in case any of them married without the consent of their mother, then a gift over to the others; "and if any of them should die unmarried, or marry without such consent, then the sum so bequeathed should go and be paid to the survivors or survivor of them." A. married with consent, and dying left B., C., and D. surviving, who all died unmarried. Held, that A.'s personal representative was entitled to the three several legacies, and that the words survivors or survivor in the will ought to be read others or other.

THIS was an appeal from a decretal order made by the Lord Chancellor in December, 1863, which declared that the petitioner, Robert M'Blain, as personal representative of Mary Hegarty, deceased, was entitled to three several legacies of £500 each, bequeathed by the will of John Clarke Swanton, deceased to his daughters Rachael, Jane, and Frances A. Swanton, with interest thereon at the rate of £5 per cent. per annum, and that the said legacies and interest thereon were charged on the premises by the will of said testator, devised and bequeathed to his two sons, Samuel Swanton, and the present appellant, John Swanton." John Clarke Swanton, by his will bearing date 14th Feb. 1835, devised certain hereditaments to his two

sons, Samuel and John Swanton, but subject to legacies and charges. He then bequeathed £500 to each of his four daughters, Mary, Rachael, Jane, and Frances Anne Swanton, "to be paid to them respectively, on their respective days of marriage, but not before; provided that such of my daughters that shall marry, should marry with the consent and approbation of their mother, my wife, Jane, but not otherwise; and in case of any one or more of my said daughters marrying without such consent and approbation, then the sum so bequeathed to such daughter or daughters, marrying without such consent, shall go to such daughter or daughters that shall marry with such consent and approbation; if more than one share and share alike between them, and if but one such daughter, then to such only daughter; and my will is that if any of my said daughters shall happen to die unmarried, or, if married, without such consent and approbation as aforesaid, then the sum so bequeathed to her or them respectively, so dying or marrying without such consent, shall go and be paid to the survivors or survivor of them, in equal shares, at such time or times of their marriage with such consent aforesaid." Then followed directions that immediately after testator's decease the interest on these several legacies should be paid to his wife to be applied by her for the maintenance and support of his four daughters until their respective marriages with such consent. Then followed a bequest over from the sons, in case they should marry without the consent of their mother. The testator died soon after making his will. In 1836 Mary, the eldest daughter, with the consent of her mother, married Thomas Hegarty, to whom her legacy of £500 was paid, and died the following year, leaving a son, John Clarke Swanton Hegarty, in whose right this petition was filed by M'Blain, acting under a power of attorney. The remaining daughters Francis Anne, Rachael, and Jane survived their sister Mary, but all died unmarried in 1848, 1852, and 1855, respectively. Samuel Swanton dying intestate and unmarried, John Swanton, the respondent, became entitled to the testator's property, subject to said legacies, and entered into possession thereof. A petition was filed in 1863, praying that John Clarke Swanton Hegarty, as legal personal representative of his mother, Mary Hegarty, be declared to be entitled to the three several legacies of £500 each, bequeathed to Rachael, Jane, and Frances Anne Swanton, the daughters of the testator, for that on the true construction of testator's will, Mary Hegarty being the only one of his daughters who had married or had married with consent, had a vested interest in the several legacies bequeathed to her sister, liable to be divested on their marrying with consent, and that John Clarke Swanton Hegarty, the only child of Mary, was therefore entitled. Upon the hearing, the prayer of this petition was granted, and the Lord Chancellor made the order as above stated. From that order the present appeal was brought.

The Solicitor General (with him M'Blain) in support of the decree below.—The question may be narrowed to one of construction as to this clause of the will. To give consistency to this will, the words survivor or survivors must be read other or others; the clear intention of the testator was that these lega-

cies should be a provision for his daughters marrying with their mother's consent; survivor means one who outlives another person, not an event; it was the event that the testator contemplated; therefore the words must be read other or others; the first clause of the will as to marriage without consent is incorporated with the next clause as to dying unmarried; there would be an anomaly in reading the words strictly, for if a daughter died unmarried under the first clause, the representatives of Mary Hegarty would take a part of the legacy, while, under the second clause it would go to the survivors only. The subsequent devises to the sons also lead to the construction for which we contend—*Hawkins v. Hamerton* (16 Sim. 410); *Aicken v. Brooks* (7 Sim. 204; 2 Jarman, 653). These legacies were vested, subject to be divested on the happening of an event—*Vize v. Stoney* (1 Dru. & War. 337); *Hanson v. Graham* (6 Ves. 239.)

Brewster, Q.C. (with him *Warren, Q.C.*, and *Bagot* for the appellant. The testator in this clause has expressed his intention that not one of their legacies should vest until the happening of a certain event, they were to be paid on the day of marriage, but not before; this was a contingency that might never arise, and never did arise, therefore, these legacies are not vested—*Atkins v. Hiccocks* (1 Atk. 500.)

Warren, Q.C., on the same side.—These legacies are not vested, and cannot now be vested, the contingency not having arisen—*Atkins v. Hiccocks*. In *Vize v. Stoney* it could not be contended that legacies vested, unless for the interest being given; here the interest is not necessarily given—*Bolton v. Bolton* (12 L. Chan. R. 233.) For the true construction of the will, the reference in the second clause to being married without consent, must be struck out as superfluous.

THE LORD CHANCELLOR.—It would be inconsistent with the evident intention of this will to adopt the construction pressed by the appellants. To do so their counsel has to admit that a sentence of the will would have to be rejected as superfluous; but we can arrive at the meaning by another construction more in accordance with the terms of the will, and that construction must be adopted.

THE LORD JUSTICE OF APPEAL.—The words "survivor or survivors" must bear their natural meaning, unless when explained by the context. From the context in this will it is plain that the words "other or others" is meant. There are two distinct clauses. In the first "other or others" is meant; the terms of the second show that there is no change in the intention, therefore, it must be read in the same way; any other construction would be a contradiction of itself.

O'BRIEN, J., concurred.

Order below affirmed accordingly.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

MICHAEL MURPHY AND CHARLES HENRY JAMES, OFFICIAL ASSIGNEES, AND JAMES WHELAN, TRADE ASSIGNEE OF JOHN SKELLY, A BANKRUPT v. KEEFE.—December 17, 1863; February 17, 1864.

Bankrupt—Warrant of attorney—Judgment—Stat. 3 & 4 Vict., c. 105, s. 12; Stat. 20 & 21 Vict., c. 60, s. 334.

A. gives B. a warrant of attorney to confess judgment, which is not filed as required by stat. 20 & 21 Vict. c. 60, s. 34, but within twenty-one days after the execution of the warrant judgment is marked, and the judgment registered under stat. 7 & 8 Vict., c. 90. The amount of the debt having been levied by sale of A.'s goods under a writ of *fi. fa.* issued on the judgment so marked, and A. having subsequently become bankrupt, Held (*per Hayes and O'Brien, J.J.*) that an action would not lie against B. at the suit of his assignees by reason of the sale, either in the form of trespass, trover, detinue, or money had and received; and (*per Fitzgerald, J.*) that it would not lie in the form of trespass, trover, or detinue, but would lie in the form of money had and received to the use of the assignees.

DEMURRER: In the first paragraph of the summons and plaint, the plaintiffs, as assignees of John Skelly, a bankrupt, complained that the defendant converted to his own use the goods of the plaintiffs as such assignees of the said John Skelly, a bankrupt, that is to say (setting out the goods), to the value of £1,000. In the second paragraph, the plaintiffs, as such assignees, complained that the defendant, before the said John Skelly became a bankrupt, converted to his own use the goods of the said John Skelly, a bankrupt, to the damage of the plaintiffs, as such assignees, of £1,000. In the third paragraph, the plaintiffs, as such assignees, complained that the defendant, before the said John Skelly became a bankrupt, seized and took the goods of the said John Skelly, a bankrupt, and carried away the same and disposed of them to his own use, to the damage of plaintiffs, as such assignees, of £1,000. In the fourth paragraph the plaintiffs, as such assignees, complained that the defendant detained the goods and chattels of the said plaintiffs as such assignees, to the damage of the plaintiffs, as such assignees, of £1,000. The fifth paragraph was for £1,000 money payable by the defendant to the plaintiffs for money received by the defendant for the use of the plaintiffs. To this the defendant by way of defence, which, to avoid prolixity, he craved might be taken as pleaded separately to each of the counts in the summons and plaint respectively, pleaded that before the commission of the said acts, or any of them complained of, and before the said John Skelly had been adjudged a bankrupt, he, the defendant, theretofore, to wit, on the 5th day of April, 1862, and in or as of Hilary Term, 1862, by the consideration and judgment of her Majesty's Court of Common Pleas in Ireland, to wit, at Dublin, recovered against the said John Skelly a certain debt of

£1.207 Os. 4d. besides £2 2s. 8d. damages by reason of the detaining of said debt, together with £1 costs of registration as by record of said Court appeared and that on the day next after the execution of the bond, the said judgment was duly entered and signed, and afterwards in pursuance of, and in conformity with the provisions of the Irish Bankrupt and Insolvent Act, 1857, duly registered within twenty one days from the entering and signing of the said judgment, in the proper office of the registrar of judgments, which said judgment was duly entered in the said last-mentioned court, and duly registered pursuant to the provisions of the Act of the 7th and 8th Vict., c. 90; and the defendant averred that afterwards, and before the said John Skelly became or was adjudged bankrupt, and whilst he was in possession of the said goods and chattels, to wit, on the 17th day of February, 1863, he, the said defendant, in order to obtain payment of the said judgment, which was in full force and unsatisfied, sued out a certain writ of our lady the Queen, called a writ of *feri facias*, directed to the sheriff of the county of the city of Dublin, whereby the said sheriff was commanded that of the goods and chattels of the said John Skelly in his bailiwick, he should cause to be levied the debt, damages, and costs aforesaid, and which said writ was afterwards, and before the delivery thereof to the sheriff, marked to levy £546 12s. 10d., certified to be due on foot of the aforesaid judgment; and the defendant averred that afterwards, and before the said John Skelly became a bankrupt, to wit, on the 17th day of February, 1863, said writ was delivered to the said sheriff to be duly executed, and thereupon, by virtue of said writ, and in due execution thereof, the said sheriff did afterwards and before the said John Skelly became a bankrupt, to wit, on the 17th day of February, 1863, in order to levy the moneys by the said indorsement on the said writ directed to be levied, lawfully seize and take in execution certain goods and chattels of the said John Skelly then being and found within his bailiwick (which said goods and chattels so seized were the same and the only goods in the summons and plaint mentioned); and the defendant averred that afterwards, by virtue of said writ, and in due execution thereof, and before the return thereof, and before the filing of any petition in bankruptcy against the said John Skelly, the said sheriff sold the said goods and chattels in the said plaint mentioned, and by such sale made and levied the sum of £383 6s. 3d. towards satisfaction of the said debt, damages, and costs aforesaid, and that before or at the times of the said seizure and sale or either of them, the defendant had not notice of any prior act of bankruptcy by the said John Skelly committed; and the defendant averred that the said judgment was, at the said last-mentioned times, and still was, in full force and effect, and that the said goods and chattels so seized as aforesaid, and none others, were those mentioned and referred to in the said plaint, and that the said moneys so levied aforesaid under and by virtue of said writ, were all paid to the defendant long previous to the filing of the said petition under which the plaintiffs were so appointed assignees as aforesaid, and before the defendant had notice of any act of bankruptcy, which were the said several causes of action in the

plaint complained of; and the defendant averred that save as aforesaid, and by causing the said writ of *feri facias* to be so sued forth as aforesaid, and thereby causing the said goods to be so seized and sold thereunder, as he lawfully might as aforesaid, he in nowise committed the said acts so complained of in the said summons and plaint, nor did he receive any money for the use of the said plaintiffs. To this defence the plaintiffs replied, that the writ of *feri facias* in the said defence mentioned was sued out upon a judgment entered up on the 5th day of April, 1862, by the said defendant against the said John Skelly upon and by virtue of a certain warrant of attorney to confess judgment in a personal action executed to the defendant by the said John Skelly after the passing and commencement of the statute of the 20th and 21st Vict., c. 60, to wit, on the 4th day of April, 1862; and the plaintiffs averred that the said warrant of attorney, or a true copy thereof, and of the attestation thereof, was not within twenty-one days next after the execution of the said warrant of attorney, filed together with an affidavit of the time of the execution thereof, with the proper officer in her Majesty's Court of Common Pleas in Ireland, in which Court the said judgment was entered upon the said warrant of attorney; and the plaintiffs averred that a petition of bankruptcy was duly filed against the said John Skelly in the Court of Bankruptcy and Insolvency in Ireland, upon which petition the said John Skelly was afterwards, to wit, on the 20th day of March, 1863, duly adjudged a bankrupt; and the plaintiffs averred that by reason of the premises, the said warrant of attorney was, and must be deemed and taken to be, null and void, and of no effect in law, and the said judgment so entered up under and by virtue thereof, and also the writ of *feri facias* in said defence mentioned, as well as the sale thereunder, were, and must be deemed and taken to be, null and void to all intents and purposes whatsoever. To this replication the defendant demurred, on the grounds—1st. That inasmuch as the said replication admitted that the said judgment was duly registered in pursuance of and in conformity with the provisions of the Irish Bankrupt and Insolvent Act, 1857, in the proper office of the registrar of judgments within twenty-one days from the entering and signing thereof, there was no necessity that there should be an affidavit of the time of the execution of the warrant of attorney filed together with the said warrant. 2nd. That the said replication stated no facts from which it could be necessarily inferred that the said judgment which had been thereby admitted to have been as in the defence stated, in full force at the times of the seizure and sale, and the writ of *feri facias* which issued thereon, or the sale so made thereunder, could be deemed or taken to have become null and void when the said John Skelly was adjudged bankrupt. 3rd. That it was in nowise averred or shewn that the said John Skelly was, at the times of entering and signing said judgment, which was so duly registered as in defence stated in accordance with the usual and well-established practice in Ireland, or the giving of the said warrant, or at any time, a trader, and subject to the operation of the laws in force in Ireland relating to bankrupts. 4th. That the said warrant of attorney

had been duly acted on and exhausted, and all the acts justified by the said defence done, and the moneys therein mentioned received, long before the adjudication in the said replication mentioned. 5th. That the said acts in the defence justified, and now admitted to have been valid and legal at the time when the said acts were respectively done and committed, could in nowise be deemed to have been subsequently rendered void and wrongful by the facts in the said replication stated and relied upon. 6th. That as the said execution had been issued, and *bona fide* executed and levied by seizure and sale, and the said proceeds thereof paid to the defendant before the filing of the said petition, and the defendant had not at the respective times of the issuing of the said execution, or of said seizure or sale, any notice of any prior acts of bankruptcy by the said Skelly committed, the said sale and transaction were made valid and protected by the 328th section of the Irish Bankrupt and Insolvent Act. 7th. That the said warrant of attorney which was given collateral with the bond of the said John Skelly, was not a warrant of attorney to confess judgment in a personal action within the meaning of the 334th section of the said Act. 8th. That even if the said judgment became void and of no effect when said Skelly was adjudged bankrupt, yet as no demand of the proceeds received by the defendant from the said sale had been averred or shewn, the plaintiffs could not now sustain this action. 9th. That the said replication was a departure, and that it in no way traversed or confessed and avoided as to each count the facts stated in and relied on in the defence so pleaded separately and distributively to the said causes of action so respectively stated in the said counts. 10th. That by said replication plaintiffs did not maintain their plaint in each and every count, and also that said replication was in other respects insufficient. And the defendant also noted in the demurrer books that he would rely, if necessary, that the plaint was bad for misjoinder.

P. Martin (with him *D. C. Heron*, Q.C.) for the defendant.—The contention of the assignees is founded on a misapprehension of s. 334 of the Bankruptcy and Insolvency Act. That section must be read in connection with the previous provisions of st. 3 & 4 Vic. c. 105, which is not repealed. Sections 10, 11, 12, and 13 of the 3 & 4 Vic. c. 105, are those which bear on the question. The object of the Legislature in passing them was to prevent a trader from appearing richer than he really was, and to force the parson obtaining the judgment against him to give notice to all the world of his debt. That is effected by the entering of the judgment, and its registration in Scriven's Office. The argument on the other side must go this length, that if a person not being a trader gives a warrant to confess judgment, and judgment is entered and execution had upon it, and ten years after he becomes a trader and bankrupt, the judgment and execution are void as against his assignees if the warrant has not been filed. To support this argument it must be shewn that the judgment becomes null and void, not merely as against the assignees, but as against the trader himself. That view of the statute cannot be supported; it is opposed to authority.—*Morris v. Mellin* (6 B. & Cr. 446); *Bennett*

v. Daniel (10 B. & Cr. 500). All the cases are collected in *Conlan v. M'Anaspie* (10 Ir. L. R., 295). *Bryan v. Child* (5 Exch. 369), which was decided upon section 137 of the analogous English Act, 12 & 13 Vict. c. 106, shews that the judgment is valid against the trader himself, and is a strong authority in favour of the defendant on this point. The argument on the Irish Act is even stronger, as the words of the English Act are merely "null and void." Those of the Irish Act are, "fraudulent, null, and void." How can the transaction be fraudulent against the trader himself? Even stronger words in the 9th Anne, c. 14, s. 1, have been held to prevent the in-dorse from suing the drawer of a bill given for a sum of money won by gaming.—*Edwards v. Dick* (4 B. & Ald., 242). There is a class of cases shewing how the Courts will construe statutes in ease of the public, and will not permit a party to avoid his own contract, even though a statute in certain cases declares it to be null and void.—*Lincoln College Case* (3 Co. 53 & 59, b.); *Malins v. Freeman* (4 Bingh. N. C. 395); *Rex v. Inhabitants of St. Nicholas in Ipswich* (Burr. Settlement Cases, 91). In *Turquand v. Armstrong* (9 Ir. C. L. R. 92), the word "void" was held to mean "voidable" only on election; and this option or election, when so exercised, has no relation back so as to avoid the act done *ab initio*. It is now well established that in cases of fraudulent preference the property vests until the assignees make a demand, and thus divest the property previously vested in the transferee, and then the title will not operate by relation, but only from the time when the demand was made.—*Stephenson v. Newenham* (13 C. B., 302); *Morewood v. South Yorkshire Railway* (3 H. & N., 797). But even if these words are to be treated as meaning "absolutely void from the commencement," the assignees could not maintain this action. From what and when did their title arise? It arises from the words of the statute, and not until their appointment could they be entitled to the property. What the assignees became entitled to, is the property at the time of the bankruptcy, qualified by the doctrine of relation in the statute. They also take the rights of action of the bankrupt—ss. 267 and 268 of 20 & 21 Vict. c. 60. If there has been an antecedent act of bankruptcy, the title will relate back to it. Then assuming that the word "void" is to be read "void so as to enable the assignees to avoid the transaction if they choose," that would not enable them to succeed here, as they have neither the property, nor the right to the property. This was a transaction antecedent to the act of bankruptcy. It is expressly decided that in such a case trover will not lie. *Brook v. Mitchell* (8 Sc. 739); *Young v. Billiter* (8 H. of L. 682). If the warrant becomes void, when does it so become void? On the first of the twenty-one days, or at the end of them? The defendant submits not till the end, and that the judgment being entered up on the warrant within the twenty-one days, and the warrant being then good, the judgment itself is good also.—*Banbury v. White* (11 W. R. 785; s.c. 2 H. & C. 300). Then as to the fifth count, which is for money had and received, there are two grounds of objection to this. The first is a formal one, that this is stated to be money had and received to the use of the plaintiffs, without saying to their use as as-

signees. Then secondly, this not being a wrongful act as against the assignees, how can it be said that any money was received to their use? The observations of Cresswell, J., in his judgment in *Billiter v. Young* (6 El. & Bl. at p. 27) are important on this point; he plainly considered that if an action of trover would not lie, neither would an action for money had and received—*Nicholson v. Gooch* (5 El. & Bl. 999); *Pennell v. Aston* (14 M. & W., 415). There is a traverse of the money had and received at the end of the defence. The replication is general to the whole defence, and if it fails as to part, it is bad as to all. [*O'Brien, J.*—We decided in *Mercer v. O'Reilly* that such a replication was to be taken distributively.] *Trueman v. Hurst* (1 T. R. 40).

Meldon and Barry, Q.C., for the plaintiffs.—If sec. 334 is to have any force, the warrant and judgment thereon are void against others than the assignees. *Acraman v. Herniman* (16 Q. B., 998), on the 136th section of the 12 & 13 Vict. c. 106, is identical with the present case.—*Dillon v. Edwards* (2 Mo. & P., 550). *Billiter v. Young* (6 El. & Bl. 1; s. c. 8 H. of L., 682) is clearly in our favour. *Orr v. Devin* (9 Ir. C. L. R. 100) is an answer to any argument that though the warrant may be bad, the judgment may yet remain valid. *R. sh. v. Baker* (Str., 995); *Somerset v. Jervis* (3 Br. & Bingh. 2); *Nickson v. Whittitt* (1 H. Bl. 135). On the authority of these cases, trover may be maintained. The warrant of attorney being void, the goods were the property of the bankrupt, and passed to the assignees. If pleas of confession were to be taken as being the same as warrants of attorney, there would be much difficulty in our way; but there is a marked difference between them, and sections 333, 334, 335, and 336, deal with them as distinct things. Section 333, in connection with the decision in *Orr v. Devin*, is conclusive that trover will lie. The question is, whether entering judgment within twenty-one days after the execution of the warrant does away with the necessity of filing the warrant and affidavit. We say it does not: the words of section 334 are too strong to be overcome, and there is nothing in any of the subsequent sections to override the declaration of nullity and voidness contained in it. If the argument on the other side is correct, we might strike out s. 334 altogether from the Act. Section 336 is a general section applying to all judgments; the exception in it is introduced for the purpose of saving those who had filed their warrants properly the trouble of also registering their judgments. No authority can be cited to shew that the positive words of section 334 can be got rid of by any subtle implication from s. 336. If s. 336 is taken to give effect to all judgments entered and registered within twenty-one days after the execution of the warrant, s. 334 is waste paper. The section must be construed in the ordinary sense of the words.—*Grey v. Pearson* (6 H. of L. 61).

Heron, Q.C., in reply, referred, in addition to the cases cited by *Martin*, to *Airdon v. Davis* (9 Bingh. 741); *Wilson v. Whitaker* (Mood. & Malk. 8); *Whitmore v. Greene* (13 M. & W., 104); *Ward v. Clarke* (M. & M., 497); *Cooper v. Chitty* (1 Wm. Bl. 65); *Smith v. Milles* (1 Term Rep. 475); *Farrow v. Mayes* (18 Q. B., 510); *Hächin*

v. Campbell (2 Wm. Bl. 827); *Notley v. Buck* (8 B. & Cr. 160); and contended that the *cognovitis actionem* mentioned in s. 335 were the same thing as the warrants of attorney mentioned in s. 334: and that an action for money had and received at the suit of the assignees lay only where it was given by statute, or where the act of bankruptcy occurred prior to the receipt of the money, or where being entitled to sue in trover they elected to sue for money had and received.

Feb. 17.—*FITZGERALD, J.*—In this case, in which the assignees of John Kelly, a bankrupt, are plaintiffs, and John Keffe is defendant, the question was argued before us on the 17th December, last, and arose on demurrer to the replication, involving the construction of the 334th section of the 20 & 21 Vic. c. 60, the Irish Bankrupt and Insolvent Act. (His Lordship then stated the pleadings, which have been already given, and continued): On these pleadings, as I have said, the question arises on the construction of the 334th section, which, in effect, provides that every warrant of attorney to confess judgment in any personal action shall be filed according to the provisions of the statute 3 & 4 Vict., c. 105, and that in default the warrant shall be absolutely null and void to all intents and purposes. The 3 & 4 Vict. c. 105, s. 12, provides that every warrant of attorney to confess judgment shall, or a copy thereof shall, be filed, and with it an affidavit containing, amongst other particulars, a statement of the time of the execution of the warrant; and what the plaintiff relies upon is that, this judgment being on a warrant of attorney, though it was itself entered and registered within twenty-one days after the execution of the warrant, the warrant was not filed with the verifying affidavit required by the statute. The main question seems to be, whether according to the true construction of the 334th section of the Bankrupt and Insolvent Act, the warrant and judgment are null and void, in consequence of the warrant not being filed within twenty-one days after the execution, though the judgment was entered on the warrant within the twenty-one days, and was duly registered under statute 7 & 8 Vic., c. 90. Mr. Martin, in an able and comprehensive argument contended, that though the words of the 334th sect. of the Bankrupt and Insolvent Act are, "shall be deemed fraudulent, null, and void to all intents and purposes whatsoever," yet that section, on its true construction, renders the transaction void only against the assignees in bankruptcy, and not against the trader himself; and in support of that branch of his argument, he relied on *Bryan v. Child*, *Brook v. Mitchell*, and *Billiter v. Young*. The inclination of my opinion is that Mr. Martin's argument on this subject is well-founded, to the extent that the intention of the Legislature was not to render the transaction void as against the debtor, but only to protect the interests of general creditors, who might be affected by secret warrants of attorney given to favour particular creditors. For reasons which will presently appear, it is not necessary to state the grounds which influence my judgment upon that subject. It is enough to say that having regard to the statute and its various provisions, it appears to me that the object and intention of the Legislature in the

334th section were to protect the rights and interests of creditors, and not to render a transaction void as between the debtor and creditor, and for that reason it appears to me that the first four counts of the plaint, which are in tort, are not maintainable; but the main question in the case arises on the fifth count which is for money had and received. The argument on this count turned on three sections of the Bankrupt and Insolvent Act, the 334th, 335th, and 336th. These sections are open to just criticism, and it is difficult to reconcile their provisions with each other. Probably this arose from the provisions of other statutes having been incorporated into this one, without sufficient care. It is no doubt true that whatever construction may be put on them, anomalies and difficulties arise in yielding to the plaintiff's arguments, and hardships and injustice may be occasioned, which my brothers, I have no doubt, will point out. Upon the whole, however, I find it impossible to get over the clear language of sec. 334. The Legislature has there expressed its intention to render null and void as against general creditors every warrant of attorney not duly filed according to the statute, 3 & 4 Vict., c. 105, and has enacted that as a consequence every judgment entered on such a warrant shall be null and void. Mr Meldon relied upon *Dillon v. Edwards*, in which it was decided that the warrant was not to be considered as filed within the statute, unless it was accompanied by the statutable affidavit. That case has since been repeatedly recognized and acted on, and must be considered as law. The next case relied upon is that of *Acraman v. Herniman*, which is, no doubt, a very important authority. It arose on the construction of the 136th sec. of the English Bankrupt Act, statute 12 & 13 Vict., c. 106, from which the 334th section of our Act is, in substance, and nearly in words, taken. The facts were nearly the same as in this case, except that there the judgment had not been registered as here, there being no provision for registration in the English Act. Lord Campbell says, "The enactment of stat. 12 & 13 Vict., c. 106, s. 136, is very plain, and I cannot agree to put a forced construction upon it. The Legislature has said there that any warrant of attorney given by a trader to confess judgment in a personal action, not filed within twenty-one days after execution, in manner and form provided by statute 3 G. 4, c. 39, shall be deemed fraudulent, null, and void. The manner directed by that Act is, filing the warrant or copy with an affidavit of the time of execution." And he further says, "Here are a judgment and execution on a warrant of attorney given by a trader and the warrant filed, but without an affidavit. The plain meaning of the late Act is, that such a warrant shall be null and void against the assignees." The other judges concurred. It was, however, argued very strenuously at the bar that *Acraman v. Herniman* is no authority in the present case, by reason of the registration of the defendant's judgment here, and the provisions of s. 336 of our statute, and this seems to be the real point of the case, for if it had not been for this, that case would have been a decision of a court of co-ordinate jurisdiction, by which, of course, we should have been bound. The 336th section of our statute is as follows: "If at any time after twenty-

one days from the entering or signing of any judgment whatsoever in any of the said superior courts, (save and except judgments entered upon or by virtue of warrants of attorney, pleas of confession, or consents for judgments duly filed under the provisions of this Act, or of the hereinbefore mentioned Act of the third and fourth years of the reign of her present majesty, chap. 105), a petition of bankruptcy shall be filed against or by the person against whom such judgment shall be entered or obtained, under which he shall be duly found or declared a bankrupt; or if at any time after said period of twenty-one days, a petition of insolvency shall be presented by or against such person, then and in such case, unless such judgment shall have been duly registered, within twenty-one days from the entering or signing thereof, in the said office of the registrar of judgments, such judgment, and any execution thereon, shall be deemed fraudulent and void against the assignees under such commission or petition, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt or insolvent, all and every the monies levied and effects seized under and by virtue of such judgment and execution." That section certainly creates considerable difficulty. It seems to embrace all judgments except judgments entered upon or by virtue of warrants of attorney, pleas of confession, or consents for judgment filed under the provisions of the Act itself, or of the statute 3 & 4 Vict., c. 105, and makes all save the excepted judgments fraudulent and void against the assignees unless they are registered. If it were not for the exception, a warrant of attorney in a personal action should not be alone duly filed, but the judgment should be registered under the 7 & 8 Vict., in order to give it validity against the assignees; but is the filing of the affidavit in the case of a warrant of attorney essential to support the judgments which are excepted? It was urged that all other judgments duly registered within twenty-one days, come within the protection of the 336th section, but in my opinion that section must be read with the provisions in sections 330 and 334. Section 336 does not give protection to a judgment which is not valid, nor does it relieve from the obligation to file the warrant contained in section 334, and section 330 enacts that nothing in the Act shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a judge's order declared to be null and void, or to any judgment entered upon such warrant of attorney, cognovit, or consent, or to any contract, covenant, dealing, or transaction by way of fraudulent preference. The third case relied upon by the plaintiff was *Orr v. Devin*, and though not pressed in argument, it is, I think, a very important authority. It is in 9th L. C. L. R., p. 100. It arose on the 333rd section, and that section having enacted that certain warrants of attorney should be in certain cases null and void, the Court of Common Pleas there decided that a judgment entered on a warrant of attorney void under that section, was as void as the warrant itself; that is, that where the section declared the warrant to be void, though it said nothing as to judgment or execution, yet the warrant being void the judgment entered on it was as void as the warrant itself, and the 330th

section is tantamount to a declaration that a judgment on a void warrant can have no validity. It appears to me, therefore, that this third case relied on by Mr. Meldon in his succinct argument was in point. I am therefore of opinion that the warrant in this case, and the judgment entered on it are null and void as against the plaintiff's assignees in bankruptcy, and that being so null and void, the registration of the judgment does not set it up, nor can it derive any validity from sec. 336. In fact I may say that section 336 is not a protecting clause. It was urged that the plaintiffs could not recover on the fifth count, and must resort to some other special count. It seems to me that it is not so. It seems to me that if the assignees may treat the judgment as null and void, they may treat the money levied under it as part of their estate, and may recover it upon a count for money had and received, for it is money in the defendant's hands to their use. I may observe that in *Biliter v. Young*, Blackburn, J., expresses that opinion. I am therefore of opinion that the plaintiffs are entitled to judgment on the fifth count, and that on the rest there should be judgment for the defendant. I may mention an objection to the replication made by Mr. Martin, namely, that there is in it no allegation that Skelly was a trader when the warrant of attorney was executed, and this objection seems to be a formidable one, but I do not think it necessary to consider it further, because I assume that Skelly was during all the time a trader, and that being so, it would be a matter of course to allow the plaintiffs to amend on terms; therefore, in my opinion, the plaintiffs are entitled to judgment on the fifth count, and the defendant on the rest of the replication.

HAYES, J.—I am of opinion that the plaintiffs have no right to recover on any of the counts, and that the demurrer to the replication should be allowed. The case is said to turn on the 334th section of the Bankrupt and Insolvent Act. That and the accompanying sections, from the 333rd to the 336th are *in pari materia* with the 3 & 4 Vict., c. 105 (known as Pigot's Act), ss. 12, 13, and 14, and ought to be construed as if they formed part of the same Act. The 12th section of Pigot's Act, reciting that injustice was frequently done to creditors by secret warrants of attorney to confess judgments for securing the payment of money, whereby persons in a state of insolvency were enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney had the power of taking the property of such insolvents in execution at any time to the exclusion of the rest of their creditors (thus plainly treating the warrant of attorney as a security for money), enacts that after the date there specified, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and endorsement thereon (if any), shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the proper officer, in one of her Majesty's superior courts at Dublin, in which judgment upon such warrant of attorney shall thereafter be entered up. This plainly contemplated that the notice thus to be given of the

warrant was only while it operated as a security. Then comes the 13th section, which enacts, "that from and after the 1st day of November, 1840, if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, or any such person shall be imprisoned for debt, and file a petition in the Court for the relief of insolvent debtors in Ireland, then and in such case, unless such warrant of attorney, or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, and in the court in which such warrant of attorney, or such copy thereof shall have been filed, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignee under such commission, and against the provisional or other assignee or assignees of such prisoners appointed under such Act, and such assignee or assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt or prisoner, all and every the monies levied or effects seized under and by virtue of such judgment and execution." Hence we may learn that the purposes of this statute would be served, and undue secrecy prevented, by filing the warrant within the time specified, or by entering judgment within the same time, and that if neither was done, advantage might be taken of the defendant by the assignees in bankruptcy or insolvency of the debtor. The mode of giving notice is the same in both cases, namely, placing the document, whether warrant or judgment, on the files of the court. Let us now turn to the Bankrupt Act. The 833rd section prostrates and annuls every warrant of attorney given by any bankrupt or insolvent within two months of the filing of a petition against him, and being for an antecedent debt, and every *cognovit actionem*, or consent for judgment given by any bankrupt or insolvent within two months of the filing of such petition, in any action commenced by collusion with the bankrupt or insolvent, and not adversely or purporting to have been given in an action, but having been in part given before the commencement of any action, such bankrupt or insolvent being unable to meet his engagements at the time of giving such warrant of attorney, *cognovit actionem*, or consent. The section says nothing of the judgment that may be entered. It merely speaks of the judgment when describing the warrant or consent, and when it comes to deal with *cognovits* or consents, which it does by a distinct clause of the sentence, then as these are given in the course of an action, the statute speaks of an action, and limits its legislation, not to cases where there is an action brought for the enforcement of a right, but to cases where an action is brought by collusion. I am, therefore, of opinion that the statute in this merely contemplates the warrant of attorney to confess judgment in the character of a security for money lent. Then comes the 334th section, which enacts that if "any warrant of attorney to confess judgment in any personal ac-

tion, or any *cognovit actionem* in any personal action, shall have been given by any bankrupt or insolvent, and such warrant or cognovit, or a true copy thereof, shall not have been filed with the proper officer in the courts at Dublin, in which judgment, or such warrant or cognovit shall thereafter be entered up, within twenty-one days next after the execution thereof, in manner and form provided by the Act passed in the session of the 3rd and 4th years of her Majesty, c. 105, every such warrant and cognovit shall be deemed fraudulent, null, and void, to all intents and purposes whatsoever." The remainder is merely a re-enactment of Pigot's Act as to warrants of attorney given subject to defeasances. In this, as in the 333rd section, the warrants of attorney, &c., are considered as securities for money, rather than as steps to securing a judgment. The 335th section does not seem to be carefully framed. It would have been better if the earlier part of it had formed a distinct section, but to pass that by, and merely observing that this whole course of machinery given in the earlier part of the section, shews that the Legislature looks to these warrants of attorney, &c., rather as securities for money, than as steps in an action, the next part of the section shews that the Legislature looked at them as both, and it enacts that "if at any time after twenty-one days, next after the execution or signing of any plea of confession, *cognovit actionem*, acknowledgement or consent for judgment, a petition of bankruptcy shall be filed by or against the person, who, by himself or his attorney, shall have given such plea, cognovit, acknowledgement, or consent for judgment under which he shall be found and declared a bankrupt, or if at any time after the said period of twenty-one days, a petition of insolvency shall be filed by or against such person, and an order made thereon that such insolvent should file his schedule, or be brought up to be dealt with under this Act; then unless such plea, cognovit, acknowledgement, or consent for judgment, shall within twenty-one days from the execution or signing thereof, have been filed pursuant to the provisions of the same Act, or unless within the same period judgment shall have been entered thereon, and registered according to the provisions of the Act of the 7th & 8th years of the reign of her present Majesty, such plea of confession, cognovit, acknowledgement, or consent for judgment, and the judgment and execution thereon shall be deemed fraudulent and void against the assignees in bankruptcy or insolvency, and such assignees shall be entitled to recover for the benefit of his estate all monies levied or effects seized by virtue of any execution on such judgment." This last provision is similar to that which is made by the 13th section of Pigot's Act, as to warrants and judgments, save as to the registration under statute 7 & 8 Vict., c. 90, which was not then in force; and it is well to remark as to both sections that the Legislature provides for the annulling of the judgment, as well as for the annulling of the warrant, and therefore appears to have thought that the consequences there would not follow, unless such provision was made, or that it looked on the warrant, &c., as a security for money, only so long as judgment was not marked, and that upon that being done the matter passed *in rem judicatam*; and this seems to be borne out by the 336th

section, which enacts, "that if at any time after twenty-one days from the entering or signing of any judgment whatsoever, in any of the said superior courts (save and except judgments entered upon or by virtue of warrants of attorney, pleas of confession, or consents for judgments, duly filed under the provisions of this Act, or of the hereinbefore mentioned Act of the third and fourth years of her present Majesty, c. 105), a petition of bankruptcy shall be filed against or by the person against whom such judgment shall be entered or obtained, under which he shall be duly found and declared a bankrupt; or if at any time after said period of twenty-one days, a petition of insolvency shall be presented by or against such person, then and in such case, unless such judgment shall have been duly registered within twenty-one days from the entering or signing thereof, in the said office of the registrar of judgments, such judgment, and any execution thereon shall be deemed fraudulent and void against the assignees under such commission or petition," thus implying that undue secrecy would be obviated by either of two ways, either by a registry of the judgment under the latter part of the section, or by filing the warrant, plea of confession or consent mentioned in the exception, and that if judgment was obtained on a warrant not duly filed, then the registry of the judgment, within twenty-one days after the entering of it, would be sufficient. Acting then on this and being of opinion that the 334th section read in its present collocation, meant to deal with the warrant and cognovit while securities for money, and not after they had ceased to be so by judgment being marked, I am of opinion that the registry of the judgment in the present case was good. In conclusion, I will say a word as to the cases. *Orr v. Devin* differs from the present. From the moment of the warrant in that case being given, it was subject to the infirmity of having been given by a person in insolvent circumstances. It so continued until judgment was entered, and the circumstance affected the warrant in both aspects, both as a security for money and as a step towards obtaining judgment. The same may be said of other cases, but in the case now before us the warrant was wholly unimpeached when judgment was entered. Again *Acraman v. Herniman* was decided on two sections—one, the 1st section of the English Act of the 3 G. 4, c. 39, and the other the 136th section of the 12 & 13 Vic., c. 106, analogous respectively to the 3 & 4 Vic., c. 105, s. 12, and the 334th section of the present Act; but I do not find in that case any clause analogous to section 336 of our Act was brought under the notice of the Court. I am of opinion that the demurrer should be allowed.

O'BRIEN, J.—From the argument in this case, and from the difference of opinion which it has been seen prevails in the Court, it would be idle to say that this is not a question of considerable difficulty, or that my conclusion has not been arrived at with much doubt. I have, however, come to the conclusion that our judgment should be for the defendant; in other words that the action does not lie upon any of the counts stated in the summons and plaint. The first four of those counts are in trover and detinue, and I believe we all concur in thinking that neither form of action

lies at the suit of the assignees, the goods having been seized, a sale had, and the proceeds handed over a considerable period before either a petition for an adjudication was filed, or an act of bankruptcy committed; but the important question which arises is on the last count of the summons and plaint, which is for money had and received by the defendant to the use of the plaintiffs. Now, the section relied on by the plaintiffs is the 334th, and if that was the only section of the Act to be considered, it might be very difficult to avoid coming to any other conclusion than that for which the plaintiff here contends. It is true that the consequences of such a decision would be most startling. The words of that section differ in one material respect from the provisions of the analogous English Act, for s. 136 of the English Act of 1849 deals only with warrants of attorney given by any "trader," manifestly implying that the person giving the warrant should be a trader at the time when he gives it, while the Irish Act, s. 334, deals with all warrants of attorney "given by any bankrupt or insolvent," that is, given by any person in case he afterwards becomes bankrupt or insolvent. Now, if the argument of the plaintiffs here is correct, it would lead to this, that if any person in the community, though not a trader at the time, executes a warrant of attorney, which is not filed in the manner pointed out by sec. 334, but on which judgment is marked, and years afterwards that person enters into trade, and becomes a bankrupt or insolvent, everything done on foot of that judgment would be annulled, every execution set aside, and the debtor's property or the value of it, might be recovered by the assignees. Of course if the Act of Parliament necessarily leads to this result, we are bound to adopt it however startling the consequences may be. But let us see if in the subsequent sections of the Act, we have any sufficient indications of what was intended by the Legislature; whether it was intended that the extent of that section should be somewhat more limited. Now, the effect of the 334th section is to make void every judgment and execution, the foundation of which is a warrant not duly filed in the way pointed out by the section. I should imagine that that section was introduced into this Bankrupt Act, taken, with the exception which I have mentioned, from the English Act of 1849, without having a due regard to the consequences which would flow from the next succeeding sections. Section 334 thus provides that every warrant of attorney not filed as there prescribed "shall be deemed fraudulent, null, and void to all intents and purposes whatsoever." Now, I think *Orr v. Devin*, and the other cases which have been cited, are authorities for the proposition which the plaintiffs contended for, namely, that the warrant being void, the judgment on that warrant must be taken to be void also. But then come sections 335 and 336. Section 334 had provided for judgments obtained on warrants, and *cognovits* not duly filed. Section 335 deals with another class of judgments, using the phrase, "plea of confession, *cognovit actionem*, acknowledgment or consent for judgment," and it provides that the provisions of Pigot's Act as to filing warrants of attorney shall also extend to pleas of confession, *cognovits actionem*, and acknowledg-

ments or consents for judgments, and it enacts that in case of the bankruptcy or insolvency of the debtor at any time after twenty-one days after the giving of such plea, *cognovit*, consent, or acknowledgment, such plea, *cognovit*, consent, or acknowledgment, unless it shall have been filed within twenty-one days from its execution, or unless within the same period judgment shall have been entered on it, and registered, shall be deemed fraudulent and void against the assignees in bankruptcy or insolvency. Now, that section, I think, provides for a different class of judgments from that affected by section 334, and if the Act had stopped there, we would have had this result, that one class of judgments obtained on warrants not duly filed were null to all intents and purposes, and were not saved by the judgment being entered or registered, but that the other class of judgments obtained on pleas, confessions, *cognovits*, acknowledgments, or consents for judgments, would be valid if entered and registered within a proper time, although the confessions, &c., on which they were obtained were not valid, and it would be only in default of the judgments being entered and registered that the assignees could recover, and then only in a count for money had and received. There seems to be no reason why judgments on confessions, *cognovits*, &c., should be dealt with in a different manner from judgments on warrants under sect. 334. Section 336 deals with the judgments on the warrants spoken of in section 334—namely, judgments on warrants not duly filed. The warrant in this case does not come within the exception in section 336, because it is not a judgment obtained on a warrant duly filed within section 334, and therefore it is one of the class of judgments provided for by the enacting part of the section. So far as to judgments of the class now before us, which, according to the plaintiff's argument are void under section 334, on account of the warrant not having been filed, and with respect to which the assignees would be entitled to recover back from the plaintiff in the judgment the proceeds levied under it, we have a subsequent section of the Act declaring that that shall be done except the judgment be registered within twenty-one days after its entry, and that then the action shall be only in the form of money had and received. I think the making these provisions of section 336, providing for a class of judgments which it is contended are provided for by sect. 334, is such an inconsistency in the Act, that we are warranted in giving a construction to section 334 as well. There was a case cited in argument, *Morris v. Mellin*, in which the contest arose upon the stat. 3 Geo. 4, c. 39, s. 4, which provides for the filing of warrants, and the question arose whether the section should not get a limited construction inconsistent with its words, which were general; and Lord Teunterden says—"It is a rule in the interpretation of Acts of Parliament, that an enactment, the effect of which is to cut down, abridge, or restrain any written instrument, shall have a limited construction." And Bayley, J., says—"It is a general rule that in order to avoid any written instrument by positive enactment, the words of that enactment ought to be so clear and express as to leave no doubt of the intention of the Legislature." Now, s. 334 declares the warrant in this case void to all intents and purposes. I believe, from the judgment

of my brother Fitzgerald, that we all concur that the effect of that is to make it void only against the assignees; and considering that this deals with warrants given by every person, but is only to come into operation when the person giving the warrant becomes bankrupt or insolvent, it is impossible to hold that every thing he has done becomes void altogether. Accordingly, I think we are perfectly warranted in coming to this conclusion, qualifying the words used, that the judgment, if within the section, is declared null and void against the assignees, but that that shall not affect the transaction between the parties themselves. It follows, I think, from *Billiter v. Young*, that trover could not be maintained on the ground that at the time the transaction took place, there was no wrongful conversion. The transaction then was good. There was then no fraudulent preference given; there was then no insolvency or contemplation of bankruptcy. That is the ground on which I think it will be found decided that trover would not lie. Then, as to the action for money had and received. If the party was entitled to bring an action for money had and received, the assignees might waive the trover and trespass, and bring money had and received. But I think it will be found difficult to say that this was money had and received to the use of the assignees at the time. In the case in 14 M. & W., *Parke, B.*, says, "The assignees could not sue for the money as had and received to their use, except it was received by the defendants after bankruptcy, or unless it was received before the bankruptcy by way of fraudulent preference." But independently of that, and supposing the count here was for money had and received before the bankruptcy, I think, on the grounds I have mentioned, that the 334th section is to be considered as qualified by the 336th, and that in this case, as the judgment was entered and registered, the non-filing of the warrant does not vitiate the transaction. In *Acraman v. Heroniman*, the case arose on the English Act, 12 & 13 Vict., c. 106, s. 136. That was an action of detinue, but the point whether detinue or trover would lie, did not arise. There the Irish Act of 1849 was relied on, which contains a provision for the avoiding of consents for judgments, unless filed within twenty-one days, or unless within that time judgment was entered and duly registered. But *Erie, J.*, says that could not apply, because there was an express provision in Ireland for the registration of judgments, and that that existing there might have been a sufficient substitution for the filing of the warrant. The fact of their being no corresponding section in the English Act might be explained by the circumstance of there being no Act in England for the registration of judgments similar to Sir Edward Sugden's Act in this country, and I think it follows that a sufficient security is provided against fraud by the registration of the judgment as by the filing of the warrant. Bearing that in mind, there will be sufficient to distinguish the English case from the present, and, on the whole, I consider that judgment should be entered for the defendant on all the counts.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

TENNANT v. OKE—May 2, 3.

Construction of Guaranty—Amendment of Pleadings.

The defendant entered into the following guaranty with the plaintiff, "You will please to credit D. McK. to the extent of £30 monthly, from time to time, and in default of him not paying I will be accountable for the above amount." Held, that this was a continuing guaranty, for goods supplied to the value of £30 in each month, and not a guaranty to the amount of £30 only.

The true rule in construing a guaranty is not to construe it either strictly against the guarantor, or in favour of him, but according to what the court can ascertain to be the intention of the parties to it.

To an action on a guaranty in the above terms, the defendant pleaded the guaranty, and paid into Court £30, saying that was all that was due upon it; Upon a motion to make absolute a conditional order to reduce a verdict for £225 11s. 10d., obtained by the plaintiff, by the amount of a bill of exchange, taken on account of the amount due upon the guaranty, and from which the defendant had been discharged by the laches of the plaintiff, Held, that the case sought to be made, being apparently inconsistent with the former one, and the parties having gone to trial on other questions, the defendant was not entitled to the reduction sought for, or to such an amendment of the pleadings as should raise the defence of the passing of the bill of exchange, and the laches of the plaintiff.

THE first count of the summons and plaint complained that a certain firm called Charles Tennant & Co. by their bill of exchange now over due, bearing date the 2nd June, 1863, directed to one David M'Kean, required the said David M'Kean to pay to the order of said firm, the sum of £134 3s. 4d. three months after date thereof, and said David M'Kean accepted said bill, and said firm of Charles Tennant & Co. endorsed the same to the defendant, and the defendant endorsed the same to the plaintiff, and same was duly presented for payment and was dishonoured, whereof the defendant had notice, and did not pay same. The second count complained that a certain firm called Charles Tennant & Co., by another bill of exchange now over due, bearing date the 2nd June, 1863, directed to one David M'Kean, required said David M'Kean to pay to the order of said firm the sum of £134 3s. 4d. three months after the date thereof, and said David M'Kean accepted said bill, and said firm of Charles Tennant & Co., endorsed the same to the defendant, and the defendant endorsed the same to the plaintiff, and the same was duly presented for payment, and was dishonoured, and after the dishonour thereof, and whilst the plaintiff was the holder thereof under said endorsement, the defendant duly waived and excused notice of said dishonour by promising the plaintiff to pay same, but the defendant

had not paid same. The third count complained that it was agreed between the plaintiff under the style and name of Charles Tennant & Co, and the defendant that in consideration, that the plaintiff would give credit to one David M'Kean, from time to time, in the dealings between said M'Kean and the plaintiff as in said agreement mentioned that defendant should guarantee to the plaintiff the amount for which credit should be given to said M'Kean, to the extent of £30 monthly, and in default of said M'Kean, would pay said amount to the plaintiff, and the plaintiff averred that in pursuance of said agreement of guaranty he did give credit monthly to said M'Kean, from time to time in his dealings between them, and that the amount for which he so gave credit from time to time, to the extent of £30 monthly, during the continuance of said guaranty, amounted to the sum of £314 3s. 4d., but neither said M'Kean nor the defendant had paid said sum or any part thereof, and all conditions had been performed, all things had happened, and all times had elapsed necessary to entitle the plaintiff to have said sum paid, and to maintain this action, but same was still unpaid. By the bill of particulars £134 3s. 4d. was claimed on foot of the bill of exchange, and £180 on foot of the guaranty, making together £314 3s. 4d. The defendant pleaded to the first count, that he had not due notice of the dishonour of the bill of exchange. To the second count, that he did not waive or excuse notice of dishonour of the bill of exchange therein mentioned. To the third count the defendant pleaded that the agreement of guaranty therein mentioned was in the words and figures following:

Laurel Hill,
August 22nd, 1862.

Messrs. C. Tennant & Co.,

GENTLEMEN—You will please to credit Mr. David M'Kean, of Hollybrook, to the extent of £30 monthly, from time to time, and in default of him not paying I will be accountable for the above amount—I am Gentlemen, Your obedient Servant,

JACOB ORR.

And the defendant brought into court the sum of £30. The following were the issues, 1. Whether the defendant had due notice of the dishonour of the bill of exchange in the plaint mentioned. 2. Whether the defendant waived and excused notice of dishonour of the bill of exchange in the plaint mentioned. 3. Whether the guaranty in the third count mentioned, was in the words and figures in the third plea mentioned. 4. Whether the money paid into Court under the third plea was sufficient to satisfy the plaintiff's demand in respect of the matters therein pleaded to. It appeared from the notes of the learned judge, Monahan, C. J., before whom the action was tried, that at the trial, the want of notice of dishonour was conceded, and that the jury found that the notice was not waived, and the defendant had a verdict so far as the bill of exchange was concerned. The Chief Justice intimating his intention to direct a verdict for the plaintiff for £245 11s. 10d., over and above the sum of £30, paid into Court that amount appearing to be due on foot of the guaranty, the defendant's counsel submitted that as the plaintiff by omitting to give no-

tice of the dishonour of the bill, had discharged defendant therefrom, that amount should also be deducted from the sum due on the guaranty, it being admitted that the bill was passed on account of a portion of the sum due on the guaranty; the plaintiff's counsel submitting that no such defence was pleaded to the guaranty, the defendant's counsel suggested that he should have liberty to file a new defence to the count on the guaranty, to which the plaintiff's counsel answered that such a defence to be good should aver that the bill was given in satisfaction of the debt, and not merely on account. The Chief Justice directed a verdict for the plaintiff for the sum of £245 11s. 10d. over and above the sum of £30 lodged in Court, reserving liberty for the defendant to have the verdict entered for him, if he ought to have held that the sum of £30 so lodged in Court covered the full amount of the defendant's liability.

Harrison, Q.C., for the defendant, in the ensuing Easter Term, obtained a conditional order to change the verdict had for the plaintiff into one for the defendant pursuant to the leave reserved, or to reduce the amount of it by the sum of £134 3s. 4d., the amount of the bill of exchange in the pleadings mentioned on the grounds that the amount of said bill should have been excluded from the amount recoverable on foot of the guaranty, the jury having found that the defendant had not received due notice of the dishonour thereof, and said bill having been taken for and on account of the amount due on foot of the guaranty at the time of the date of the said bill, or for a new trial on the ground of misdirection of the Judge, and upon the further ground that the Judge should have amended the pleadings, if necessary. Against this,

Dowse, Q.C. (with him Falkiner) showed cause.—The third defence is a curious one. The defendant ought to have traversed the contract stated in the third count, but he says the agreement of guaranty was in the words and figures following. This is capable of two meanings, but only one was made of it at the trial; that the defendant was only liable for one sum of £30, no matter how much goods had been advanced to M'Kean. The first question is if the Chief Justice was right in his construction of this guaranty. We say that the defendant is bound to pay us for all the goods supplied to M'Kean. It is not a case to be much assisted by authority. The question generally is whether a guaranty is a continuing guaranty, but that is not exactly the present question, but what it is a continuing guaranty for. M'Kean was the defendant's tenant, and the fair meaning of it is this, I will guarantee the payment for all the goods you supply to M'Kean, provided you do not supply him with more than £30 worth in one month. These instruments are to be construed most strictly against the party making them—*Hargreave v. Smees* (6 Bing. 244). The next thing the defendant asks is that if he does not get a verdict entered for him, that the present verdict be reduced by the amount of the bill of exchange. That is upon the ground that if the party fails by his laches to recover upon the bill of exchange, he cannot recover on the consideration of the bill. That can be only taken advantage of by pleading it specially. Then the defendant seeks to get it in under the general issue. One

plea can have only one meaning—*Goldby v. Goldby* (26 L.J., N.S. Ex. 29). If a principal makes default to the amount of £500, and the defendant in an action on the guaranty brings in £30, and says this is all that is due, does that mean that he has paid the difference between the £500 and the £30, or does it mean that he gave a bill of exchange for the difference, and that notice of dishonour was not given? 1. The plea does not mean what the defendant contends for. 2. The point was not made at the trial. It could only have been pleaded specially, and the question is if the Chief Justice ought to have amended the pleadings. He was not asked to do so in such a way as to take a ruling from him. Where there is an application to amend, it must be to the jurisdiction of the Court, independently of the new trial motion. Assuming that the application had been made to the Judge, he would have been wrong in granting it, because that was not the question the parties came to try. [*Christian, J.*—The words of the section of the Common Law Procedure Act are that all such amendments as may be necessary shall be so made.] It is discretionary to make such as the Court think fit, and it is obligatory to make such as shall go to determine the real question in the cause. I do not deny that the defendant may make a substantive motion to the court for this purpose. He could not succeed on such a motion. It would amount to raising a different question from that which the parties came to try. 1. The construction of the guaranty is in the plaintiff's favour. 2. The defendant cannot get in what he contends for under the plea paying in the £30. 3. He did not make this case at the trial. 4. He cannot be allowed to amend.

Harrison, Q.C., and *M'Blain*, contra.—The words "the above amount" in the guaranty, mean the £30. In *Nicholson v. Paget* (1 Cr. & M. 48), the words, "I hereby agree to be answerable for the payment of £50 for T. Lerigo, in case T. Lerigo does not pay for the gin, &c., which he receives from you, and I will pay the amount," were held not to be a continuing guaranty—*Melville v. Hayden* (3 B. & Ald., 593). Taking the security of the bill of exchange, was some evidence that the plaintiff did not himself consider the guaranty had the extended sense now contended for, though that argument is not open to the defendant. "Amount" is the same thing as the word "sum." If indefinite, it might create a liability of thousands of pounds. Upon our construction, the word "monthly" is, no doubt, superfluous, but there are other superfluous words. The defendant is a man who does not know much of the English language. The rule of construction in *Nicholson v. Paget* is the right one, that an ambiguity in the guaranty ought to be construed in favour of the guarantor rather than against him. As to the second point, would it not have been a good defence to say that the bill was taken on account, and by the laches of the party the defendant was discharged?—*Bayley on Bills*, 6th ed., p. 552; *Peacock v. Purrell* (14 C. B., N. S., 728); *Kearslake v. Morgan* (5 T. R., 513); *Green v. Smithies* (1 Q. B., 796). [*Monahan, C. J.*—Where is the authority for this, that if a bill of exchange be passed not in satisfaction, but on account of a debt, and presentment is omitted, whereby the party is prevented

from suing on the bill that he cannot sue on the consideration?] *Peacock v. Purrell* is express on that. *Peacock v. Purrell* is an authority to show that what took place here amounted to payment. The present case is stronger than that.—*Price v. Price* (16 M. & W., 232). [*Monahan, C. J.*—There is no doubt that the bill was passed, if not in terms on account of the guaranty, on account of the debt.] The defendant's counsel fell into a mistake at the trial; had they been aware of *Peacock v. Purrell*, they would have asked for leave to amend. Even under the issue as framed, we could have given evidence of this at the trial. [*Monahan, C. J.*—Show that you could.] In *Goldby v. Goldby*, although the Court were of opinion that payments by the defendant could not be given in evidence under a plea of payment into Court, yet by consent the damages were reduced which is what ought to be done here.

Falkiner in reply.—It appears by the more recent authorities that in these mercantile contracts for the purpose of getting at the meaning of the parties to a guaranty, the Court will look at the surrounding circumstances.—*Hoad v. Grace* (7 H. & N., 494). [*Monahan, C. J.*—Surrounding circumstances are for the jury.]—*Mumford v. Gething* (7 C. B., N. S., 305). The principal in the present instance carried on business in Armagh. The defendant was his landlord. A £30 guaranty is out of the question. [*Monahan, C. J.*—The Court will not favour one construction or the other, but will see what was the meaning of the parties.] The amendment could not have been made at the trial, and cannot be made now. It would be contrary both to cases and principle. Would the Court be raising for the parties on the record what was the real question they came to try? *Wilkin v. Reed*, cited in Taylor on Evidence, s. 181, where it was held that the question in controversy is in other words the question which both parties really intended to have tried, and not any question which, during the course of the trial, may for the first time be brought into controversy by one of the litigants. In the third count, the pleader has put the legal construction on the guaranty, and the defence sets out the agreement, and says £30, and no more, is due. That is either a traverse of the contract, or it is not. It is settled that he who pays money into Court, pays it *secundum allegatum*. The payment admits a contract, and it admits a breach. It would have been impossible to have allowed the defendant to amend, without abandoning what he already had. It was a plea to the whole cause of action. He could not have amended except upon withdrawing his point of law. He should have paid the balance into Court, and we would not have resisted in that case. But can a party be heard to say, I will not abandon my point of law, but if beaten on that, I will come to the Court, and ask for liberty to amend?

MONAHAN, C. J.—There is no probability that we should alter our opinion by further consideration. In the first instance we are clear that the construction of the guaranty is what occurred to me at the trial to be the true one, and that the defendant undertook to be responsible for goods supplied to M'Kean, not exceeding in value £30 a month, and that a right verdict has been found upon that. We do not think it ne-

cessary to consider whether the rule regarding construing a guaranty strictly, or in favour of the guarantor applies. We think that the true rule is, that the Court are bound to find out, with all the light they have, what was the intention of the parties. The other question is a little complicated. The substance of it is this—Orr alleges that by reason of the non-presentment, not only has he got rid of liability on foot of the bill of exchange, but also of his liability to the same amount on the guaranty. As to my making the amendment at the trial, I was not called on in such a way as required me to exercise any judicial discretion. Therefore, this is not renewing a motion to the Court, but really a motion to force the parties to reduce the amount of the verdict, or for liberty to add a plea raising this question. We do not decide whether, as the record now stands, it would be impossible to frame such a plea, i.e., whether this might have been originally pleaded. But it not having been pleaded, and being apparently inconsistent, and the parties having gone to trial on other questions, we do not think that at the twentieth hour of the day we ought to accede to this. The verdict therefore stands.

Rule discharged.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

HOEY v. CAULFIELD.—April 28; May 6 & 9.

Marshal of the marshalsea—Action for escape—Marshal's liability—19 & 20 Vict., c. 68.

The marshal has the custody of the Marshalsea, and is responsible for the escape of prisoners in all cases (except where the escape is caused by the act of God or the Queen's enemies). Where, therefore, a prisoner escaped from out of the marshalsea and where such escape was not caused by the act of God or the Queen's enemies, but where it happened through the negligence of the officers of the prison, the marshal shall be answerable, although since the passing of the 19 & 20 Vict., c. 68, s. 17, he no longer has the power of selecting his own officers—of appointing competent, or of removing incompetent ones from their posts in the keeping of prisoners confined in said marshalsea.

THE plaintiff in this case appeared to shew cause against making absolute a conditional order which was obtained by the defendant, that the verdict had for the plaintiff should be entered for the defendant in pursuance of the leave reserved in that behalf by the learned judge at the trial. The action was brought against the marshal of the Marshalsea, for the escape of a prisoner from out of his custody. The summons and plaint, in the first count, charged that one Thomas Farrington was in custody of the defendant the marshal of the Four Courts Marshalsea, at suit of the plaintiff, under execution on a civil bill decree for £20 17s. 3d, and that defendant

voluntarily permitted his escape. The second count charged a negligent permission to escape. There were two defences to the first count, one traversing the voluntary permission, the other denying that Thomas Farrington was in the defendant's custody at the time of such escape; and there were also two defences on the second count—one traversing the permission to escape, and the other denying that Farrington was in the defendant's custody at the time of the escape. The case was tried before Fitzgerald, B., at the after-sittings after Hilary Term, 1864, when the first witness examined was John Hoey, whose evidence was in effect that he was the plaintiff in an action tried in the Recorder's Court, wherein Thomas Farrington was defendant, and that he obtained a civil bill decree for £20 17s. 3d., besides costs, on the 29th July, 1863. A receipt dated 13th August, 1863, purporting to be signed on behalf of the defendant as marshal for the body of Thomas Farrington under an execution on foot of the decree, was then produced, and it was admitted that Farrington had been placed in the custody of the marshal under such execution, and that he had escaped after such commitment. At the close of the plaintiff's case, counsel for the defendant pressed for a non-suit on the ground that the marshal of the Marshalsea was not liable except for voluntary escape, or there must be at least, some personal negligence or default on his part expressly proved to render him liable, and he relied on the statutes 7 Geo. 4, c. 74, s. 123—19 & 20 Vict., c. 68, s. 17. The learned judge was, however, of opinion that the plaintiff had given no evidence to sustain the case of voluntary escape; but that there was evidence against the defendant on the second count of the summons and plaint, and declined to non-suit. The defendant's case was then gone into; the defendant was first examined; his evidence was that he was marshal of the Marshalsea of the Four Courts; that Mr. Pilkington was the deputy-marshal; that he was appointed by the Government, and not by the witness. The body of the prisoner Farrington was received by the witness himself. The escape occurred on the 7th September, 1863; he, the marshal, was then on leave, and was absent about a fortnight. There are eight hatchmen; the hatch is the only means of entrance into the prison: of the escape, he, the witness, knew nothing of his own knowledge. On cross-examination, the defendant said that he was absent at the time of the escape on leave, though strictly speaking he had not leave of absence; his custom was to apply for leave to the general inspector, stating his wish to be absent from such a day to such a day; but in the present case he did apply about a week before the 7th September, and on since looking into the books of the inspector at the Castle, he found that on this occasion his leave had not been entered, and he got no answer from the inspector. On other occasions his leave had been entered without getting any answer; however, the fact was, that not receiving any answer on that occasion, he took for granted that he had leave and was absent. Several other witnesses were examined to prove that the prisoner did not escape out through the hatch; that he got over the wall of the prison racket-court, and that there was a ladder laid on the ground in the racket-court the night of the

escape; it was left there by some workmen who had been repairing the wall; it was a very weighty forty foot ladder, which no one man could move, and one of the witnesses, who was a prisoner on the night of the escape, swore that he saw Farrington on that night on the top of the wall of the racket-court, which was the outside prison-wall, from which he could easily get into the street and out of the prison. The rules of the prison under the 19 & 20 Vict., c. 68, dated 29th Aug., 1859, were put in evidence. This closed the defendant's case. The jury found for the plaintiff damages £15 15s. The learned judge reserved liberty for the defendant to move the Court to have a verdict entered for the defendant, if the Court should be of opinion that the plaintiff ought to have been non-suited, or on the evidence that he should have directed a verdict for the defendant.

Sidney, Q.C., now appeared to shew cause against making absolute the conditional order.—The prisoner here was in the custody of the marshal, and he must be held responsible for the prisoner's escape. By the 1st section of the 5 & 6 Vict., c. 95, s. 1, which was an Act for consolidating the Four Courts Marshalsea, Sheriff's Prison, and City Marshalsea, and for regulating the Four Courts Marshalsea in Ireland, it was enacted that no person shall be in future imprisoned for debt in Newgate, or in the City Marshalsea, which was the Sheriff's prison, and that after the 10th of August, 1842, no committal shall be made by any court to the City Marshalsea or Sheriff's Prison, or to Newgate, for debt, and that after the passing of that Act, the prison of the Four Courts Marshalsea shall be the only gaol for all debtors, bankrupts, or other persons who, before the passing of that Act, might have been imprisoned in the Four Courts Marshalsea, City Marshalsea, or the Sheriff's Prison, and that thenceforward "the persons imprisoned in the Four Courts Marshalsea shall be there in the custody of the marshal, from whatever court, or by whatever legal process they shall severally have been committed; and all securities taken by any officer of the Four Courts Marshalsea shall enure for securing the performance of the like duty respecting the prisoners who shall be confined in the same prison under this Act." It has been decided under that section of the Act that all persons confined in the Marshalsea are in the custody of the marshal.—*Ex parte Higgins* (9 Ir. Law, 414). The following is the marginal note in *Re Lampiere* (2 Ir. Jur. 291)—"The sheriff of the county of the city of Dublin has not the custody of a defendant arrested under a civil bill decree, or a special warrant directed to the plaintiff; nor has the sheriff, since the passing of the 5 & 6 Vict., c. 95, the custody of debtors confined in the Four Courts Marshalsea; both these classes of creditors are in the custody of the marshal only." The question now for the Court to consider is, assuming the marshal to be lawfully absent from the marshalsea, is he responsible for an escape effected while lawfully absent, through the misconduct or carelessness of his deputy? In *Alept v. Eyles* (2 H. Black. 108), it was held that an action of debt would lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge of, and without any fault whatsoever on the part of the gaoler, who,

in such case, can avail himself of nothing but the act of God or the King's enemies as an excuse. The whole law of escape is laid down in that case. A gaoler is liable for every escape which does not arise from the act of God or the King's enemies, and any escape within those two exceptions, is, by construction of law, a negligent escape.—1 Roll Abr., 808, tit. Escape; Dyer, 66, b., 4 Co. 84. And it appears from the Year Book, 33 Hen. 6, 1, that if a number of the King's subjects who are unknown break open the prison in the night, and set the prisoners loose, in that the marshal shall be charged for negligently keeping them. Even fire, unless it is from lightning, is no excuse. [*Hughes, B.*—The question here is; was the deputy marshal who was in charge of the gaol on the night of the escape, the gaoler, the only gaoler, and if so, is the marshal exonerated?] The marshal is answerable for the neglect of his deputy. Previous to the passing of the 19 & 20 Vict. c. 68, the marshal would have been clearly liable for the omission or breach of duty, or negligence of his deputy, and there is nothing in that Act to exonerate the marshal. By that Act, which was an Act to amend the laws relating to prisons in Ireland, the jurisdiction of the Court of Queen's Bench was transferred to the Lord Lieutenant. The 17th section is as follows:—"So much of the 123rd sect. of the Prisons' Act as provides that one deputy marshal of the Four Courts Marshalsea, three hatchmen, and all inferior officers necessary for the safe custody of the prisoners, or the discipline of the prison, shall be appointed and paid by the marshal of such marshalsea, is hereby repealed; and such deputy marshal, hatchmen, and inferior officers as aforesaid, shall, from and after the passing of this Act, be appointed and removable at the will and pleasure of the Lord Lieutenant; and the deputy marshal, hatchmen, and inferior officers, shall be paid such salaries as the Lord Lieutenant, with the sanction of the Commissioners of her Majesty's Treasury, shall in that behalf direct." The Legislature, by that section, has taken the power both of appointing and removing the officers of the prison from the marshal, and has vested same in the Lord Lieutenant; but it has by no means altered the custody of the marshal, and all the responsibilities that were cast upon him before the coming into operation of this last Act in 1856, still remain to be cast upon him. No doubt but there was negligence in allowing the ladder to remain in the racket-court, and evidence was given to shew that Farrington was seen on the wall of the racket-court that night. It is submitted that the mere power of appointment and removal of the officer by the Lord Lieutenant, did not relieve the marshal of his responsibility. Again, the absence of the marshal on that night is no ground for shewing that the deputy was the gaoler. Whether he was there or not, the custody of the prisoner is in the marshal alone.

Dowse, Q.C., appeared for the defendant.—Two questions are for the consideration of the Court.—First, assuming that the marshal, on the night of the escape, had the custody of the prisoners, can the marshal be responsible for an escape which occurs through the negligence or incompetency of the officers of the prison, the marshal not having the power to appoint

competent, or to remove incompetent, officers from their situations? Second—was the prisoner, on the night of the escape, in the custody of the marshal, or was he in the custody of the deputy marshal, supposing the marshal to be legally absent—or, in other words, who was the keeper of the jail on that night? On the first question, the general law cannot be controverted that the gaoler is responsible for escape in all cases save by the act of God or the Queen's enemies. Before the 19 & 20 Vict. c. 68, the marshal would have clearly been liable; but now the law is quite different. By the 7th Geo. 4, c. 74, sect. 12³, it was provided that one deputy marshal of the Four Courts Marshalsea, three hatchmen, and all inferior officers necessary for the safe custody of prisoners, or the discipline of the prison, shall be appointed and paid by the marshal of the Marshalsea. The marshal was, no doubt, then liable; he was responsible for the efficiency of his own officers, whom he might appoint or dismiss at his pleasure, but it would be intolerable if the marshal, since the passing of the 19 & 20 Vict., could be held liable for the negligence of officers over whom he had no control. By the 17th section of that Act, the Lord Lieutenant was empowered either to appoint or remove all officers; thenceforward all the officers of the prison became the servants of the Lord Lieutenant, and ceased to be the servants of the marshal. If the deputy and the officer were guilty of negligence in leaving the ladder in the prison racket court, the marshal could not exercise any control over them, or pushing the case further still, if the officer aid in the escape, can it be contended that the defendant is liable for such misconduct? If then the officer lets out a prisoner, or contributes by his negligence, then the action lies against the officer, who is quite independent of the gaoler. I admit the rule *respondet superior* applied when the marshal employed his officers. The 9 Anna, ch. 7, ss. 1 & 2, (Irish), which was an Act for the better preventing escapes out of the prison of the Marshalsea of the Four Courts, makes the sheriff liable for an escape of a prisoner. Since the passing of the 5 & 6 Vict., c. 95, abolishing the Sheriff's Prison, the Marshalsea has become the Sheriff's Prison, and the prisoners were held to be in the sheriff's custody. In the case of *Ex parte Higgins* (9 Ir. Law, 419), it was held that the Marshalsea was the Sheriff's Prison. Chief Justice Doherty there says, "In point of fact, the prisoner is in the safe keeping of the marshal; in point of law, he is in that of the sheriff." And Judge Ball, in the same case, when delivering judgment, says, "It appears to me that it was not the intention of the Act (which abolished the Sheriff's Prison) to divest the sheriff of the legal character in which he stood towards the prisoner, by enacting, as I conceive it did in substance, that for the future the marshal should have the actual custody of the prisoner, as the sheriff's gaoler had before. At the same time it may be just and reasonable, from the circumstance of the marshal not being appointed by the sheriff, that the latter should not be held liable for an escape of the prisoner from the marshal's custody, or otherwise answerable for his acts or omissions." Apply this to the present system, and can the marshal be held liable for his deputy, whom he has not appointed? Second ques-

tion—The marshal cannot be held responsible for the escape. The marshal was away on leave, and the duty then devolved on the deputy marshal. The 37th of the rules framed under the authority of the 19 & 20 Vic. c. 68, sec. 3, declares that "All powers of inspection and punishment of prisoners vested under these rules in the marshal or his deputy, shall extend to the local inspector of the Four Courts Marshalsea for the time being, and to the *deputy marshal* during the illness or *absence* from any cause of the said marshal;" and this rule was discussed in the case of *Carpenter v. Teeling* (13 L. C. L., 527).

Buchanan followed on the same side.—The common law relationship of principal and deputy which existed between the marshal and deputy marshal has been destroyed by the Act giving the appointment of the office to the Lord Lieutenant, and before the passing of the 19 & 20 Vict., his act would have been the act of the marshal. In *Les Termes de la Ley*, tit. *deputia*, "a deputy hath not any estate or interest in the officer, but is only the shadow of the officer, and doth all things in the name of the officer himself, and nothing in his own name, and for which his *grantor* shall answer; what is done by the deputy is done by the principal, who may displace him at his pleasure.—Per Holt, C. J., 1 Salk., pp. 18, 19; *Sedley v. McGowen* (7 L. C. L., 436).

May 6.—FITZGERALD, B., said that he wished to call the attention of counsel to an old case, *Milton's case*, (4 Rep. 34, Pasch. 26 Ely.) at the end of which case the following occurs,—"that it was resolved by all the judges that the grants of the custody of the gaols of the counties either by King Henry VIII. or afterwards granted by patent were utterly void; forasmuch as the custody of them belongs to the office of sheriff, who being immediate officer of the king's courts, should answer for escapes, and shall be subject to amerciaments if he has not the body in court upon process directed to him, &c. It is reason that he shall put in such keepers of the said gaols, for whom he will answer according to the purview of the Act of 14 Ed. III.; and therefore it would be against all reason that he should answer for escapes out of the said gaols, and that he should be subject to amerciaments for not having the bodies of prisoners, &c.; and yet another should have the keeping and custody of the gaol." We cannot hold in the present instance that an office filled by Act of Parliament is void. By the 19th & 20th Victoria, chapter 68, section 17, the deputy marshal, hatchman, and inferior officer of the Four Courts Marshalsea shall be appointed by the Lord Lieutenant; and by the 18th section all the other prison officers all over Ireland are to be appointed by the Board of Superintendence. By the 20th section of the Act just mentioned every person who shall be nominated or appointed as therein provided to the office of governor of any prison by the Board of Superintendence shall immediately after his nomination to such office, and before he shall enter upon the duties thereof, enter into a recognizance in such sum as the Board of Superintendence shall direct; the condition of which recognizance shall be, that such governor shall faithfully discharge the duties of his office while he shall hold same; and that "he shall indemnify and save harmless every sheriff and every other per-

son from all loss, costs, damages, and expenses which any such sheriff or other person shall incur, sustain, or be liable to by reason of any escape of any prisoner in the charge of such governor." No doubt, the principle adopted by the Legislature conflict with that which was decided in *Milton's case*. We are, however, here dealing with an Act of Parliament and not with patents.

May 9.—*Serjt. Armstrong*, with *Sidney, Q.C.*—It is plain that the creditor who has been damnified must have an action against somebody or other. I will endeavour to show that against the sheriff he has no remedy. I shall commence with 10 William III., ch. 9. By the 10th section of that Act the appointment of the marshal of the marshalsea was in the Crown, and exercised by the chief governor of this country; and it so remains until the General Prisons Act, which altered the law—*Lampiere's case* (2 Ir. Jur. 291) decides that the sheriff has not the custody of the prisoner in the marshalsea since the passing of the 5 & 6 Vic. ch. 95—*Wightman v. Mullens* (2 Strange, 1226). The 3rd sect. of 8 Anne, ch. 7, declares the marshal of the Four Courts liable for the escape of any person out of his custody. In *Sir George Reynel's case* (9 Rep. 98) it is laid down that he who occupies or has the custody of a gaol, by right or wrong, shall be charged with the escapes of prisoners—2 Inst. 379–382. Could it be tolerable that our action would be against the deputy or against the hatchman? The marshal then, and he alone, is responsible for all acts save the act of God and the Queen's enemies. The office of marshal was not thrust on him—nobody compelled him to take it; it is one of emolument, and he must take it with all its risks, and that of escape is one of them. But in the case of a sheriff the office is thrust upon him; he is compelled to take it against his will; and yet though unpaid he is answerable for escapes; *a multo fortiori* is the paid officer, whom nobody pressed to take the office, liable.

Dowse, Q.C., thought that the case he was referred to by Baron Fitzgerald was in point. There it was decided that the gaoler who had the responsibility of keeping and detaining the prisoner, must allow him the opportunity of appointing his servants. By the 14 Edw. IV. c. 10, Eng., it was enacted "that the sheriffs shall have the custody of the gaols; and that they will put in such keepers for whom they will answer." And that Act is extended to Ireland by Poyning's Law, 19 Hen. VII. c. 10; and in this case it is endeavoured to make the marshal, who has not the appointment of his servants, responsible.

Pigor, C.B.—It appears to me that this case does not turn upon the old law, but entirely upon the recent Acts of Parliament which deal with the marshal of the marshalsea. The last statute vests in the Lord Lieutenant the right of appointing the deputy as well as the marshal. From the earliest times it has been the law that the person who has the custody of the prison is responsible for the escape of prisoners in all cases except when the escape is caused by the act of God or the king's enemies. Under the Prisons Act, 7 Geo. IV., ch. 74, the marshal was appointed by the Lord Lieutenant. Before the 5 & 6 Vic. ch. 95, the sheriff had the common law right of imprisoning

debtors wherever he pleased, but that power was destroyed by the 1st section of that statute which contains this remarkable passage, that after the passing of that Act the prison of the Four Courts Marshalsea should be the only prison for all prisoners who, before the passing of the Act, might be imprisoned in Newgate or in the city marshalsea or sheriff's prison. Now, that statute considerably abridged the Common Law power of sheriffs. A very early distinction prevailed between debtors and malefactors; debtors might be imprisoned in any prison the sheriff might please; but under the 5 & 6 Vic. it is incumbent on the sheriffs to imprison debtors in the marshalsea, and the prisoner is then in the custody of the marshal. We are not now considering what the Court of Common Pleas did in the case of *Re Higgins*. It is enough now to say that the prisoner was in the custody of the marshal. We are now dealing with the last Act, which is very futile in its provisions. It does make the marshal responsible for the conduct of those over whose appointment he has no power whatever. If the prisoner escape he is liable without being able to provide for the appointment of a proper officer; but, on the other hand, it would be a grievous hardship if the suitors were to be left without a remedy. It does seem very difficult to maintain under this Act that the sheriff is responsible; but it would be a most inadequate remedy if suitors were driven to make responsible the humble servants of the gaol. The 18th section vests the appointment of the officers of the county gaols in the Board of Superintendence; and yet the sheriffs are not exonerated by the change. That they are not exonerated, is evident from the fact that, after their nomination by the Board of Superintendence, every gaoler or governor of a prison shall, by virtue of the 17th sect. of the Act (19 & 20 Vic. c. 68), as a condition precedent to his entering on the duties of his office, enter into recognizances that he will save the sheriff harmless from the damages he may incur by reason of the escape of a prisoner in the charge of the gaoler. No doubt, it was resolved by all the judges of England in *Milton's case*, that the appointment of his officer was incident to the office of sheriff; yet here the Act of Parliament exactly stepped in and did the very thing that the judges said would be against reason. Now, that being so with regard to the sheriffs, who are unpaid officers, can we hold that the marshal, who is a paid officer, is exonerated? The verdict must be entered for the plaintiff.

Cause shown allowed.

IN RE MATTHEW DALY—April 21.

Habeas corpus—20 & 21 Vict., c. 60, ss. 185 & 186
—Recommitment to prison without warrant.

A witness committed by the judge of the Bankrupt Court for unsatisfactorily answering questions put to him on examination in a bankrupt matter, was again brought up for further examination, and recommitment without a warrant. The recommitment was held bad.

This case came before the Court on return to a writ of *habeas corpus*, which writ was in the form following, was directed to the governor of the gaol of Kilmainham:—"Victoria, &c., to the Governor of the jail at Kilmainham, in the County of Dublin, greeting. We command you that you have the body of Matthew Daly, by whatever name he may be called, detained in our prison, under your custody, as we are informed together with the day and cause of his caption and detention before the Barons of our Exchequer, at the Queen's Court, Dublin, on Thursday, the 21st of April, inst.; so that the said barons having seen the cause, do what is right, and according to the laws and customs of that part of our United Kingdom, called Ireland, ought to be done in this behalf, and have you then this writ, witness," &c. In obedience to the above writ, the prisoner was brought up on the 21st April, when counsel for the prisoner applied for his discharge on the facts which were disclosed in the affidavits; it appeared therefrom that the prisoner was a shopkeeper residing at Ballyjamesduff in the County of Cavan; that he was brought up to Dublin in the month of January last to be examined in the matter of Felix M'Cann, a bankrupt, before Judge Lynch, one of the judges of the Court of Bankruptcy and Insolvency in Ireland; that he was examined for four consecutive days in the month of February, 1864, on the 8th of which month he was committed to prison at Kilmainham under the warrant of said judge for unsatisfactory answering, pursuant to the 385th section of the Irish Bankruptcy and Insolvency Act, 20 & 21 Vict. c. 60, from which time he remained in the Kilmainham prison until the 14th April, when he was again brought up for further examination under the warrant of said judge, upon which last-mentioned occasion a motion on notice was brought on for his discharge, and refused with costs, and he thereupon was recommitted, but without a warrant, neither was the prisoner furnished with a copy of his examination within twenty-four hours after his recommittal.

Herrn, Q.C., *Sidney*, Q.C., and *Levy* were for the prisoner.—The prisoner is entitled to be discharged on two grounds; firstly, he was recommitted on the 14th April without a warrant therefor; secondly, even supposing the second committal good, he was entitled to his discharge on the ground of not being furnished within twenty-four hours thereafter, with a copy of his examination; his recommittal was, under the 385th section, for not answering such questions as had been put to him to the satisfaction of the Court, and by the 386th section, it was provided that "in any warrant of committal of any person by the Court for refusing to answer any question, or for not fully answering to the satisfaction of the Court, or for refusing to subscribe his examination, it shall not be necessary to set forth or specify any questions, nor any part of the examination of the person so committed, but it shall be sufficient to refer in said warrant to the examination or deposition of the person as remaining on the file of proceedings, and to specify in the said warrant the precise date of the examination or deposition referred to; Provided, however, that in every case in which any person shall be so committed for refusing to answer, or for not fully answering any question put to him, every such question shall be specified in the exami-

nation or deposition of the person committed, remaining on the file of the proceedings, and so referred to as aforesaid; and provided that a copy of said examination or deposition so referred to shall be delivered personally to the person committed within twenty-four hours next after his actual committal to prison, and in default of the copy being delivered, the person committed shall be discharged from custody either by the Court or by the judge before whom such person may be brought by *habeas corpus*," &c. This section of the Act was not complied with; neither was the prisoner committed on a warrant at his second committal in the form prescribed by the 387th sect. of the same Act. In *Coombe's case* (2 Rose Bank. Rep. 396), the marginal note says, "Where a bankrupt committed by commissioners is again brought up before them and is remanded, there ought to be a warrant of recommittal." The exact same practice is laid down in *Brown's case* (2 Rose Bank. Rep. 396); in like manner it was held in *Martin's case* (5 Jur. 462; 3 De Gex's Bank. Rep. 485); that further detention was illegal without a second warrant—*Ex parte Dauncy* (12 M. & W. 271); *Ex parte Lampon* (1 Mont. & Ayr. 245).

Serjeant Armstrong (with him *Kernan*, Q.C., and *Carton*) contra.—As to the point of the absence of depositions, though the Act of Parliament compel the depositions to be furnished within twenty-four hours, still if there were no necessity for the second warrant, then consequently there was no necessity for the second service of the depositions. The cases stated on the other side are distinguishable; in those cases there was no getting the record of the whole proceedings before the Court, and those cases were decided on the principle that the whole of the case against the party committed for unsatisfactory answering was not before the Court; here the proceedings were before the Court.

Pigor, C.B.—It appears to us that *Coombe's case* is decisive on the point, namely, that there should be a warrant of committal on the recommittal on the 14th of April. The same doctrine is laid down in *Brown's case*, both of which were decided by Lord Eldon.

Prisoner discharged.

HUNT v. SMITH—Apr. 25.

Ejectment on the title—Will—Construction of—New trial motion.

Testator, by will dated 5th December, 1807, gave and bequeathed "to his eldest daughter, M. S., all his estates in the lands of Newgarden, for and during the term of her natural life, with remainder to his grandson, D. S., and the heirs male of his body." On the 16th June, 1808, he made a codicil, "which he did thereby annex to his above will," whereby he bequeathed to his wife, during her natural life, the lands of N. G., remainder to his daughter, M. S., and after her death, to her grandson, D. S., omitting the words "heirs male of his body." Held, that the

estate tail given by the will was not cut down to a life estate by the codicil.

In this case the plaintiff shewed cause against making absolute a conditional order for a new trial, the summons and plaint was in the statutable form for ejectment on the title, for the lands of Newgarden, in the County of Galway, and the defence a traverse of the plaintiff's title. The action was tried before the Hon. Baron Hughes, at the last Galway assizes, when the jury found for the defendant. The following appears to be the case made. The plaintiff was Daniel De Vere Hunt, eldest son of Thomas Hunt, deceased, who was the eldest son and heir-at-law of Daniel Hunt, upon the construction of whose will and codicil the parties, both plaintiff and defendant, insisted that they were respectively entitled to the possession of the lands in question. The defendant, Edward Smith, was the son of Daniel Smith, deceased, who was the son of Mrs. Margaret Smith, deceased, who was the daughter of said Daniel Hunt, the testator. The following is an extract of the will, dated the 5th Dec. 1807—"I give, devise, and bequeath unto my dearly beloved wife, Jane Hunt, one annuity or yearly rent or sum of £100 sterling, to be issuing, and paid and payable out of the lands of Newgarden, &c., to have, hold, receive and take the said annuity of £100 a-year, to my said beloved wife and her assigns, for the term of her natural life." Having given a power of distress to his said wife, the will proceeded, "I hereby give, devise, and bequeath unto my eldest daughter, Margaret Smyth, widow of the late Charles Smyth, Esq., all my estate, right, title, and interest in and to the lands of Newgarden, &c., with every their rights, members, and appurtenances, and without impeachment of waste, for and during the term of her natural life, to her own sole and separate use, with remainder to my grandson, Daniel Smyth, her only son, and the heirs male of his body." To the above was a codicil, dated June 6, 1808, "The above-named Daniel Hunt do hereby annex to my above will this codicil; to my wife I leave and bequeath during her natural life the use and benefit of my house, offices, and garden of Newgarden, and from and after her death the same to go to the use of my daughter, Margaret Smith, and after her death to her son, Daniel Smith:" omitting the words "heirs male of the body." For the plaintiff it was insisted that he was the heir-at-law of the testator, that by the will, the house and lands of Newgarden were given in tail male to Daniel Smith, that had the will remained unrevoked, then the present defendant would, no doubt, be in as tenant in tail male, but that by the codicil the gift of the tenancy in tail was revoked, and the tenancy in tail was cut down to a life estate in Daniel Smith, and that on his death, which happened some time in 1862, the heir-at-law would enter accordingly, and counsel for the plaintiff at the trial, called on the learned judge so to direct the jury. This, however, his Lordship declined to do, but on the contrary he told them that the codicil was not a revocation of the will, but that it merely let in a life estate in the premises to the testator's widow, and that it did not otherwise alter the effect of the will. The jury found for the defendant. On the first

day of the present Term, a conditional order was obtained by the plaintiff for a new trial on the grounds of misdirection of the learned Judge.

Chas. Kelly, Q.C., (with him *Beytagh*) now showed cause against making the conditional order absolute. The codicil did not operate as a revocation of the will; it merely interposed a life estate to testator's widow; reference must be had to the whole will, which must, taken as a whole, be read together—*Jarman*, 161. The intention manifestly was to open a life estate for his widow; in place of the codicil revoking the will, the testator has actually made use of the expressions that he annexes the codicil to his above will.

Hodgens, contra.—The codicil operates as a revocation of the estate tail in the will, the codicil merely gives a life estate. The two dispositions are quite inconsistent, and it is a rule that when two different dispositions are made, one inconsistent with the other, the latter disposition will be carried out, as indicative of a subsequent intention; it is unnecessary to cite cases in support of this doctrine. *Powell on Devises*, 3rd edition, 361, note, where the cases are collected.—*Cum duo inter se pugnancia reperiuntur in testamento ultimum ratum est.*—*Co. Lit.* 112 b. There is a positive bequest of a life estate in the codicil, and upon the cessation of that estate, the heir-at-law was clearly entitled, and a positive bequest will not be controlled by a reference to a former part of the will, *Jones v. Calbeck* (8 Ves. Jun. 42). A disposition in a will and former codicil is not to stand where there is a disposition at variance or different in a subsequent codicil—*Patch v. Graves* (3 Drew., 347); *Sandford v. Sandford* (1 De G. & S., 67); *Poore v. Wright* (3 L. T. N.S. 773); it is a canon that the intention of the testator must be carried out.

Morris, Q. C., followed on the same side.

Beytagh, in reply, cited *Cowan v. Marshall* (Cro. El. 721); *Perse v. Daly* (9 L. E. 508); *Pilsworth v. Moss* (14 Ir. Chan., 163). There a testator bequeathed £12,000 among his younger children, and his household furniture and live and dead stock to such of his daughters who should attain twenty-one; and he bequeathed other portions of his property, real and personal, to his children, and the residue of his property to his daughters. He made a codicil to his will commencing thus:—"Codicil to my will of the, &c. Four of my children having died since the execution of said will, I alter the disposition of my property as follows." He bequeathed £4,000 to each of his three daughters; and in case of one dying unmarried, her portion to go to the survivor; but in the event of one or more dying unmarried, her portion to go among her sons; and he bequeathed to his two surviving sons the remainder of his property, in equal proportions, of whatever kind it might consist, at the time of his death. He gave certain directions as to the management of mills which he held in partnership, and devised his property over in the event of his sons dying without issue, and appointed executors of the codicil as of "his last will and testament." It was held that the bequest of the household furniture in the will, &c., was not revoked by the codicil.

FITZGERALD, B.—It would appear that the intention of the testator was that the codicil and the will should be read as one, for he makes reference to the

will, and he expressly annexes the codicil to his will. The testator does not revoke in the codicil a gift which he makes in the will—namely, a tenancy in tail. It does appear that his intention was merely to interpose a life estate for his widow. The cause shewn must be allowed.

Cause shewn allowed.

DOWD v. PERCY—April 23.

Pleading—Embarrassing defence.

To a summons and plaint for assaulting and imprisoning the plaintiff's wife, the defendant substantially pleaded by way of justification that the defendant was a collector of public cess, and that the plaintiff had acted as his servant in collecting the said public cess, and that having collected and obtained certain moneys he "retained same, and did not pay over same, or any part thereof to defendant; that having been informed, and verily believing that plaintiff had fraudulently embezzled said moneys, and having reasonable cause for suspecting that plaintiff's wife, well knowing said moneys to have been fraudulently embezzled as aforesaid, had the said monies in her possession at the time of the alleged assault and imprisonment, defendant gave her into custody," &c. The defence was ordered to be amended on the ground that there was no positive allegation that a felony had been committed.

THIS was an application that the defence to the first paragraph of the summons and plaint, the two several defences to the second paragraph, the second defence to the third paragraph, the defence to the fourth paragraph, and the defence to the fifth paragraph respectively, be set aside upon the grounds, that they were so framed as to prejudice, embarrass and delay the fair trial of the action, and because the traverses contained in the said defence to the first paragraph, the first defence to the second paragraph, and the defences to the fourth and fifth paragraphs were too large, and were negatives pregnant, and were double, and involved immaterial issues, and because the second defence to the third paragraph contained no sufficient answer or defence to said paragraph, and because the defendant in said several defences respectively had tendered immaterial issues. The summons and plaint was as follows:—"Alexander Percy, the defendant, is summoned to answer the complaint of Thomas Dowd and Catherine, his wife, the plaintiffs, who complain, for that the defendant assaulted, and beat and ill-treated the said Catherine, then being the wife of the said Thomas Dowd; second paragraph, and also that the defendant assaulted the said Catherine, then being the wife of the said Thomas Dowd, and imprisoned her and kept her in prison for a long time; 3rd, and also that the defendant assaulted the said Catherine, then and still being the wife of the said Thomas Dowd, and gave her into custody to a policeman, and caused her to be imprisoned in a police

office for a long time, to the damage of the plaintiffs of £200; 4th, and the said Thomas Dowd also complains, for that the defendant broke and entered the dwelling-house of the said Thomas Dowd, situate at Killyglanon aforesaid, and made a noise and disturbance therein for a long time; 5th, and also that the defendant converted to his own use the goods of the said Thomas Dowd, that is to say, household furniture, wearing apparel, one trunk, several—to wit, 50 pieces of gold and 50 pieces of silver, and carried away the same, and disposed of them to his own use; 6th, and also for that the defendant converted to his own use the goods of the said Thomas Dowd, that is to say, household furniture, wearing apparel, one trunk, divers—to wit, 50 bank notes, and 50 pieces of gold and 50 pieces of silver, to the damage of Thomas Dowd of £200; and the plaintiffs pray judgment against the said defendant, to recover the said sums of £200 and £200," &c.

To the above plaint the defences following were filed:—As to the first paragraph of summons and plaint, that he did not assault, beat, or ill-treat the said Catherine, as in first paragraph alleged; 2nd, and by way of defence to the second paragraph, that he did not assault, imprison, and keep in prison the said Catherine, as therein alleged; 3, and by way of defence to the third paragraph, that he did not assault the said Catherine, or give her into custody to a policeman, or cause her to be imprisoned as in third paragraph alleged; 4, and by way of defence to the 4th paragraph that he did not break and enter the dwelling-house of the said Thomas, and make a noise and disturbance therein, as in fourth paragraph alleged; 5, and by way of defence to the fifth paragraph, that he did not seize and take the goods in said paragraph mentioned, or any of them, or any part thereof, and carry away, and dispose thereof as alleged; 6, and by way of defence to the sixth paragraph, that he did not convert to his own use the goods in said paragraph mentioned, or any part thereof, as therein alleged; 7, and by way of further defence to second paragraph defendant saith, that for a long time before and at the time of the alleged grievances in said paragraph complained of, defendant was and is still, high constable and collector of public cess in and for the barony of Carrigallen, in the county of Leitrim; and plaintiff the said Thomas Dowd was, and up to the time of the alleged grievances, and for a long time previous thereto, had been the clerk or servant of defendant, as such high constable, and was entrusted by the defendant with the collection of divers sums of money of the cess, payable by the several cess payers in said barony; and defendant saith that plaintiff did, in fact, as such clerk and servant of the defendant, collect a large amount of said cess, for and on account of defendant, and so theretofore payable by said cess-payers; and after having so collected and obtained same, plaintiff, Thomas, retained same, and did not pay over same or any part thereof to defendant; that defendant having been informed and verily believing the plaintiff had fraudulently embezzled said moneys, and having reasonable and probable cause for suspecting that plaintiff, Catherine, well knowing said moneys to have been fraudulently embezzled, as aforesaid, had the said moneys in her possession at the time of the

alleged assault and imprisonment; defendant gave the said Catherine into the custody of a policeman to be imprisoned, and caused her to be imprisoned in a police station, to be dealt with according to law in respect of the premises, which are the alleged trespasses in the said second paragraph mentioned.

Mr. Mahon.—These defences are bad on the several grounds in the notice of motion stated, but the most material objection is to the seventh defence; it opens by stating that the defendant was high constable and cess collector, that the male plaintiff was in his employment, and that having collected a large sum of money in his capacity of clerk or servant of defendant, he retained it in his own possession, and defendant believing he had embezzled same, and that his wife knew of the fraudulent embezzlement as aforesaid, that he gave her in charge to a policeman, &c.; now it is impossible to know what is here meant; it does not appear that a felony was stated to be committed [*Pigot, C.B.*—Is not embezzlement a felony?] Yes; but the plea does not say embezzlement was committed at all; it merely says that plaintiff, Thomas, retained the monies, and that defendant believing that plaintiff had fraudulently embezzled same, &c.; this surely is no averment at all; he is stating his mere belief. A private person, not a policeman, causing an arrest on suspicion of a felony, is not justified in doing so, unless a felony was in fact committed; had the defendant been a policeman, no averment of the kind would have been requisite—per Tyndal, C.J., in *Allen v. Wright* (8 C. & P. 526); *Hall v. Booth* (8 N. & M. 316.) The other objections are also unsustainable; 1st defence, that he did not assault, beat, and ill-treat; same in second and fourth defence; he ought to have used the disjunctive instead of the conjunctive conjunction; the plea ought to have been that he did not assault, beat, or ill-treat the said Catherine—*Lysatt v. Lee* (8 Ir. Jur. N.S., 113); *Brett v. Shandon* (7 Ir. Jur. N.S., 387).

George Orme Malley in support of the defence.—The allegation of the committal of the felonious misapplication of the funds, which he had in his house, is a sufficient justification. The 91st section of the 24th and 25th Vict., c. 96, which was an act to consolidate and amend the statute law of England and Ireland relating to larceny, enacts “that whosoever shall receive any chattel money, valuable security, or other property whatsoever, the stealing, taking extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law, or by virtue of this Act, knowing that the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, however convicted, shall be kept in penal servitude,” &c. The plea then justifies the handing over of the woman to a policeman for an act which is directly stated in the plea, namely, receiving money knowing same to be fraudulently detained in the possession of her husband. [*Pigot, C.B.*—Where is there any allegation of an embezzlement

being committed? *Fitzgerald, B.*—What do you mean by using the word “aforesaid?”] In answer to the Lord Chief Baron, we allege that he misappropriated the funds he had received, and the word “aforesaid” refers to the aforesaid misappropriation, which is embezzlement, and is a felony.

Pigot, C.B.—Your plea is, at best, argumentative; you must amend.

Defence ordered to be amended. Costs to be costs in the cause.

Court of Appeal in Chancery.

Reported by R. Buxton Bolton, Esq., Barrister-at-law.

[BEFORE THE LORD CHANCELLOR, THE LORD JUSTICE OF APPEAL, AND MR. JUSTICE O'BRIEN.]

DOLPHIN v. ALYWARD.—May 10, 11.

Voluntary settlement—Judgment debts—Exoneration of life estate—Construction of deed—Recital—Confirmation—Res judicata.

*A. being seised in fee of certain estates, executes in 1809 a voluntary settlement, which, after reciting simply that those estates were subject to an annuity to his wife in case she should survive him, and subject also to certain charges amounting to £3000, settles the estate on himself for life, remainder to his children in the usual manner. A. afterwards contracted debts which were secured by judgment on his life estate. In 1831 A., on the marriage of his eldest son, executed a deed confirming the limitations of the former deed, and died in the year 1861. The sum of £3000, recited in the deed of 1809, as charged on the estates, was paid off out of the rents and profits of the life estate, and the subsequent creditors on the life estate now sought to have the life estate indemnified for these payments by the inheritance, contending that by the recital in the deed of 1809, this sum was made a charge on the inheritance. Held, reversing the decree of the Court below, that the life estate was entitled to be indemnified, for that by the recital, the intention of the settlor appeared that this sum was to be a charge on the inheritance, and that it was not necessary for the settlor to specially exempt his own life estate from these payments. Held, also, on the authority of *Hunter v. Stewart* (8 Jur. N. S. 317), that the dismissal of a suit is not an absolute bar to a new suit between the same parties, and in the same right if new equities have arisen or ripened in the mean time.*

THIS was an appeal from a decision of the Lord Chancellor made on the hearing of this cause on the 15th December, 1863, ordering that this petition be dismissed with costs. The cause petition in this case was filed by the appellant on his own behalf, and on behalf of the other unpaid creditors on the life estate in certain lands in the County of Galway of John Michael Alyward, deceased, for the purpose of hav-

ing an amount raised by sale out of the inheritance, and applied to the payment of the demands of incumbrances upon said life estate, equivalent to the amount which had been paid out of the rents and profits of said life estate, in discharge of certain debts and charges affecting the inheritance. In the year 1802, John Michael Alyward, being seised in fee of certain extensive estates in the County of Galway, executed his bond, with warrant of attorney for confessing judgment thereon in the penal sum of £4,000, conditioned for the payment of the sum of £2,000, with interest, as a marriage portion for his sister Barbara, to John Callanan, and a person named Roche, as trustees for his sister Barbara and her husband, William Lawrence Mahony, in trust, to pay interest on the sum of £2,000 to said William and Barbara Mahony, and the survivor of them, and the said principal sum in trust, for the issue, if any, of the marriage, and in default of issue, then in trust for the survivor of them, the said William and Barbara. Judgment was marked on this bond in Easter Term, 1802. These estates were also subject to the sum of £1,000, secured by judgment of Hilary Term, 1802, against John Michael Alyward, as a portion for his sister Mary, given on the occasion of her marriage with William Burke. In the year 1803, John Michael Alyward intermarried with Jane Lambert, on which occasion he did not put any lands into settlement, but merely charged them with an annuity of £300 for his wife, if she should survive him. This annuity he increased in 1807 by another sum of £300 charged upon the same estates. By deed bearing date 27th December, 1809, between John Michael Alyward of the first part, his wife Jane of the second part, and trustees of the third and fourth parts, reciting that there were issue of the marriage of John Michael and Jane, his wife, two children, John Michael Alyward the younger, and Cecily Connolly Alyward, and also reciting that "Whereas the said John Michael Alyward is now seised in fee of the said several estates, subject to the said yearly sum of £600 for the life of his said wife, if she shall survive him, and subject also to certain charges amounting in the whole to £3,000 principal money, with which the said estates stand charged, for the use of the sisters of the said John Michael Alyward, as expressed in the several marriage settlements of his said sisters," the said John Michael Alyward conveyed the said lands unto Anthony Lambert and his heirs, to the use of the settlor and his wife, for their joint and several lives, and after the death of the survivor to the use of Richard Morrisson for the term of 300 years, to secure portions for younger children, and subject to said term to the use of John Michael Alyward the younger, for life, with remainder to his first and other sons in tail male, remainder to the other sons (if any) of the settlor by his said wife in tail male, remainder to the daughters of the settlor by his said wife, and their heirs, as tenants in common, with remainder to the right heirs of the settlor. This deed gave power to John Michael the younger, when he would come into possession of the life estate thereby limited to him, to charge the said lands with a jointure for any wife he might marry, and with a portion for younger children. In 1812 a bill was filed by William and Barbara Mahony for the payment of the sum due on foot of

the judgment of Easter Term, 1802, and £300, the balance of a sum originally payable out of said lands to Barbara. A receiver was appointed in this cause over the lands for the payment of these demands, and the receiver being extended to other causes and matters, continued over the lands until after the death of John Michael Alyward, senior, which took place in September, 1861. By a deed of arrangement, dated the 28th April, 1815, made between John Michael Alyward of the one part, and William and Barbara Mahony of the other part, reciting the said suit, and that in order to put an end to the expenses thereof, John Michael Alyward had agreed amongst other things to guarantee the punctual payment of the accruing interest on the said sum of £2,000; the said John Michael Alyward covenanted that the said lands should stand charged in the first place with the arrears of interest and costs due to William Mahony; in the second place, with an annuity of £300 for said John Michael Alyward, and in the third place with an annuity of £400 to be applied first to pay off the aforesaid balance of £300, then to pay the accruing interest on said sum of £2,000, and to pay the balance into Court, until the sum of £2,800 should be levied, and be applied to the trusts of Mahony's marriage settlement. By deed of November, 1818, John Michael Alyward mortgaged said lands to one Thomas Higgins for the sum of £2,750. By articles of agreement dated 12th December, 1831, executed on the occasion of the marriage of John Michael Alyward the younger with Mary Higgins, daughter of Thomas Higgins, mortgagee on said lands, after reciting the post-nuptial settlement of 1809, and that John Michael Alyward, senior, was anxious to confirm the provisions thereby made for his children, the said J. M. Alyward and J. M. Alyward the younger, in consideration of the marriage portion of Mary Higgins, secured by said mortgage of 1818, and by certain judgments confessed by the said J. M. Alyward to Thomas Higgins, covenanted that the limitations of the deed of Dec. 1809, should stand good and be confirmed, save so far as same limited any estate to Jane Alyward; and J. M. Alyward covenanted that as soon as he became seised of an estate in possession under the said deed, he would execute the power of jointuring in favour of said Mary, and of portioning to the extent of £6,000 in favour of the issue of intended marriage; and J. M. Alyward, senior, covenanted that from the decease of his son (if he should die before him) he would charge the lands with said jointure. He then demised the lands for a long term of years to trustees, to secure an annuity of £400 to be paid to J. M. Alyward the younger, during his own life. These articles, after further reciting that the deed of Dec., 1809, was void against subsequent purchasers for value, and reciting the mortgage of 1818, and certain judgments, and that the sum of £5,184 was due to Thomas Higgins on foot of said mortgage and judgments, declared that the said Thos. Higgins assigned the mortgage and judgments to trustees in trust as to the interest to the use of J. M. Alyward the younger, and Mary Higgins, for their joint and several lives, and as to the principal sum, to the use of the younger children of the intended marriage; and these articles further provided that so soon as Mary

Higgins should get into possession of the jointure under the provisions of the deed of December, 1809, she should cease to be entitled to the interest on said sum of £5,184, and such interest should thereupon become payable to the person next in remainder entitled to receive the same; and that younger children were not to be entitled to double portions. On the day after the execution of these articles, J. M. Alyward, so as to accelerate his son's life estate under the deed of Dec. 1809, in order to enable him to charge said lands with the jointure, and the sum of £6,000 for younger children, conveyed the said lands to John Michl. Alyward, the younger, who having effected these charges, reconveyed the lands to J. M. Alyward for his life, subject to these charges. Notwithstanding that the purport of the deed of December, 1831, as the appellants contended, was to make the sum of £5,184 payable out of the inheritance only, and that on the execution of the subsequent deed, charging the said jointure and the sum of £6,000 on the said lands, the sum of £5,184, for which the sum of £6,000 was so substituted, ceased to be payable at all for the purposes of the said settlement, yet the entire of said sum was paid since 1860 out of the rents and profits of the life estate of John Michael Alyward to the trustees of the settlement. By an order of the Master of the Rolls of the 16th July, 1854, the said judgment of Easter Term, which has since been paid out of said life estate, was assigned to one John Richardson, as trustee, for the benefit of the creditors on such life estate. In November, 1857, Joseph Stock, a creditor on the life estate of John Michael Alyward, and John Richardson, filed a petition in the Court of Chancery, praying that so much of the said judgment of Easter Term, 1802, and of any other incumbrance affecting the inheritance of said lands as had been paid out of the life estate might be raised out of the inheritance for the payment of the creditors on the life estate. This petition was dismissed by the Lord Chancellor Napier, (*vide* 8 Ir. Chan. R., 429). The present appellant's claim was on foot of a judgment of Hilary Term, 1822, obtained by Henry Joseph Dolphin against John Michael Alyward, and which became vested in appellant, and which in the aforesaid cause of *Mahony v. Alyward* was reported to be a charge on the said life estate, and ordered to be paid in its proper priority by the receiver in said cause. John Michael Alyward having died in September, 1861, appellant filed the cause petition in this cause in December, 1863, against John Michael Alyward the younger, his mother, Jane Alyward, John Michael Alyward Lewis, who is entitled to the remainder in fee in said lands, in default of issue of John Michael Alyward, who has no issue, and John Richardson; praying that any sum paid by the life estate for the benefit of the inheritance might now be raised out of the inheritance for the payment of the creditors on the life estate, and more particularly as to the judgment of Easter Term, 1802; for that the inheritance as between it and the life estate was primarily liable for the payment of the principal of this judgment and the mortgage of November, 1818, and the principal of those incumbrances having been paid out of the rents and profits of the life estate, petitioner and the other creditors on the life estate were entitled to have

the sums so paid raised and paid out of the inheritance; that it being the purport of the settlement of December, 1831, that the charge of £5,184 should be paid out of the inheritance, and it being paid out of the life estate, the creditors were entitled to be indemnified, and that the claim of J. M. Alyward the younger for arrears of the annuity charged for him by said deed, could not defeat the claim of the petitioner, and the other creditors on the life estate, who came in privity with the rents and profits before December, 1831; that the expressed object of the deed of April, 1815, was not to relieve the inheritance from the judgment of Easter Term, 1802, but to relieve the life estate from costs, and the litigation of a suit then pending. Respondent, in his answer, contended that the petitioner was bound by the decree dismissing the petition in the case of *Stock v. Alyward*, as Richardson was a party to that suit in the capacity of trustee for the life estate creditors, of whom the present petitioner was one, and as that petition sought relief on similar equities, and was founded on the same charges as the present petition; that the petitioner had failed to prove that the judgment of Easter Term, 1802, was a portion of the sum of £3,000 which was charged upon the lands by the deed of 1809, as petitioner alleged; that the true construction of the deeds of 1815 and 1831 was to exonerate the inheritance from the payment of the judgment of 1802, and that the deed of 1815 clearly manifested the intention of dedicating the life estate to the payment thereof; that even if the deed of 1831 entitled John Michael Alyward to rely on the mortgage of 1818 as against John Michael Alyward the younger, yet that deed subjected John Michael Alyward to the payment out of his life estate to John Michael, the respondent, of an annuity of £400 per annum, none of which had ever been paid, and the arrears of which would more than cover any claim which such life estate might have in respect of the mortgage of 1818. This petition came on for final hearing before the Lord Chancellor on the 15th Dec. 1863, and was dismissed with costs, on the ground, as appellant stated in his petition of appeal, that his Lordship considered that the deed of April, 1815, showed an intention in John Michael Alyward to onerate his life estate with the payment of the judgment of Easter Term, 1802, and that any amount that might be payable out of the inheritance in consequence of the charge of £5,184 in the settlement of the 12th December, 1831, having been paid out of the life estate should be applied in part satisfaction of the arrears of the annuity settled on John Michael Alyward the younger by said deed. From this decision the present appeal was brought.

Darley, Q.C., (with him *Lawless, Q.C.*, and *H. Plunkett*) for the appellant.—Our case is that by the deed of 1809, the judgment of 1802 was thrown on the inheritance, and that the inheritance must be onerated with the judgment; the contention on the other side is that that deed did not onerate the inheritance, but the life estate. As to whether the dismissal of the petition in the cause of *Stock v. Alyward* (8 Ir. Chan. R. 429), should bind the appellant, *vide Norris v. Le Neve* (3 Atkins, 25.) [*Lord Chancellor*—Richardson was a party to that suit, and he is trustee for the appellant; he represented his

rights]. The principal cannot be bound when he is not before the Court. [*The Lord Chancellor*.—He was before the Court then, and now he wants to have the cause tried again. Did not Richardson sue as trustee for all the creditors, together with his *cestui que trust*? He cannot come here again in the person of Dolphin, who was one of the creditors then, and who was represented. If this suit be dismissed, then another of the creditors could file a petition for a new hearing; this certainly cannot be done]. If we are able to show that the persons are not the same, then have we not some right here? In *Hunter v. Stewart* a very recent case before Lord Westbury, reported in 8 Jur. N.S. 317, and also in 31 L. J., N.S. Ch. 346, as to a former suit being a bar, it was held that one of the criteria of the identity of two suits, in considering a plea of *res judicata*, is the inquiry whether the same evidence would support both. That is the very case we have; the suits are not similar, nor is the evidence, which we offer the same as given in the former suit. In that case Lord Westbury refers to an old authority, which bears strongly on our side. [*The Lord Chancellor*.—Was there ever a new suit allowed because new evidence was discovered? I do not think so]. The parties were put out of Court in the former suit because they asserted their equity before their claim arose. John Michael Alyward was alive at the time, and he might not have died for years. Lord Chancellor Napier dismissed the suit on the ground that the equities had not arisen. He also considered that we failed in identifying the charges on the estate. It was mainly relied on by the opposite parties that no claim could be made on the inheritance while the life estate was in existence and unsold. The fact of the deed of 1809, reciting the sum of £3000, together with the £600 annuity as charges on the estate, is very important to show the intention of the settlor; the annuity could not be paid out of the life estate, for it was not to commence till the latter should determine, and the charge of the £3000 was clearly meant to be paid in the same way, out of the inheritance, and not out of the life estate. It should be remembered that this deed was voluntary; is it reasonable then to suppose that the settlor would have encumbered his life estate thus heavily for the benefit of volunteers, who got the inheritance? As to exoneration of the inheritance, the law is pretty clear—*Piers v. Tufts* (1 Drury and Walsh, 279, before Lord Plunket, and *Flood v. Digby* (1 Jones Ra. Ex. 520). In that case it was held that the tenant for life is entitled to get paid out of the inheritance money which was paid on a judgment out of the life estate, and that the tenant for life has a right to be recouped out of the estate, and he has a charge on the estate, *pro tanto*, and his personal representatives have the same right. [*The Lord Chancellor*.—But not the creditors; they have no right to file a petition for payment. Lord Chancellor Napier dismissed the suit because Stock was a mere judgment creditor, and had no right to raise the equity which he sought to do]. But Stock had not a decree charging his judgment on the life estate, as we have. The deed of 1809 was voluntary, but the deed of 1831 was for value, for marriage; it recites the deed of 1809, and therefore it makes it valid *pro tanto* from that date. The deed of

1831 confirms the former deed, and, therefore, the charges recited in it; if these charges were on the inheritance by the former deed, then they are confirmed upon it by the latter deed—*Lomas v. Wright* (2 Mil. and Keane, 769).

Brewster, Q.C., (with him *The Solicitor General, Blake, Q.C.*, and *O'Flaherty*) for the respondents.—The question here is, was not this case decided before in the case of *Stock v. Alyward*. Richardson was party to that suit, and he was trustee for all the creditors, of whom the appellant was one. These judgments which they seek to make available are the very judgments which they endeavoured to make available before. The case has been closed by the dismissal of the former suit in this Court. Richardson is in reality the petitioner in this suit. This is a contrivance to make it in some way different from the former suit: but it is substantially the same suit, founded on the same equity, in the same rights, brought by the same parties.

Blake, Q.C., on same side.—This suit cannot be entertained. [*O'Brien, J.*—In *Pierce v. Brady* (23 Beav. 64), a decree was made in favour of the *cestui que trust* upon the discovery of fresh evidence, although a decree had been previously made as to the same matter against their trustees, but in a suit to which the *cestui que trust* were not parties]. We will show that had the case of *Stock v. Alyward* never been decided, this Court will decide this case in the same way. The doctrine of the two equities cannot support them in this case. The first equity is raised by the tenant for life paying out of his own funds debts which were charged on the inheritance, but it is not on every state of facts that this equity can be raised. In this case all the charges which the tenant for life paid were debts which he himself owed, it is but the debtor paying off the debts which he had charged upon the inheritance. It was right that he should pay his own debts. The personal estate was *prima facie*, the primary fund for the payment of these charges: if that was insufficient, then the life estate became liable; but this order might be altered. Well, did John Michael Alyward make the inheritance the primary fund for the payment of their charges, or did he mean to do so? We are not bound to show that he did make the life estate the primary fund, but we will show that he did not make the inheritance the primary fund, and it is on them to prove the contrary; not one of the subsequent deeds alters the position of the parties under the deed of 1809. In *Allen v. Hogan* (Lloyd and Goold, tem. Sugden, 231) and in *Vandeleur v. Vandeleur* (Lloyd & Goold, 241,) the distinction is made as to what will fall on real, and what on personal estate—*Lady Langdale v. Briggs* (8 DeG. M. & G. 391.) All that this deed of 1809 does is to recite those charges, and these recitals create no obligation to pay them. If this deed made these judgments a charge on the inheritance, it made the life estate the primary fund; the inheritance was only the secondary, for that deed, contained a covenant for further assurance, and it has been decided in *Jones v. King* (5 Taunton, 418), that that is equivalent to a covenant against incumbrances. In Lord St. Leonard's Vendor's and Purchasers, 613, it is stated that where there is a covenant for further

assurance, the purchaser is entitled to the removal of a judgment, which was on the estate. There is a strongly worded covenant in that deed, and on the authority of *Jones v. King*, so far from making the estate the primary fund, it exonerates it from their charge and judgments. [*O'Brien, J.*—Is there any case to shew that a covenant for further assurance will bind the settlor to clear off charges and judgments, which were recited in the very same deed?] There is no case, but we do not want to prove so much; we only contend that the deed of 1809 did not alter matters; before that deed the personal estate was the primary fund, and after that deed it was so too. The recital did not create a charge. [*The Lord Chancellor.*—Would not the wife's annuity come under the same rule then? it was included in the same recital]. The settlor left matters as they were by the deed of 1809. It is enough for us to prove he did not alter them; let the other side show that he did. The annuity for the wife was given only in the event of her surviving the grantor, when, of course, the life estate was gone; it was all along a charge on the inheritance, but these judgments were essentially different in their character. The deed of 1815 goes still further, for it makes these judgments a charge on the rents and profits of the life estate; under that deed the inheritance could not be sold—2 Jarman on Wills, 572, on the doctrine of exoneration. The settlor created by the deed of 1815, a sinking fund out of the rents and profits for the payment of these charges—*Averall v. Wade* (Lloyd and Goold, tem. Sugden, 252).

Lawless, Q.C., in reply.—The case of *Hunter v. Steward*, before Lord Westbury is very strong. The former suit is no bar to this one; it is clearly laid down in Maddock's Chan. Prac. that a suit to be pleable in bar must be between the same parties and in the same rights. This is not the case here; they are not the same parties. The real question depends on the deed of 1809 and that of 1831. There can be no doubt now as to the identity of these charges and judgments—*Jenkinson v. Harcourt* (1st Kay's Reports, 668); *Jameson v. Stain* (21 Beav., 5). In the deed of 1831, the intention is clearly shown to operate the inheritance with these charges. The son who got the inheritance subject to the life estate, by that deed got other valuable benefits, the estate was conveyed to him to enable him to charge it with a jointure, and with portions for younger children; this the settlor might now have done, but having done so, and benefitting his son to that extent, could it be his intention to incumber his life estate with these judgments? Such was not his intention, either in that deed or in the deed of 1809. The deed of 1815 was a voluntary deed; by it the settlor merely altered the mode of payment of the interest, but nothing else. The annuity which was given by the deed of 1831 to the son stood last of all, and was not intended to be paid unless the estate could pay it, after keeping down all other charges, and the son having taken such great benefit under that deed, cannot in equity claim arrears of an annuity, which he was only to have in case the estate was able to pay.

THE LORD CHANCELLOR delivering the judgment of the Court.—This question has been very fully and

ably put forward on both sides; it was a question of great difficulty and complication. It may seem strange that there should be two decrees of opposite character in the same Court; but I have now the assistance of two learned judges, my Lord Justice of Appeal and Mr. Justice O'Brien, and having paid the greatest attention to this complicated question, we will now endeavour to do justice between the parties. The case was brought forward in the first suit, that of *Stock v. Alyward*, before Lord Chancellor Napier, in the interest of the present appellant, and on the same facts, but the question is whether it was brought on in the same rights as the present suit. At the time of that former suit, John Michael Alyward was alive, and I think that the cause, embarrassed as it was with life estate, was not ripe for judgment in all its branches. The material matters in that suit were not rested on the recitals of the deed of 1809, there was no averment of the identity of those charges, that suit was undoubtedly affected by that defect, and might have been decided on the ground that the settlement of 1809 did not raise the equity. Under such circumstances the case came before Lord Chancellor Napier, who decided the case mainly on the ground that they could not satisfy him as to the identity of these charges. The equity of the present suit is substantially different; the grounds on which the decree of 1858 was pronounced are now removed, and the equities are ripe for judgment. The petitioner here is not the same person, though he has been represented in the former suit, but the suit of one residuary legatee will not bar the suit of another residuary legatee—2 Madox Chan. Prac., 406. Here we have a suit not in the same equity, not having the same person, though in the same right. A great deal of the reasoning of Lord Westbury, when delivering judgment in the case of *Hunter v. Stewart*, is applicable in this case. What is this case? it is a suit filed on the part of Dolphin, for himself and other unpaid creditors on the life estate of the late John Michael Alyward, and he claims the benefits of those debts which have been paid by the tenant for life, as if an assignment of them had been made. The main question is on the construction of the deed of 1809, and whether by that deed, John Michael Alyward is to be taken to have operated or exonerated his life estate with these charges. We have facts sufficient to show that the judgment of 1802, was the same as that which is in controversy, and that it was included in the recital of the deed of 1809. Alyward had no other substantial property, real or personal, except the Galway estate, of which he was seized in fee, and which he operated with a jointure for his wife. He then executes a deed in 1809, which was a voluntary settlement, and in this he recites that, "Whereas the said John Michael Alyward is now seized in fee of the said several estates, subject to the said yearly sum of £600, for the life of the said wife, if she shall survive him, and subject also to certain charges, amounting in the whole to £3000, principal money, with which the said estates stand charged for the use of the sisters of the said John Michael Alyward, as expressed in the several marriage settlement of his said sisters." These words throw light on that instrument to show the intentions of the settlor, which was to benefit his family to the utmost extent possible. That being so, is it

likely that he should make himself liable to pay off all those charges out of the life estate, which he had reserved for himself? He made this deed voluntarily, and is it for equity to say that he would burden his estate with these charges, unless he was compelled so to do? At first I was inclined to think that there was an analogy between this case and that of the rights of devisees or creditors under a will; but on reading the judgment of V. C. Wood in *Jenkinson v. Harcourt* (Kay's Reports, 696,) I find that there is not any. Where it is perfectly plain that the intention of the settlor was to settle the estate, subject to these charges, and subject to these demands, it is not necessary that he should have in terms rendered himself exempt from the payment. He has paid those charges, and I think we must, in equity, give effect to this payment, as if an assignment of those debts had been made, and, therefore, we grant the relief sought, and order that a mutual account be taken, as between the life estate and the inheritance.

Decree below reversed accordingly.

Court of Chancery.

Reported by R. Ruxton Bolton, Esq., Barrister-at-law.

IN THE MATTER OF FANNING'S CHARITY.—May 3.

THE COMMISSIONERS OF CHARITABLE DONATIONS AND REQUESTS v. THE ATTORNEY-GENERAL AND OTHERS.

The Commissioners of Charitable Donations and Requests in Ireland, filed a petition, which prayed, among other things, that the Commissioners be discharged from their trusts in the matter of the Fanning Charity, and that new trustees might be appointed. Held, that though the Court would have jurisdiction to interfere if there were any breach of trust, or misappropriation of the funds, yet the Court had no power to relieve the Commissioners from the trusts imposed on them by Act of Parliament.

Quære—Whether the Court had power to frame a scheme of rules for the management of a charity under the control of the Commissioners.

THIS case, which was argued before the Lord Chancellor during last term, came on as directed for re-argument. The petition prayed in the first place for a reference to the Master to have a scheme approved and settled under the authority of the Court, for the application and management of the charitable funds bequeathed by the will of James Fanning, and certain other funds which had been incorporated with them; and in the second place the petition prayed that the Court would relieve the petitioners from the duties and responsibilities connected with this charity, and that new trustees might be appointed in their stead. The funds which were the foundation of this charity, were, for more than 40 years, in England, France, and Ireland, the subject of litigation which involved

the nicest questions of municipal and international law. In 1841 this protracted litigation was brought to a close, and by an order of the Lord Chancellor of England, the sum of £35,000 was transferred to the Commissioners of Charities in Ireland to be applied by them pursuant to the will of the donor, James Fanning, "for the relief of the poor of the City of Waterford." The Commissioners accordingly applied these funds as they saw fit, and established an institution in Waterford called the Fanning's Charity, for the primary object of affording a shelter and home to poor epileptic persons, idiots, and lunatics; several other sums bequeathed for a like purpose were subsequently incorporated with this Fanning Charity. The Commissioners then appointed a board of governors, to whom they gave authority to make such bye laws for the government of the institution, and the conduct of the inmates as from time to time they might think necessary. The working of this scheme was not found satisfactory, some of the governors alleging that certain alterations and changes in the rules of the institution were required, others maintaining that no such change was either necessary or expedient, and the Commissioners now came into this Court to obtain a scheme under its sanction and protection which would obviate all difficulties and doubts. On the former hearing the Court expressed an opinion that it had no jurisdiction, and it now came on for re-argument.

The Solicitor-General (with whom were *Lefroy*, Q.C., and *James S. Green*) stated the case for the petitioners.—There is grave doubt whether the whole body of bye-laws made by the governors is not wholly inoperative and illegal, and whether it has not been so *ab initio*, for it is very uncertain whether the Commissioners had the power to delegate to others the right and authority to manage this institution, and to frame rules and bye-laws for its regulation. If so, it is evident that the governors may from time to time alter and change the management of the institution, and seriously modify and affect its character and scope. To relieve them from all such doubt and difficulty, the Commissioners now seek the assistance of the Court in settling a scheme of rules under the authority of the Court, which would be binding on all parties, and liberty could be given to apply to the Court from time to time on petition under Romilly's Act for aid or directions as circumstances may require. The powers which the former Commissioners exercised were conferred on them by the 40th Geo. 3, c. 75. The present Commissioners derive their authority from the 7 & 8 Vict., c. 97, which alters their powers, and at the same time limits and abridges to some extent their action. Under the provisions of this Act, they took this property and these funds, impressed with the trusts under which the former Commissioners held them, but they have not now power to do anything but conform to the rules and regulations made and sanctioned by their predecessors. Difficulties have lately arisen in reference to certain matters connected with the finances of the institution, as, for instance, what parties are to sign cheques for the payment of expenses, and the Commissioners, feeling that they have no power under the circumstances to make any change in the rules are compelled to come here for the

assistance of the Court; nor ought that assistance to be denied them. This Court has jurisdiction; for if the Commissioners are not exempted by statute from the general jurisdiction of this Court, there is no reason why they should not make such an application. Suppose the Commissioners had managed the funds improperly, or misappropriated them, could it be contended that the Court would not have control over them? There is nothing in the Act of Parliament to exclude them from its jurisdiction. If they could be brought here under such circumstances, it follows as a correlative proposition that when a difficulty arises in the discharge of their duties, they can come here to the Court for its assistance and advice. As to the branch of the petition which seeks to have the petitioners discharged from their trusts, there is more difficulty. [*The Lord Chancellor.*—I cannot do that; the Act has put the trust upon them, and I have no power to release them. But have not the Commissioners power to frame rules for the management of the institution, and the administration of its funds? Could they not make an additional rule or two to meet the present difficulty? If there were any breach of trust, then clearly this Court would have jurisdiction, but in the present instance no such case is attempted to be made. Here is a special body constituted by Act of Parliament for the government and direction of the charities of Ireland, and if the Court were now to grant the prayer of this petition, applications on behalf of some charities, to make a new rule, or alter an existing one, would be every day occurrences. It strikes me the Commissioners can make any rule they think fit, without the intervention of this Court. I should feel it a position of great difficulty if the Commissioners of National Education were to come here to get an alteration made in their rules; yet that would be but a parallel case to the present. It appears to me the Commissioners want only to be relieved from their duties and responsibilities.] Even if the Commissioners have the power to frame rules for the government of the institution, they have not the power of this Court to investigate properly. They have no power to examine witnesses, nor to obtain information in that satisfactory manner in which it could be had in the Master's Office. If the Commissioners are amenable to the jurisdiction of this Court, they have a right, like other trustees, to come into this Court in a case of any difficulty.

Brewster, Q.C., (with whom were *J. E. Walsh, Q.C.*, and *Peet*) for some of the respondents.—This petition must be dismissed. If the commissioners had brought forward a case of default in the management of the charity, the matter would be on a different footing, and they would be entitled to the same relief that any trustee has a right to claim from this Court; but the primary object of this suit is that the Commissioners may be relieved from the discharge of their duties, and it is only incidentally that any mention as to this supposed difficulty in the construction of the rules is introduced. There is no statement that any actual difficulty has occurred, or that there is any practical difficulty in the construction or application of these rules. It is a mere theoretical point—a suggestion of a difficulty, and on that ground they seek to be discharged from those trusts imposed on them by the Legislature. If they were allowed to act in this manner, they would

soon get rid of all their duties and liabilities, and be left with nothing to do. This would disappoint the object of the Legislature, and frustrate the design which it had in calling these Commissioners into existence, which was that all gifts and bequests intended for charitable purposes might be administered with impartiality and certainty. There is no pretext for supposing that the power of the Commissioners was exercised for any improper purpose; or that the charity has failed in its objects under their management.

THE LORD CHANCELLOR.—I would have great difficulty in acceding to the prayer of the petition, or in coming to any satisfactory conclusion on the case as it now stands. On the former hearing of this case I mentioned some of the difficulties with which I felt this question was surrounded. I allowed the case to stand over, not feeling inclined to dispose of the matter hastily, and being anxious that there might be time to consider carefully the serious matters involved. It has now been very fully re-argued, and I am still of opinion that something might be done to test the working of the present system and constitution, and the present rules of this institution before calling on me to make any decree, or to decide this matter one way or the other. The basis of this petition is in fact that the Commissioners of Charitable Donations and Bequests may be relieved from their duties, discharged from their trusts, and exonerated from their responsibilities in connexion with this institution. In support of this, they state that they have not time, nor inspectors, nor means to look closely after the working of this large and important charity, or to take that part in its control or management which its interests would properly require. Some such difficulty as that suggested appears to exist; but if it does, it is not one that this Court has power either to remedy or remove. It is, in fact, a question for the Legislature, and not for me. I cannot usurp its power; and if the Commissioners find their staff insufficient, or their machinery defective, they must go to Parliament for relief. That part of the petition then being clearly untenable, we come to what is more tangible, namely, that portion which seeks for a reference to the Master, to settle a scheme for the management of the Institution. No doubt, if the property of Mr. Fanning had, in the first instance been brought into this Court, a scheme for the application of it would have been settled. There was in existence, however, a body having power and ample power to frame such a scheme, and they have done so. The petition does not allege that any of the existing rules are illegal, or calculated to interfere with the working of the charity. On the contrary, everything appears to have gone on in the most satisfactory manner down to the institution of this suit. The question then is, is there any rule requiring alteration or amendment. If such be the case, it strikes me that the Commissioners have full power to make any alteration they think necessary, and to call on the Board of Governors or standing committee to adopt the amended rules. If they wish to have the cheques signed by a monthly meeting, they can draw up a rule to that effect, and insist on its adoption by withholding the funds, if such a course should be necessary. If this were done, the board of governors

would not think of offering any opposition. It would however, be very inconvenient, and a manifest failure of justice, that this Court should be called upon, and its decision required on the making of every rule in the numerous charitable institutions of Ireland. It would be a strange state of the law if a cause petition must be filed to make a new rule or alter an old one. If the Commissioners had taken this matter carefully into consideration, and pointed out to the board of governors any amendments or additions they regarded as advantageous or essential for the proper management of the institution, or the administration of its finances, it could have been ascertained whether, without any litigation, the matters now before me, could not have been simply and satisfactorily arranged. If the petitioners do make any alteration in the rules, they will probably find no difficulty to prevent them; or if on the other hand, they consider it more expedient not to make any new rule, or any amendments, no doubt all will go on harmoniously, and the business of the institution will be managed as successfully and satisfactorily as heretofore. As to that portion of the petition, which seeks to have the Commissioners discharged from the trusts, and new trustees appointed, that is a thing which, as I have before remarked, I am wholly unable to do. If the Commissioners would examine carefully into the rules of the institution, and ascertain by consultation with the governors, whether any alterations or modifications in them are necessary, they would save this Court a great deal of trouble, and probably lead to an arrangement that would satisfy all parties. In the mean time let the case stand over generally, and what I have said on the subject may lead to a final adjustment of matters.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

THE QUEEN v. CROSTHWAITE.—Jan. 13, 19.

Quo warranto.—*Towns Improvement Act, st. 17 & 18 Vict., c. 103—Franchise—Females.*

Women are capable of voting at the election of town commissioners, under the Towns Improvement Act, 1854, st. 17 & 18 Vict., c. 103.

THIS case came before the Court upon a special verdict had on the trial of a *quo warranto*, which had been obtained to impeach the election of the defendant as a town commissioner for one of the wards of the township of Kingstown, in the County of Dublin. The election was had in October, 1861. There were four candidates for the office—namely, Mr. Crosthwaite, the defendant, who had eighty-five votes; Mr. Mayne, who had seventy-seven votes; Mr. Gorman, who had seventy-five, and Mr. Murphy, who had seventy-one. Of those who voted for Messrs. Crosthwaite and Mayne, twenty-one were females; and the whole question upon the present argument was, whe-

ther under the Towns Improvement Act, 1854, stat. 17 & 18 Vict., c. 103, females are entitled to vote at the election of town commissioners. Other points also arose upon the special verdict, but the Court directed this question to be argued, and gave judgment upon it separately.

Coffey and Ball, Q.C., for the prosecutor.—The election of town commissioners in this case was held under statute 17 & 18 Vict., c. 103. The qualification for voters is given in s. 22, where the persons entitled to vote are (so far as is necessary for this argument) stated to be "every person of full age," the immediate lessor of premises in the town of the value stated therein, and who shall reside within five miles of the boundary of the town; and also "every person of full age who shall have occupied as tenant, or owner, or joint occupier, or shall have been the immediate lessor" rated as is stated in the section, of premises in the town. In the interpretation clause, s. 1 of the Act, the word "householder" is defined to mean "a male occupier of a dwelling-house, or of any lands, tenements, or hereditaments within the prescribed boundaries of the town, rated to the relief of the poor thereof." The right here claimed is unsuitable to females, and to give it to them would be giving to the whole of the Act an inconsistent and repugnant construction. Sections 4, 5, and 6, shew how the Act is put in force, and a township constituted. Under section 4, upon the application of twenty-one "householders," the Lord Lieutenant may order the mayor or other chief magistrate to convene a meeting to consider whether the Act shall be carried into execution therein; s. 6 directs the mode of holding the meeting, and enacts that the mayor or other chief magistrate is to notify a time and place for holding the meeting, which notification is to be made by publishing in the way pointed out in the section a notice in the form in the Schedule marked A. annexed to the Act. The form in the Schedule requires the rated occupiers and lessors following to meet, viz., "Every male person of full age" qualified as mentioned. Then section 7 gives the qualifications of those entitled to vote at the meeting, that is, "every person of full age" qualified as mentioned—and with one exception the qualifications are the same as those in section 22. The notice alluded to in s. 6 plainly shews that those who are to be summoned to the meeting, and are to vote at it, are to be males. This throws a great light on the policy and intention of the Act of Parliament. A further light is afforded by section 25, which is that giving the qualifications of commissioners; the persons enumerated are, "every person" who is immediate lessor, and also "any householder or occupier of full age," qualified as stated in the section. If the argument on the other side were allowed to prevail, females might be commissioners. The Court will not hold that, as the duties to be performed under the Act are quite unsuited to females. It is true that many offices have been held by females, but they were always offices capable of being performed by deputy. There is nothing in the Act to enable a commissioner to appoint a deputy. Although words in an Act of Parliament may include a particular class of persons, it does not follow that that class *must* be included. The words of stat. 8 Hen. 6, c. 7, providing the qua-

fications for voters for members of Parliament might be held to include females; but it never has been supposed that women could so vote, and it appears from 4th Inst., p. 4, that they never did so vote. The reason is, the difference of position between men and women. There is an inherent disqualification in the female sex, and where is the line to be drawn between parliamentary and municipal purposes? *The King v. Stubbs* (2 T. R., 395) will be cited on the other side. There it was held that a woman might be appointed overseer of the poor; but the circumstances there were peculiar; and the appointment was proper from the necessity of the case. *Olive v. Ingram* (2 Str., 1114; a.c., 13 Viner's Abr. 159, *Fene*), where it was held that a woman was capable of being appointed a sexton, and of voting in the election; but the decision was made expressly on the ground that the office did not concern the public, or the care and inspection of the morals of the parishioners. In the *Anonymous Case* (2 Lord Raym. 1014), it was held that a woman might be governess of a workhouse, but it was said that she might act by a deputy. So, in *The King v. Lady Braughton* (3 Keble, 32). There is no case of a female having been appointed to an office where the office carried a discretion. Under s. 29 of the Towns Improvement Act, the Lord Chancellor may select one of the commissioners to be a justice of the peace for the town. It is manifest that such an office must be unfit for a female.

Heron, Q.C., and Jellett, contra.—The right of voting at the election of town commissioners is one suitable to be exercised by all occupiers of local property, whether male or female. The preamble of the Act shews what its object is: it is to make better provision "for the paving, lighting, cleansing, supplying with water, and regulation of towns in Ireland." These are all matters of merely local concern, and in all such cases, such as vestries, poor-law elections, &c., females may vote. There is no express disqualification of them in the Act, and in fact s. 22, read with the interpretation clause, gives them the franchise. Sect. 22 stands by itself, defining the qualifications for voters; the word "householder," which in the interpretation clause is defined to mean a "male occupier," does not occur in it. No doubt that under ss. 4, 5, 6, and 7, the preliminary proceedings for constituting a township are to be taken by males only, but except for the wording of the form in Schedule A., females would have the right to vote at the preliminary meeting. According to the argument on the other side, the word "occupier" in section 25 clearly refers to males only, and therefore in the rest of the Act it must also have the same restricted meaning; but the rule *nosciatur a sociis* applies here. In the 25th section, "occupier" stands with "householder." The words are, "any householder or occupier," and both must receive the same construction: the words, "not being an ecclesiastic of any religious denomination," also shew distinctly that the 25th section is confined to males; but there is nothing in the other sections cited, where the word "occupiers" occurs, to exclude females. St. 8 Hen. 6, c. 7, cited on the other side, does not prove anything; the title of the statute is, "What sort of men shall be choosers," and the pronouns used in the French original of the statute, shows that the

persons spoken of in it are all males. The Reform Act, 2 Wm. 4, c. 45, uses the words "every male:" so in the Corporation Acts. Women have voted in elections under the Poor Law Act, where the voters are described simply as "every rate-payer."—Stat. 1 & 2 Vict., c. 56, ss. 80, 81. *Femes soles* liable to church-rates may vote at vestries.—Finlay on Churchwardens, 21. The statute 4 & 5 Wm. 4, c. 90, s. 43, uses the words only "every parishioner," and females vote under that Act. The cases of *The King v. Stubbs* and *Olive v. Ingram*, which is better reported in 7th Mod. 263, than in *Strange*, are in our favour. There is no reason why this Act should receive a different construction from other statutes upon local subjects. This franchise depends upon property, and not upon personal qualifications. Section 28 of the Commissioners' Clauses Act, 1847 (10 Vict., c. 16), which is incorporated with the Towns Improvement Act, prescribes the mode of voting, which is simply by handing in a voting paper. There is nothing unsuitable to females in that. The election to the office of commissioner would depend on personal qualifications: that is not the case with the right of voting.

Whiteside, Q.C., (with *Heron, Q.C., and Jellett*) referred to *Bull v. Turner* (1 M. & W., 47).

Ball, Q.C., replied.

Jan. 19—*LEFROY, C. J.*—This case comes before the Court on questions raised on the construction of the Towns Improvement Act, 17 & 18 Vict., c. 103. In this particular case the question arises on the validity of an election which took place under that Act, upon the appointment of commissioners for carrying into execution the objects of this Act in Kingstown. The precise point upon which we have decided upon the validity of that election, upon this portion of what has been brought before us generally, is this, whether females are entitled to vote for the election of commissioners under that Act. Now it has been said, by very eminent judges, that the soundest construction of an Act of Parliament, indeed, I would say of any instrument, whether it be a deed, a will, or an Act of Parliament, is that which is arrived at upon what appears within the four corners of the instrument itself; and, accordingly, we have all attentively considered the various provisions of this Act in reference to the particular question that we have to decide, and I think it will be found that the rule which has been sanctioned by the highest authority will be verified as to this being a useful and a correct principle upon which to proceed upon the construction of an Act of Parliament, particularly in this instance. For it will be found that the conclusion at which we have arrived will not only be fortified by the affirmative clauses of the Act, but also by its negative clauses: that is, not only established by what we find positively inserted in some provisions, but also substantiated by what we find omitted in clauses or in parts of clauses upon the subject matter in reference to the particular point on which we have to come to a decision. Now the point is, as to the qualification of voters for these commissioners. The case has been argued very much upon the ground—at least one main line of argument has been—that we should arrive at the conclusion that females are not competent to vote for commissioners,

because the inference from holding that they were, might be, that they might also be commissioners, and that the most absurd consequences would attend such a conclusion; and that would no doubt be a strong ground of argument; but adverting to the title of the Act, and the duties to be performed, nothing can be more distinct than the difference between the qualification for the commissioners themselves, and the qualification for voters for them. The qualification for being a commissioner is a qualification for carrying out the duties of the Act, and the superintending the performance of those duties. The very title of the Act shews its object,—To make better provision for the paving, lighting, draining, cleansing, supplying with water, and regulation of towns in Ireland. Now, to be qualified to superintend, direct, manage, and control in respect to these several matters, it is quite plain would require a class of qualifications which it is just as unnatural and as unreasonable to expect from females as it is reasonable and proper that a person who has property liable to be taxed, in reference to which it is important that these several duties should be carried out, and who is, therefore, interested in their discharge, should have a share in the election of those who are to perform them. It is no more than saying that a female who has property should have the right to appoint an agent to act for her: there is no absurdity in that. The excluding her from appointing an agent would be as great an absurdity as to say that she herself would be qualified to discharge all the various duties which she may discharge through an agent; or to say that she is not to have the right to appoint an agent, because she would not herself be qualified. This puts an end to all that line of argument which has been taken from the nature of the qualification for commissioners, which has been attempted to be confounded with the qualification of those who are to vote for commissioners. The distinction is quite obvious, and so far as any argument can arise upon a comparison of the duties to be performed in one case and the other, instead of being an argument, the consideration cuts the other way. Now to pass on farther, from the title of the Act which, though in general it goes but a short way, still does go some way in the construction of an Act of Parliament, to go to the essential ground on which to construe an Act of Parliament, namely, the language of various clauses. The first thing that I shall refer to is the interpretation clause, and it is important that the interpretation of the word "householder" should be adverted to, for that word is interpreted to mean "a male occupier of a dwelling-house, or of any lands, tenements, or hereditaments, within the prescribed boundaries of the town rated to the relief of the poor in respect thereof." Therefore wherever we meet with the word "householder," as far as that word goes, the interpretation clause is perfectly conclusive, that females would be excluded from any duty which could only be performed by a householder. The next part of the Act to which I would call attention is the fourth section, which provides, "that on the application of twenty-one *householders* of any city or town in Ireland, each of such householders occupying a dwelling-house, or other lands, tenements, or hereditaments within such city or town.....applying that this

Act or a specific portion thereof may be carried into execution.....it shall be lawful for the Lord Lieutenant of Ireland, one month after receipt of such application.....to order and direct that the mayor or other chief magistrate of such town (being a corporate town) or the chairman of the municipal commissioners, under the Act of the 3rd & 4th Vict., c. 108, wherever the same shall be in force, or any two or more justices of the peace resident within ten miles of such town, shall convene a meeting for the purpose of considering the carrying of this Act into execution." It is plain if the Act ended there, there could be no question, but that none but males should be amongst the persons who were to petition the Lord Lieutenant for the adoption of the Act. Householders, therefore, who apply to the Lord Lieutenant must be males. The Lord Lieutenant then having directed that the meeting to consider the adoption of the Act be convened, then comes the provision who are to be the persons summoned to that meeting. Notice of the meeting is to be given by affixing in certain places a notice in the form provided in the Schedule A. That schedule describes the persons who are required to attend the meeting, and they are according to the form of notice given "the rated occupiers and lessors following." Nothing is said there about householders. If there had been, the very word would carry the necessity of the summons being given to householders; but then come the following words, viz., "Every male person of full age who shall have occupied as tenant or owner, or shall have been immediate lessor, (rated for such premises to the relief of the poor), of any lands," &c. Now, a great argument was founded on this provision, that the persons to receive notice should be male persons. And I for one, was very much struck with the argument founded on that, that it was natural to suppose *prima facie*, that the persons who were to vote should be the persons who were to be summoned, and *vice versa*; but we shall find as we go on, a perfect distinction made in plain terms between those to whom notice should be given with a view to convene them, and the qualification for voting when the meeting was constituted. It is remarkable that with respect to summoning, it is not left upon the general term "persons," but the words of the notice are "such male persons," shewing clearly the understanding of the legislature, that the word "person" would not of itself indicate sex. For the Legislature here have not left the matter with respect to the word "persons," but they have qualified it in a way by the additional word "male person" so as to leave it beyond a doubt what they meant. Now, then, having disposed of the persons who are entitled to be summoned to the meeting, let us proceed to the 7th section, which gives the qualification of persons entitled to be admitted to the meeting—not entitled to be summoned, but entitled to be admitted to the meeting and to vote thereat. It says—"At any such meeting convened as aforesaid, such persons as next hereinafter mentioned shall be admitted and entitled to vote, and no other person whatsoever; that is to say, every person of full age who is the immediate lessor of lands, tenements, and hereditaments, within such town, or within such boundaries of the same respectively, of the value of fifty pounds or upwards according to the last poor

law valuation, and who shall reside within five miles of the boundary of such town." Thus in the summons the qualification is "Every male person of full age," but when we come to the qualification of persons entitled to be admitted to the meeting and to vote thereat, we find that the word "male," which would limit the qualification for the right to vote, is omitted, and the word "person" left in this respect unqualified. Where the Legislature meant to impose any restriction on the word "person" they have done it. In this very section we have the words "of full age," but there is no restriction with respect to sex; and thus it is clearly indicated that where the Legislature meant to restrict the sense of the general term "person" they were prepared to do so, and would do so. Well, then, the right to be admitted and to vote for commissioners is in the terms I have stated; and therefore *ex vi termini*, every one without restriction, who could be embraced under the general term "person" is included. That is as to lessors: now as to others,—“also every person of full age who shall have occupied as tenant or owner, or shall have been the immediate lessor (rated for such premises to the relief of the poor) of any lands, tenements, or hereditaments, within such city or town, or within such boundaries of the same respectively as aforesaid, and shall have been rated in respect of such premises for the period of twelve months preceding, under the acts for the relief of the destitute poor in Ireland as occupier of such lands, tenements, or hereditaments, at a net annual value of eight pounds or upwards.” Every person of full age who has occupied as tenant or owner.” There again the specific restriction is imposed, not as to sex but in respect of age, affording the inference *expressio unius est exclusio alterius*, and leading to the implication, that where the Legislature have imposed one restriction, no other should be added. Well then, after the Act has been adopted, and the determination of this preliminary meeting has been approved by the Lord Lieutenant, a meeting is convened for the election of commissioners, and by section 22 the qualification of persons entitled to vote for commissioners is given, and this in fact is the section which specifically applies to the very point we have to decide. The qualification of persons entitled to vote at that meeting and at every future meeting for the election of commissioners is described in the following terms:—“At such first and every other meeting for the election of commissioners in said town, as thereafter prescribed, such persons as next hereinafter mentioned, shall be admitted and entitled to vote, and no other person whatsoever; that is to say, every person of full age”—not a word of sex—“who is the immediate lessor of lands, tenements, and hereditaments within such town, or within such boundaries of the same respectively as aforesaid, of the value of fifty pounds or upwards according to the last poor law valuation, and who shall reside within five miles of the boundary of such town, also every person of full age who shall have occupied as tenant or owner or joint occupier, subject to the rating and payments mentioned in the section.” We therefore find that in that section on the interpretation of which in fact the case before us must be decided, not only are affirmative words used where a qualification was designed by the Legis-

lature; but the words which would be essential to disqualify the claimants here are omitted; we find the introduction of a qualification not the subject of the question here; and the omission of the one upon which we have to enquire. We have therefore both affirmative and negative evidence, that the claimants are entitled to redress, and ought to be admitted to vote for the election of commissioners. I have thus gone through these sections. I have not omitted to look carefully into all the other sections of the Act; but I find none to shake the conclusion to which we have come, that on the true construction of the Act itself, it appears to us that females are entitled to vote for commissioners in this town.

O'BRIEN, J.—On the question which has been argued before us, I concur in the judgment that our answer should be in favour of the right of females to vote, and I do not think we would be warranted in coming to any other conclusion. I think it clear on the provisions of the statute of 1854, and that of 1847 incorporated in it, that according to the ordinary and well settled rules of construction, females are not only not excluded from voting, but that they get the right in express terms. One ground of argument which has been referred to by the Chief Justice, was very much pressed, namely, that the same process of reasoning that would lead to the conclusion, that females were entitled to vote, would establish that under the Act they were qualified to act as commissioners, that the qualifications under the Act for the office and for voting are identical, and that such a result would be attended with such manifest inconvenience, and so repugnant to the policy of the law, that we should not adopt it, even though on the Act we should be otherwise disposed to do so. I think a careful examination of the statute will shew that this is not the case, but that with regard to sex the provisions for holding the office of commissioner, are materially different from the sections as to the qualifications of voters; and that it will further shew that females are by the express words of the statute excluded from the right of taking a part in certain other proceedings, from the right of voting at certain other meetings under the Act; and the very circumstance that such words are employed in the sections upon these subjects, and are carefully omitted from the sections as to voters for commissioners, is I think a strong and unanswerable argument, to shew that the intention of the Legislature was, that females may have the right of voting for commissioners. Now the provisions of the Act to which I shall refer are the interpretation clause and some others. The interpretation clause says that the words mentioned in it shall have the meanings assigned to them in the clause, unless there be something in the subject or context repugnant to such construction; then it goes on to say what is most material, that the word “householder” shall mean “a male occupier of a dwelling-house,” that the word “occupier” shall extend to and include an immediate lessor, and that the words importing the masculine gender (except only the word male), shall include females. Now, therefore, by that interpretation clause, the word “householder” expressly excludes females, and the word “occupier” does not exclude them. Well, looking at the other sections of the Act,

we find four species of provisions for qualifications; first—of those entitled to apply to have the Act put in operation; secondly—of persons entitled to vote at the preliminary meeting; thirdly—the qualification entitling parties to be town commissioners; and fourthly—the qualification entitling parties to vote for town commissioners. Now let us bear in mind what I have said, as to the words “householder” and “occupier.” The first section to be referred to is s. 4, which provides for the application being made, to have the Act applied to the particular township. It is expressly provided, that the application shall be on the part of twenty one or more *householders*. Females are therefore excluded from that. The next sections to be referred to are ss. 6 & 7, as to the meeting which is to be held after the application to his Excellency, the Lord Lieutenant, for the purpose of deciding as to the Act being extended to the district, and these sections are to be read in connexion with Schedule A. Section 6 says that notice shall be given by affixing notices in the form in the schedule A.; and then on referring to Schedule A. we find that the word “male” is used in the form there given. That gives us a light by which to construe the other sections, and shews, I think, that the persons who are qualified to be present at the preliminary meeting are to be males only. The next qualification is that for filling the office of town-commissioner. It is given in the 25th section, which first uses the words, “every person,” but later on it uses the word “householder,” and it was accordingly admitted that the circumstance of that word being used was sufficient to exclude females from the office of town commissioner. Now, let us come to the section dealing with the qualifications of persons to vote for town commissioners, and the words there are as wide as possible. It says that such persons as hereinafter-mentioned shall be entitled, that is to say, and then it sets out the qualification. It drops the word “householder,” and uses the word “occupier.” It states the rating necessary, and it states what would be equivalent to “householder,” if by the interpretation clause that word was not confined to males. It is impossible to say that the Legislature has not as clearly as possible, by using the terms which it does use, by dropping the word “householder,” and using the word “occupier,” shewn what its intention was, and I have no difficulty upon the subject; then, that being so, is there anything that would warrant us in importing into the 22nd section, words that would exclude females? Is there anything so repugnant to the policy of the law, as to warrant us in importing into the Act words which we do not find in it? It was at one time considered or thrown out that if a party was disqualified from holding an office—if females were disqualified from holding an office,—they should also be disqualified from voting for that office; and in *Olive v. Ingram*, there are words used which would import that to be so; but what has taken place of late years? We have in the whole of the Poor Law Acts an express declaration of the Legislature, that though females cannot be guardians, they may vote for them. Then with regard to the general intention and policy of the law, a great deal was said as to the right of voting for members of parliament, and that females though not expressly excluded were held not

entitled to vote on principles of general policy; but looking at the legislation of late years, the Reform Act, to go no farther back, excludes them in terms. The Municipal Corporation Act also does so; while the Poor Law Act does not exclude them; and therefore under it they are entitled to vote at the election of guardians; therefore, the argument arising from the general policy of the law, is negatived by the fact of the Poor Law Act entitling females to vote, and where the Legislature intended to exclude them of late years, it has done so expressly. The Act of 1847 is referred to in this Act. There were certain words in that Act to which at first I thought some force might be given. The word “his” is used in it, but on looking to the interpretation clause of that Act, I find the word “his” would include females as well as males. It is stated that the 9th Geo. 4, c. 82, has been in force for thirty years, and that there has been no instance of females voting under it; but if there was any decision on that Act of the 9th G. 4, it would not be binding here, because the words of the qualifications for voters are different in it from those here. I therefore concur in the judgment which has been pronounced by my Lord Chief Justice.

HAYES, J.—I do not think that there is anything, either in the Act or in the policy of the law, to exclude females from exercising the right of voting at the election of town commissioners. I think that everything has been said by my Lord Chief Justice and my brother O’Brien upon the construction of the Act, and in everything that has been said I concur. As to the nature and duties of the office of a voter, I do not think there is anything that need affect the modesty, which is so much the grace and ornament of the female sex. All the lady has to do is to hand in a voting paper, and answer a couple of questions. What is the duty of a commissioner? To him is entrusted the disposal of property, and carrying out the objects mentioned in the Act. All these are to be performed by contributions from females as well as from males, and then on the general principle that there shall be no taxation without representation, and as it does not appear to be contrary to the ordinary principles of justice that the ladies should vote, I concur.

FITZGERALD, J.—I concur also. I wish only to add that I am not to be taken as concurring in the expression that have fallen from the other members of the Court, to the effect that ladies are not entitled to sit as town commissioners.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

IN RE BRADY v. SLATOR.

Landlord and tenant—Precept to restrain waste—
23 & 24 Vict., c. 154, ss. 35, 36, 37.

Information taken under the 35th section of the 23rd & 24th Vict., c. 154, upon which it is sought by the landlord of any premises to obtain a precept

from a justice of the peace to restrain a tenant or others from doing any acts of waste, in said section mentioned, must state, if present acts of waste are complained of, what those acts are; and, if future, what those future acts, the tenant intends to do, are. A precept, therefore, granted on an information, which informed merely of past acts of waste, and which averred that the tenant "persists in doing and committing acts of unlawful waste to the injury and damage of said premises, notwithstanding that I warned him to desist from the same," was held bad and quashed accordingly.

THIS was an application under the 37th section of the 23rd & 24th Vict., c. 154—the Landlord and Tenant Law Consolidation Act—made on behalf of Bryan Brady, tenant to the lands of Whitehill, (and claiming the right of cutting turf appurtenant thereto for his own consumption), for an order that the precept bearing date the 25th day of April, 1864, obtained upon the information of George Warner Slator, the landlord of the premises, and granted by Mathew Weld O'Connor, Esq., a justice of the peace of the County of Longford, might be annulled or varied. The application was grounded upon an agreement, bearing date the 29th of October, 1860, made between Alexander H. Slator and Bryan Brady, under which said agreement applicant held said lands and bog, which agreement was as follows:—"Alexander H. Slator, of Whitehill, in the County of Longford, Esq., agrees to let, and Bryan Brady, of Castlebrock, in the county of Longford, farmer, agrees to take the two fields, called Bullfield and Hallfield, and the grazing of all the bog of Whitehill, now in Alexander Slator's possession; the above two fields contain about 18 Irish acres, plantation measure, be the same more or less, at 30s. per acre, to be paid in two equal payments each year, the gale days, 25th March, and 29th September, in each year, the first gale to become due on the 25th March next; and Bryan Brady agrees to mind plantations, and allow no persons to cut turf on the bog but (naming certain persons) and A. H. Slator, and all persons having leases, and Bryan Brady.

Signed, A. H. SLATOR.
BRYAN BRADY.

Dated 29th October, 1860."

Under this agreement, Bryan Brady held the lands, and claimed the right of cutting, and did, from the date of said agreement until the obtaining of said precept, actually cut turf for the use of his house. On the 25th of April, 1864, Alexander W. Slator, for the purpose of obtaining an injunction or precept from said justice, to restrain Bryan Brady from cutting turf, or breaking up meadow or pasture lands, swore the information following before Mathew Weld O'Connor, one of the justices of the County of Longford:—"I, George Warren Slator, of Cartron Lodge, in the County of Longford, make oath and say that I am the owner in fee-farm of the Whitehill estate, in the barony of Granard, and County of Longford, having purchased same in the Landed Estates Court on the 19th January, 1864; and I say that certain portions of said lands are in the tenure or occupation of Bryan Brady, of Castlebrock, viz. that portion of said lands, called or known by the name of the Bullfield

and Slatefield, together with the grazing of the bog of Whitehill, which said premises are set out in the printed and published rental for sale, and which he now holds by agreement dated October 29, 1860, for a term of five years, from the 29th October, 1860; and I say I verily believe that I am entitled to the absolute possession of said lands and bog, at the expiration of said agreement, to wit, on the 29th day of October, 1865; and I say that Bryan Brady has committed unlawful waste heretofore, by cutting down the ancient white-thorn fences and ornamental timber on said premises; and I say that said Bryan Brady has unlawfully cut turf, and broken up and used portions of said bog of Whitehill, contrary to said agreement, and that he persists in doing and committing acts of unlawful waste, to the injury and damage of said premises, notwithstanding that I warned him to desist from the same, which said acts are contrary to the statute in that case made and provided." Thereupon the following precept issued:—"To Bryan Brady, and all others whom it may concern—Whereas information on oath has been this day laid before me, one of her Majesty's justices of the peace of the County of Longford, that you Bryan Brady being the occupier of a farm of land on and holding the grass of the bog of Whitehill, in the barony of Granard, and County of Longford aforesaid, and held by you under an agreement, as set forth in the printed rental, published by order of the judges of the Landed Estates Court, for the sale of said estate in the month of January, 1864, as tenant to George Warner Slator, Esq., he being the purchaser thereof; and that you have already, and are about to commit or suffer certain unlawful waste and injury to be committed on the said premises, known as the Bullfield and Hallfield, together with the bog of Whitehill, by breaking up certain portions of the surface of said premises, and cutting turf thereon, contrary to the statute in that case made and provided; these are therefore to command and firmly enjoin you, and each and every of you, and all other persons whomsoever, not to proceed to break up any of the surface of the ancient meadow or pasture lands, comprised in said premises, or break up the surface, or cut turf on the said bog of Whitehill, or to continue the same, or otherwise injure the said premises, or any part thereof, until special leave, license, and authority, in writing for that purpose, shall be first procured from and given by me, the said justice, or until the matter of the said information shall be first inquired into at the Petty Sessions, to be holden at Edgworthstown, on the 25th day of May next, and this my precept lawfully annulled or altered in that behalf; and in case you disobey this my precept, you and each of you, and all persons wilfully aiding and abetting, or assisting you in so doing will be punished in pursuance of the statute, in that case made and provided; and all constables of police and others are hereby required to prevent such waste or injury, and to apprehend and bring to justice all persons present, and aiding, abetting, or assisting in such unlawful acts, to be dealt with according to law.—Given under my hand and seal this 25th day of April, in the year of our Lord, 1864, at Drewmount, in said county.

MATTHEW WELD O'CONNOR, Justice."

Brady, by his affidavit, made on the 30th April, denied having cut turf for any other purpose than for the use of his house, which he insisted he had a legal right under the terms of the above agreement to do, and he denied any intention to do any of the acts in said information mentioned. On the 7th May said George Warner Slator made an affidavit, wherein he alleged he was an infant under the age of twenty one years, when the above mentioned agreement was entered into; that the estate upon which the lands of Bullfield and Hallfield, together with the bog of Whitehill, were situated, were lately set up for sale in the Landed Estates Court, and that said George Warner Slator became the purchaser of the fee of said Whitehill estate, for £16,000, subject only to the particulars of tenure set out on the printed rental, and discharged as it was submitted under the operation of the Landed Estates Act, from all rights and easements not expressly excepted and reserved therein: and he reiterated the allegations made in the information, specifying the acts of waste, viz., cutting down ancient whitethorn hedges, and cutting turf; the conveyance had not yet been made by the Landed Estates Court. It further appeared that the informations were sworn before a justice, who lived in a remote part of the county, and not before one usually acting in that district of Petty Sessions.

J. Richardson, in support of the motion, called the attention of the Court to the 35th section of the 23rd & 24th Vict., c. 154, the Act under which the injunction was obtained. It was thereby enacted that "Where any person shall be in possession of lands, or of any dwelling-house, out-house, or buildings, as tenant thereof, or as a servant or caretaker of any owner, or having obtained the possession thereof from any such tenant, servant or caretaker, and the landlord or owner, or other person interested in the preservation of the premises, or any agent acting on his behalf, shall by affidavit satisfy any justice of the peace of the county, not being a party interested in the said premises (who is thereby authorized and required to take such affidavit) that there exists probable and just grounds of suspicion that such person is about to commit, or to permit or suffer any unlawful waste, injury, alteration, destruction upon, or removal from any such dwelling-house, out-house, or other building, or intends unlawfully to burn or break up any part of the soil, or surface, or subsoil of the lands, or unlawfully to remove the soil, or surface, or subsoil of the said lands, or unlawfully to cut down, top, lop, or grub any trees, woods, or underwoods, growing on the said lands, or otherwise use or misuse the premises, or any part thereof, contrary to his agreement, or that he is in the act of doing or suffering any of the aforesaid matters, it shall be lawful for such justice of the peace to issue his precept in writing under his hand and seal, stating that information had been received that such waste or injury is intended to be, or is in the act of being done or permitted, and commanding all such persons, and all other persons whomsoever, to desist from such waste or injury, and not to continue the same until special leave and authority for that purpose shall be first procured from the magistrate who shall have signed such precept, or until the subject-matter of the said information be inquired into at the next petty sessions of

the district in which the said premises are situate, or such other time as may be therein mentioned; and such precept may be according to Form No. 1 in the Schedule A. to this Act annexed, and shall be served on every or any person by whom it shall be suspected that such waste or injury is intended to be, or is being committed, by delivering a copy thereof to such person, if he can be found, and if not, by affixing a copy thereof on the principal door or entrance to the dwelling-house, out-house, or other building, and if there be no such house or building, on some conspicuous part of the premises; and the said persons shall and may attend at the petty sessions, and such order may be made thereat by the court of petty sessions for annulling or continuing for a limited period the said precept, or otherwise, as may be agreeable to justice." Then comes the 36th section which provides the punishment for disobeying the justice's precept:—"If any person shall, after the service or posting of such precept, in disobedience thereto, without such leave and authority as aforesaid, proceed with, or continue to do, the act prohibited by such precept, or wilfully aid, abet, or assist in so doing, he shall, on conviction thereof before two or more justices of peace at petty sessions, be liable to be imprisoned for a period not exceeding one calendar month, and all the provisions of the 'Petty Sessions Ireland' Act' respecting summary convictions before justices at petty sessions, and respecting appeals therefrom, shall be applicable to every conviction under this section." By the 37th section "It shall be lawful for any of the superior courts of law or equity in Ireland, or any judge thereof, or for the going justice of assize, or one of them, or for the chairman presiding in the county, on a summary application on behalf of any person aggrieved by any such precept, order, or conviction, of which due notice shall be given to the opposite party, to annul or vary any such precept granted by any justice of the peace, or any order or conviction made at petty sessions in relation thereto, and to award as between the parties a reasonable sum for the costs occasioned by the procuring and sustaining, or annulling or varying the said precept, or order, or conviction, and reasonable compensation for any loss or damage caused by the procuring such precept or order." Mr. Slator, in his information, alleges that he is entitled to the reversion of the lands after the expiration of the lease, thereby implying, if not admitting the tenancy of Brady. Another element of grave suspicion, exists in this case, and that is, that it appears on affidavit, that Mr. O'Connor, the justice of the peace, who granted the precept, was not a magistrate of the district, but from a remote part of the country.

Dowse, Q.C., resisted the application.—The purchaser, though he have not the legal, has the equitable title to the lands, and the estate he now has is freed from all easements not established in the Landed Estates Court, and Brady does not appear in the rental to be entitled to cut turf. [Fitzgerald, B.—Surely an injunction cannot issue without stating what the then acts of unlawful waste are. The information deals with past acts, but it does not inform us what the acts are he persists in doing. Hughes, B.—You do not shew on the face of your information that the tenant intends to do unlawful acts.] The section is

specific, that when "he is in the act of doing any of the matters in the Acts mentioned" it shall be lawful for the justice to issue his precept. The Act speaks of matters in the present time, as well as of the future; and the affidavit upon which the precept was granted, complies with the provisions of the 35th section, for it says, that Brady *persists* in doing acts of waste, and we complied with those directions. [*Pigor, C.B.*—The precept purports to restrain the tenant from breaking up old meadow; there is no complaint in the information as to the breaking up of meadow land at all. *Fitzgerald, B.*—Can it be suffered that a justice of the peace can act upon so loose an affidavit as this? There is also another fact that weighs very strongly on my mind, and that is, although not contrary to the Act of Parliament, that you went out of your own district to a distant magistrate].

Pigor, C.B.—We are all of opinion that this precept cannot stand; there are one or two matters that I refer to; this is a summary jurisdiction, very penal on a tenant; it was given for the purpose of a party getting instantaneous relief without being obliged to wait for the sitting of the Petty Sessions; and at the sitting of the next Petty Sessions of the district in which the premises are situate, the subject matter of the said information may be enquired into; the act thus gives a double opportunity before the party comes to a superior court. The affidavit states past acts of waste; those acts are the subject of controversy; the tenant denies the cutting of the turf further than for the use of his house, and he admits having done so for that purpose. We are not informed what the tenant was doing at the time of the granting the precept; it merely states that he persists in doing and committing acts of unlawful waste, without informing us what those acts of waste are; it appears to me that that affidavit is on the whole defective. I also think that the informant exceeded his privilege in going to a distant magistrate, instead of going to a magistrate usually acting in the district in which the Petty Sessions were situated, to which tribunal the tenant had it open to him to repair. Again, there is no foundation for the injunction preventing the tenant turning up meadow land. The affidavit does not state that Brady ever broke up meadow land at all, but it does state, that he cut down white thorn hedges, and strange to say the precept was issued to restrain him from doing what is not complained of in the information, namely, breaking up meadow land—and what is complained of, the cutting down of hedges, it does not even pretend to restrain him from doing; this affidavit is extremely loose; firstly, it omits to state what the specific acts of waste which the tenant was doing at the time of making the information were; secondly, it does not inform us what the future acts of waste apprehended were, in both those omissions the affidavit is faulty: this precept cannot stand grounded upon so loose an affidavit as the one before us. This is not the place to decide whether or not the tenant has the right to cut turf under the state of facts that exist.

Precept quashed.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

IN THE MATTER OF THE ESTATE OF VALENTINE BROWNE AND ALEXANDER BETTAGH, OWNER AND PETITIONER.
—May 9, 1864.

Interest—Statute of Limitations—42nd section of 3 & 4 Will. 4, c. 27, s. 42.

A creditor filed a claim on a judgment against the owner, calculating interest by charging all the interest which accrued since the judgment, and giving credit for rents received by him out of a portion of the estate of which he had been put in possession by the owner, which calculation left a balance due exceeding six years' interest. The creditor contended that his possession of part of the estate prevented the operation of the Statute of Limitations. Held, that claimant was only entitled to six years' interest from date of filing petition.

ON ALLOCATION SCHEDULE.

JAMES DARCY filed a claim on April 18, 1863, on foot of a judgment obtained against A. Beytagh in Trinity Term, 1846, in an action for the sum of £681 13s. 7d., damages and costs, and claimed for interest £282 17s. 11d. It appeared by the claim that A. Beytagh, in 1860, put Darcy in possession of a portion of the estate sold in this matter, the rents of which, amounting to less than £20 per annum, were since received by Darcy, and his calculation of interest was made by charging all the interest which accrued since the rendition of the judgment, and giving credit thereout for the rents received by him, which left a balance due much exceeding six years' interest. An objection being made before the Examiner to the amount of interest claimed, and the judgment creditor insisting that his possession of a portion of the estate prevented the operation of the Statute of Limitations, the question was reserved for the Court, and came on this day, 9th of May, 1864, before Judge Hargreave.

J. S. Green, for the owners, contended that not more than six years' interest could be recovered. Though the judgment bore interest under the 3 & 4 Vict., c. 110, yet it came within the operation of the 3 & 4 Wm. 4, c. 27, s. 42.—*Henry v. Smith* (2 Dr. & War. 391–2), which expressly enacts that no interest shall be recovered but within six years after it becomes due. The only exceptions are an acknowledgment in writing, or the possession of a prior creditor; and Lord St. Leonards, in his Real Property Statutes, p. 140, says, "There is no exception which could make the payment of a portion of a gale interest, save the right to the residue."

Beytagh, contra, contended that the possession of a portion of the estate by the express consent of the owner should be treated as an agreement to make payments on account, and to take the case altogether out of the operation of the statute. He relied particularly on the case of *Battersby v. Rochfort* (10 Ir. Eq. Rep., 439), where a jointress in possession of the estate, which was not sufficient to pay the jointure in full, was, on the estate becoming increased in value, allowed the full arrears, though much exceeding

six years. He further submitted that the facts of this case brought it within the class where, under particular circumstances, interest was allowed beyond the penalty.

JUDGE HARGREAVE was of opinion that *Battersby v. Rockfort* had no application to this case, and treated the payments made as voluntary payments which the judgment creditor was at liberty to apply to the entire interest, and decided that claimant was only entitled to six years' interest before the filing of the petition.

As this was the amount which the Examiner would have allowed, his Lordship refused the claimant the costs of appearing.

Court of Criminal Appeal.

[Reported by William Woodlock, Esq., Barrister-at-law.]

[BEFORE LEFROY, C.J., MONAHAN, C.J., FIGOT, C.B., AND KEOGH, CHRISTIAN, O'BRIEN, AND FITZGERALD, J.J.; AND FITZGERALD AND DEAST, BB.]

THE QUEEN v. NORTON.—May 28, 1864.

Child in custody of mother—Step-father—Taking away child under sixteen against mother's consent—Stat. 24 & 25 Vict., c. 100, s. 55.

A mother does not lose the possession of her child, an unmarried girl under the age of sixteen, by contracting a second marriage, and neither the consent of the girl herself, nor that of her step-father, to her being taken away out of the possession and against the will of her mother, is any bar to an indictment and conviction under statute 24 & 25 Vict., c. 100, s. 55.

CASE reserved by O'Brien, J., from the Spring Assizes, 1864, for the South Riding of the County of Tipperary. The case stated for the opinion of the Court was as follows:—This case was tried before me at Clonmel at the Assizes for the County of Tipperary, South Riding. The indictment, which was under the statute 24 & 25 Vict., c. 100, s. 55, charged that the "prisoner on the 20th of January, 1864, unlawfully did take and cause to be taken one Sarah Smith out of the possession and against the will of Mary Lannon, her mother, she, the said Sarah Smith, then being an unmarried girl under the age of sixteen years, to wit, of the age of fifteen years, against the form of the statute and so forth." It was proved at the trial by said Mary Lannon that she had been formerly married to one John Smith; that he died about four years before last Christmas, and that in about a year afterwards she married her present husband, Thomas Lannon; that said Sarah Smith was her daughter; that since said last-mentioned marriage Thomas Lannon, Mary Lannon, and Sarah Smith had resided together in Thomas Lannon's house in Carrick-on-Suir, until a Wednesday in January last; that on the evening of that day Sarah Smith went away from

said house without Mary Lannon's consent; that Mary Lannon saw Sarah Smith again on the following Sunday in Clonmel, when she was arrested by the police, and that Sarah Smith, at the time of her going away was under the age of sixteen years. In a subsequent part of the trial, it appeared that the day on which Sarah Smith so went away was Wednesday, the 20th of January, and that she was then over fourteen, and about fifteen years of age. It was also proved by Patrick Cuddihy (a person in the employment of Mr. O'Ryan, who keeps post-cars in Carrick-on-Suir); that on said Wednesday evening (the 20th January) the prisoner went to him to put a horse to a covered car; that prisoner got into the car, and told witness to drive up to the poor-house, which witness did; that when witness got near the poor-house, he saw Sarah Smith standing on the road; that she came over to the car; that prisoner got out; that she got in; that prisoner got into the car afterwards, and told witness to drive to Clonmel; that witness drove them to a house in Clonmel, and left them there about 9 o'clock in the evening. It was also proved by Mrs. Ellen Farrell (who kept a lodging-house in Clonmel), that on said Wednesday evening, 20th January, the prisoner and the girl came to witness's house, and remained there till the Sunday evening after, when three policemen came to the house, and arrested both the prisoner and the girl, and took them away, and that Mary Lannon (who was at the house when the police were there) went away with them. It was also proved by several witnesses examined by the prisoner, that prisoner had resided in Carrick-on-Suir from November, 1862; that for several months previous to said 20th January last there had been a courtship between the prisoner and Sarah Smith; that Thomas Lannon and Mary Lannon knew of it; that on several occasions during the six months previous to said 20th of January, Thomas Lannon had sent for the prisoner to come to his, Thomas Lannon's house, and that prisoner used often to stop there for several days at a time, and had stopped there off and on for about three weeks during said six months, and was stopping there some days about a week before said 20th January, but had left it a couple of days before that day; that Thomas Lannon had frequently, during said six months, spoken in prisoner's presence, and on other occasions, of a marriage between prisoner and Sarah Smith; that on one occasion after Christmas last, he had spoken about it in the presence of Sarah Smith to Mary Lannon, who did not then express any dissent or disapprobation of it; that about a week before last Christmas, Thomas Lannon said to the woman in whose house the prisoner was stopping, that if Mary Lannon would not give Sarah Smith to the prisoner, he himself would; that afterwards, and about last Christmas, Thomas Lannon proposed to Sarah Smith that if she had a wish for the prisoner, she should go away with him (the prisoner); that in about a week afterwards, Thomas Lannon accused Sarah Smith of immorality, calling her an opprobrious name, and that she had summoned him before the magistrate for so doing; that a few days before said 20th January last, and on several occasions, Thomas Lannon had said in prisoner's presence that if Mary Lannon would not give Sarah Smith to the prisoner, he himself would,

and had in prisoner's presence encouraged the courtship and a marriage between them; that about a week before said 20th of January, while prisoner was stopping in Thomas Lannon's house, Thomas Lannon had on one occasion told the prisoner to kiss Sarah Smith, who was then asleep in her chair (which the prisoner did not do); and Thomas Lannon had on another occasion brought up the prisoner on some pretext to the bed-room, where Sarah Smith was in bed with a niece of Mary Lannon, and had gone out of the room, leaving the prisoner there; that Mary Lannon immediately came into the room and the prisoner went away. There was, in fact, sufficient evidence to warrant the jury in finding not only that the alleged abduction was with Thomas Lannon's consent, but that he had actually encouraged it. It was further proved by Sarah Smith that prisoner did not ask her or propose to her to go away with him, but that her leaving Thomas Lannon's house on said 20th of January, and her going away with the prisoner to Clonmel were entirely voluntary upon her part without any influence or persuasion having been used by the prisoner; that her going away with the prisoner was first suggested and proposed by her to the prisoner; that after Thomas Lannon had (as above-mentioned) proposed to her to go away with the prisoner, and about a fortnight before said 20th of January she herself first asked the prisoner, and proposed to him to go away with him; and that on the night before the said 20th of January she lent the prisoner money to hire a car to go to Clonmel, and sent him a message that she would meet him at the poor-house on the Clonmel-road. There was no evidence (save as above mentioned) as to whether or not prisoner in any way proposed to or induced Sarah Smith to leave Thomas Lannon's house, or to go away with him (the prisoner). The evidence on both sides having closed, I expressed to the Crown counsel my doubt whether the charges in the indictment were proved by the evidence, and particularly whether the charge that the prisoner had taken Sarah Smith out of the possession of her mother within the meaning of the statute could be sustained upon the facts as proved. The Crown counsel contended to the effect that the facts proved (as above-mentioned) established that upon said 20th January, when Sarah Smith went away in the car with prisoner to Clonmel, she was then in the possession of her mother, though the mother was then the wife of Thomas Lannon, and although she and Sarah Smith had resided in his house above mentioned, and although Sarah Smith had previously left his house on that evening, and that prisoner had taken said Sarah Smith out of such possession, within the meaning of the statute, even though Sarah Smith had left Thomas Lannon's house that evening, and gone away with the prisoner afterwards voluntarily, and without any influence or persuasion on prisoner's part, and even though said Thomas Lannon had consented to, and encouraged her so doing. The Crown counsel referred to *Ratcliff's case* (3 Coke Rep. p. 38 & 39). The prisoner was not defended by counsel or attorney, and after some discussion I stated that I would reserve the case for the consideration of the Court of Criminal Appeal. I told the jury to the effect that if Sarah Smith was on said 20th of January last un-

der the age of sixteen years, and if her going away with the prisoner on the evening of that day was against the will of her mother, then that the facts above stated to have been proved by Mary Lannon, Patrick Cuddihy, and Ellen Farrell, would establish that the prisoner had taken Sarah Smith out of the possession of her mother, within the meaning of the statute, and was guilty of the offence with which he was charged by the indictment. I thus left the question of the prisoner's guilt to the jury irrespective of the fact of the mother being the wife of Thomas Lannon, and of his having consented to and encouraged the alleged abduction, and also irrespective of what is above stated to have been proved by Sarah Smith, as to her having left Thomas Lannon's house, and gone away with the prisoner voluntarily, and without any influence or persuasion on his part, and as to his having first proposed it to him, and as to the money and message she sent him the night before she went away. The jury found the prisoner guilty, but stated that in their opinion Sarah Smith herself had first proposed to the prisoner to go away with him, and had gone away with him voluntarily, and that Thomas Lannon had encouraged her to so going away, and that they, therefore, strongly recommended the prisoner to mercy. I did not sentence the prisoner, but as I had reserved the case, I directed that the prisoner should enter into his own recognizance, to appear at the next assizes to receive judgment (which was accordingly done), and that he should be discharged from custody, upon a similar recognizance being entered into by Mr. Fitzgerald as his surety, before Mr. Hanna, the resident magistrate. I understand this latter recognizance was entered into, and that prisoner was accordingly discharged from custody on the 22nd of March. I, therefore, request the opinion of the Court of Criminal Appeal upon the propriety of the prisoner's conviction, and particularly on the following questions:—

1st. Whether upon the facts proved as above-mentioned, Sarah Smith was, at the time of her going with the prisoner in the car to Clonmel on the evening in question, in the possession of her mother, within the meaning of the statute, though the mother was then the wife of Thomas Lannon, and though Sarah Smith had previously on that evening voluntarily left Thomas Lannon's house.

2nd. Whether the prisoner was properly convicted of having taken Sarah Smith out of the possession and against the will of her mother, and whether the facts proved to have occurred constituted a taking of her by the prisoner out of such possession, notwithstanding what was proved by Sarah Smith, as I have stated in the foregoing part of this case, and notwithstanding that there was no further evidence than above stated, whether or not the prisoner proposed to or induced Sarah Smith to leave Thomas Lannon's house, and to go away with him (the prisoner).

3rd. Whether upon the facts proved as above stated, the prisoner had committed an offence under the statute.

4th. Whether my directions to the jury, and the manner in which I left to them the case as to the prisoner's guilt were correct, and according to law.

5th. Whether I should have left to the jury any

further questions for them to consider before they should find the prisoner guilty, and particularly any question as to Sarah Smith having left Thomas Lannon's house, and gone away with the prisoner voluntarily, and of her own proposal, and without any proposal, influence, or inducement on the part of the prisoner, or any question as to Thomas Lannon's having consented to, or encouraged her so going away.

If the Court should be of opinion that any of these first four queries should be answered in the negative, or that I should have left any further questions to the jury, then the conviction is to be reversed.

May 19, 1864.

JAMES O'BRIEN.

Serjeant Sullivan and O'Hara, Q.C., for the Crown.—As to the question whether a woman's marrying a second time deprives her of the custody of her children, *Ratcliffe's case* (8 Co. 38 a, b) is decisive that it does not. Then the fact that it does not appear that the abduction was against the consent of the stepfather is quite immaterial. *The Queen v. Burrell* (9 Cox C. C., 368). The fact of the girl consenting is also immaterial. *The Queen v. Burrell* (2 Cox. C. C., 271); *The Queen v. Mantelov* (6 Cox. C. C. 143); *The Queen v. Kipps* (4 Cox. C. C. 167); *The Queen v. Timmins* (8 Cox. C. C. 401); *Ex parte Barford* (8 Cox. C. C. 407); *Regina v. Handley* (1 F. and F. 649).

There was no appearance for the prisoner.

MONAHAN, C. J.—We are all of opinion that the conviction is right, because under the statute it is immaterial whether the girl consents or not. The short facts of the case are that this young girl asks the man to take her away, and he says he will. Then this case is distinguished from those in which the girl was not in possession of her father, for here she was in possession of her mother. The consent of the girl is immaterial, and there is no doubt she was taken away against the mother's consent, and all the cases show that the concurrence of the stepfather is of no consequence.

The other judges concurred.

Conviction affirmed.

THE QUEEN v. HAYES—May 28, June 1.

Evidence—Character—Impeachment on cross-examination—Evidence to sustain.

Where a witness upon his cross-examination is merely asked questions tending to impute to him the commission of particular criminal acts, and also to impeach his character for veracity, but he gives no answers, admitting the imputations and impeachment, evidence cannot be adduced to support his general good character.

PER PIGOT, C. B.—*If the witness upon such a cross-examination makes admissions which impeach his general character at the time to which the cross-examination is pointed, general evidence of his more recent reputation may be adduced.*

CASE reserved by O'Brien, J., from the last Spring Assizes for the North Riding of the Co. of Tipperary. The case stated was as follows:—

The prisoner in this case was tried before me at Nenagh at the last assizes for the County of Tipperary, North Riding, on an indictment charging him with shooting a gun loaded with gunpowder and a leaden bullet, at Mr. John Gore Jones, with intent to murder him. The indictment had been found at the Spring Assizes of 1863, when the prisoner pleaded, "Not Guilty," and the case had been tried at the Summer Assizes of 1863, when the jury disagreed, and were discharged without giving a verdict.

Wall, Q.C., stated the case, and the following were examined for the Crown.

John Gore Jones.—This witness stated, (amongst other matters) to the following effect: that he was resident magistrate at Thurles; resided there for near two years; was in the habit of attending sessions on alternate Mondays at Borrisoleigh, about ten English miles from Thurles. That on the 2nd March, 1863, witness left Thurles on horseback a few minutes before 10 o'clock in the morning to attend said sessions; that on his way he came to a place called Liscone, in the County of Tipperary, North Riding, about three English miles from Thurles, and was riding fast; that there was a bohreen running from the road on his right hand side along the lands of Lisarew; that when he was about twenty-two yards from the bohreen, he saw a movement behind the bushes, in the angle where the bohreen and the road met, and there saw about one third of the barrel of a gun put on the ditch through the bushes; that an explosion immediately took place from the barrel; that witness saw the flash; but could not say from the noise whether the gun was loaded or not; that it was stormy; that witness's mare turned short to the left, and plunged; that he turned her round, and rode up immediately to the place the shot came from, and that when he rode up, he saw two men standing in the gap behind the place where he saw the barrel of the gun; that their faces were towards him, and that they were so near him, that he could have touched them with his riding rod; that they looked at him as he came up; that he looked at them; that they immediately pulled their hats down over their eyes, but he said to them, "I know you, and will make you pay for this." That prisoner was one of the two men; that they made no reply, but got up into the field; that he saw a gun in the hands of the prisoner; that the men immediately crossed the field to a gap or hedge about 40 yards distant; that witness rode up the bohreen nearly parallel with the course they took, and about eight yards from them till they got near the gap; that they averted their heads from him as they were running; that when they got out of the gap into another field, they turned to the left more away from witness towards a bog; that witness rode along the bohreen for about one hundred yards further, and then turned back; that the men were then about 100 yards from him; that witness went on to Borrisoleigh, got there about 10 minutes of 11; remained there till the Sessions were over, a little after one; that witness then went with sub-inspector Mullarkey, and some constables, to the place where he saw the gun; that he wore that day two coats (inner and outer); when he got to that place he observed that the two coats were perforated (witness produced the two coats in court,

with the two holes in the outer coat, and one in the inner coat); that none of said holes were, as witness thought, in the coat that morning, and that witness had not met with any accident, or come into collision with anything that day from the time he left home until he observed the holes, which could have caused those holes, except the transaction in question; that when the shot was fired, witness was about 14 yards from the place where the gun was, and was riding very fast, the wind in his back, and his coats flying up and down; that a search was made by Mr. Mullarkey, Constable Lee, and Mr. George Ryan, on the ground inside the hedge where he saw the gun, and which place he pointed out to them; that he saw prisoner afterwards on the following Wednesday morning, 4th March, in the police barrack at Templemore and identified him then.

Cross-examined by prisoner's counsel.—Witness stated amongst other matters, to the following effect: That the men did not change the position of their hats from the time they pulled them down, but he did not think their eyes were covered; that he saw the face of the other man also; that he would know him if he saw him again, from the view he then got of him; that he saw the other man in gaol last April; his name was Grady; that witness would not swear to Grady positively, though he believed he was the man; that Grady was in custody last assizes, but not now; that witness heard Grady was in Dublin last week; that he, witness, never had any doubt about the prisoner Hayes; that witness between the 2nd and 4th March gave a description of Hayes to Mr. Mullarkey; that prisoner was in custody under suspicion of theft, when witness saw him in Templemore; that witness is a magistrate; went to the barrack where prisoner was, and saw him, and identified him; that after witness had identified Hayes, another man was arrested and brought to witness, but he would not arrest him; witness was about 68 years old, and had been for 32 years a resident magistrate in various places.

This witness was further cross-examined as to his reasons for going after he was fired at to Borrisoleigh, and not to the nearest police station; also as to the holes in his coats, and as to their having been made by bullets or not.

2nd. witness—Mr. John Fleming.—I am resident magistrate for this district; saw prisoner in Nenagh gaol, on 22nd March, 1863; I was sent for. I went to the board-room of the gaol. Mr. Minchin, the governor, and Willis, senior warden, were there. I told prisoner not to say anything that would criminate himself, otherwise that it would be taken down, and used in evidence against him. I gave him that caution before he said anything to me. After I gave him that caution, he made a statement which I took down in writing from his dictation. I took it down as he went along in a memorandum. When he finished the statement, I took it, and I read for him all I had taken down. As I read he made various corrections. I corrected the memorandum accordingly, and when it was all read out for him, and corrected by me, I made a fair copy of it, and while I was reading it, he suggested a few other corrections, which I made accordingly. He then signed it in my presence, and acknowledged it to be correct, and I signed it also.

The statement was produced to witness, and identified by him as the document, and he proved the signatures of himself, and of the prisoner.

Cross-examined.—The prisoner had been arraigned at previous assizes of March, 1863, and pleaded, "not guilty." I think he was in the board-room when I went in there. I had heard that he sent for me, and I knew what he wanted me for. I may have told him to sit down, that I was the resident magistrate he sent for, or the governor or senior warden may have said it, but I said nothing else before I gave the caution. I don't know where the original memorandum or draft which I took down from him is. I think I did not keep it long. I did not give it to anyone. I believe I destroyed it. It did not differ materially from the copy. No other names were mentioned in it. I thought it of no importance. I did not ask him questions in the course of his statements; I took down what he said.

Witness looks at the statement, and points out the alterations made at prisoner's suggestion, by insertion of the following words:—"day" in p. 3, and "whiskey," and "some out of it," and "fellow" in p. 4, the word "I" in page 5, and the word "parted" in page 6.

Witness was then asked whether the alterations made in the copy were the result of the prisoner having stated incorrectly, or of the witness having made mistakes in taking it down; and witness stated in reply that he supposed the words "of whiskey" had been omitted by witness.

Cross-examination continued.—The original memorandum of course contained more errors than the copy. I had nothing to say to the prisoner's legal adviser. I think it was fair to take down his statement without reference to his legal adviser. I read the statement truly to him. I know Grady; he was in custody on the same charge as the prisoner. I took down a statement from him also in 1863, after I had taken the prisoner's. I never saw the prisoner till the Spring Assizes, 1863, nor from that until said 23rd of March. Grady was removed to Dublin after he made his statement. He was in gaol at last assizes. He made two or three statements; two last April, and one last May. I was not the committing magistrate of Grady, or of Hayes. I heard Mr. Lover apply at last assizes to have Grady admitted to bail, and I heard that application refused. I heard Grady had escaped from the police, and is at large. I can't say where he is.

Witness was cross-examined as to the prisoner understanding the word "criminate."

To me.—I am positive that before prisoner commenced his statement, I did not hold out any threat or inducement to him. I am positive that I told prisoner that what he stated would or might be used in evidence against him.

Cross-examination continued.—I am not sure in my evidence at the former trial I used both words, "would" and "might," or which I used, but I am certain I used either.

To me.—I have searched for the memorandum before the last assizes, and since; I did not find it; I am certain I did not give it to any one.

3rd witness for the Crown—William Roberts.—I was a warden at Nenagh gaol last March. Prisoner

was in my charge. He told me one day when I was putting him back into his cell, that he wanted to see Mr. Willis, the senior warder. I did not hold out any threat or inducement to him, or ask him any questions before he said that. I don't exactly recollect the day, but he only asked me once. I gave Warder Willis the message accordingly.

Cross-examined.—Grady was also in my charge. He and the prisoner were not to my knowledge ever put together. I did not hear them holding conversations together. Prisoner was transferred to the hospital after he made the statement. He did not complain to me of being sick.

4th witness for the Crown.—William Willis.—I am head warder of Nenagh gaol. I recollect Roberts, the late witness, bringing me on a Sunday morning, at the end of March last, a message that the prisoner wanted to see me. I did not use any threat or inducement to him whatever. I found him crying. He was saying something to me, when I told him not to tell me anything, but that if he wanted to see a magistrate, I would send for one. He said, "I want to see a magistrate." I went away, and told Mr. Minchin, the governor, the same day. Mr. Minchin and I were going round afterwards about half-past 11. Mr. Minchin asked the prisoner if he had any complaints. Prisoner said he would wish to see a magistrate. I did not, nor did the governor in my presence, make use of any threat or inducement to prisoner.

Cross-examined.—Prisoner was unwell from time to time with diarrhoea, when he was sent to hospital. Grady was arrested early in April. In about a week afterwards, he and the prisoner were in the same room for one night. M'Loughlin (a prisoner under sentence) was put in the same room with them; there is always a third person put in. Mr. Ryan, the attorney, was concerned for the prisoner at the Spring Assizes of 1863, when prisoner pleaded, Not Guilty.

Re-examined.—I was in the board-room on the 23rd of March. I never held out any threat or inducement to prisoner, to induce him to make the statement, or said anything to him about it.

William Roberts, recalled, also negatived his having held out any threat or inducement to the prisoner.

5th Witness for the Crown, Wm. Minchin, Esq.—I was governor of Nenagh Gaol last March, prisoner spoke to me on the Sunday in that month. I had not used any threat or inducement to him. My practice is to ask the prisoners if they have any cause of complaint. When I asked him that, he said he wanted to see a magistrate, that was on Sunday, the 22nd of March. I went for Mr. Fleming the next day, I was present when he came to the Board Room.

Cross-examined.—Grady was discharged last October, I never held out any threat or inducement to the prisoner to induce him to make the statement, or said anything to him about it.

6th Witness for the Crown, Mr. John Mullarkey.—This witness stated (amongst other things) that he was Sub-Inspector of Constabulary at Borrisoleigh, in March, 1863. That on the 2nd of March, after the Petty Sessions there were over, he rode with Mr. Jones and Mr. George Ryan to the place in question, which was shewn to him by Mr. Jones, that he ob-

served two holes in Mr. Jones' outside coat, and one in his inside coat, that one or two waddings and a paper containing percussion caps were found by Constable Lee and Mr. George Ryan in witness's presence. That Grady was arrested on the 31st March; that witness lived about 3 English miles from the place in question.

7th Witness for the Crown, George Lee, Police Constable.—Stated (amongst other things) that on Monday, 2nd of March last, he found on the bank quite near the place in the gripe pointed out to him by Mr. Jones a piece of wadding and a paper containing 7 percussion caps.—produces them.

8th Witness for the Crown, Mr. John Ryan.—Stated, amongst other things, that prisoner had come to him about a fortnight before March, 1863, said he wanted a letter from witness to Mr. John Mullally of Liverpool, for his (the prisoner's) nephew, who was going to America, and that prisoner asked witness at what time the ship would be going to America, and what the passage was. That on a Saturday early in March, and before witness heard of Mr. Jones having been fired at, the prisoner came again to witness and asked him for the letter, that witness gave it to prisoner, sealed in an envelope, but did not read it to him.—[Envelope produced and identified.]

9th Witness for the Crown, John Flinn, Policeman.—Stated amongst other things, having searched prisoner on 4th March last, while under arrest in Templemore Police Barrack, and found on him the said envelope sealed with a letter in it, and that another constable took £4 6s. 1½d. from prisoner.

Mr. Wall, counsel for the Crown, proposed to read the statement or confession proved by Mr. Fleming.

Mr. Curtis, for the prisoner, objects on the following grounds:—

1. That the original draft or memorandum written by Mr. Fleming had been altered and should have been produced.

2nd. That the prisoner was under arrest at the time, and was not properly cautioned before he made the statement.

3rd. That it was in evidence that the prisoner could write and therefore it should be inferred he could read; and that it was in evidence that he did not read the document produced before he signed it.

4th. That the statement or confession was taken after the plea of Not Guilty was recorded for the prisoner at the Spring Assizes, 1863, and in the absence of prisoner's professional adviser or any professional adviser.

I allowed the statement or confession to be given in evidence, subject to the foregoing objections, of which I took a note; it was accordingly read to the jury. The following is a copy of the document,

(Copy Statement).

I, Philip Hayes, a prisoner in Nenagh Gaol, having sent for Mr. Fleming, resident magistrate, and after receiving from him the necessary caution not to say anything that might criminate myself, I do of my own free will and accord make the following statement:—I live in Gurtkelly under Mr. Andrew Ryan of Gurtkelly; I was his ploughman. I know a man named Pat Grady since I was born, he is some relationship

of mine; he lives in Kylecrew. He lives under Mr. Hanly, of Cottage. He is a labourer. He came to my house about 5 weeks ago, it was upon a Friday, about 8 or 9 days before Mr. Jones was fired at: he called me out into the haggard. I went out and he took a bottle of whiskey out of his pocket, and gave me a pull at it. I took better than a glass out of it. He took some himself. He pulled one pound note out of his pocket and gave it to me, "Come now you thief," says he, "now is your time to hold sound." "What is this about, Paddy," says I, "Whist," says he, "this is nothing to what we will get. Come down to my house in the morning early, and don't let your wife or any person know but 'tis going working you will be." Accordingly I got up about 5 o'clock on Saturday the next morning; I went down to his house. He lives something less than an Irish mile from me. There was no one in the house but a little girl, his daughter Mary. Her father desired her to go out and fetch in a little brussa. She then went out and Grady came in and shewed me two pistols he brought with him. I stopped there about an hour and a half. We then stood up and he said: "Come off down with me now, you thief," he says, "we will get plenty of money from Michael Gorman to take us to America, or any place we wish." "For what?" says I; he hesitated for some little time and then said: "There is a lad going to play some tricks on Michael Gorman, Mr. Trant, of Dovea; if we settle him we will get plenty of money from Michael Gorman." We went on then until we went into a grove belonging to Mr. Ryan of Inch. He pulled out a gun he had under a bank, over which rushes were growing. He then took out some powder and loaded the gun. He put also 2 or 3 slugs of lead and a cap on it. He then gave it to me and we went along through the fields and through the grove to the road side to where he told me Mr. Trant would be passing. We hid ourselves under a brake of briars that was covering over the dyke. I said to Paddy Grady: "I don't know Mr. Trant." He said, "I know the lad well." The gun was in my hand at the time. We remained there until it was near 12 o'clock. "I think," says Paddy Grady, "it is better for us to go away, afraid we might be caught or seen, until Tuesday next, or some other day, when I can get the certainty of his passing." Accordingly we went away and returned to the grove or place where we found the gun. He then took the gun—"Let you dart for home, and I will hide the gun, afraid you would be missed out, or that we would be seen together." I returned home as quick as I could; he went out over the ditch, but cannot say where he went to. I returned home, and began to dig in my own haggard; I did not go to work with my master for about ten days. Paddy Grady came again to my house about nine days after; we parted at ten o'clock; I was just going to bed. He called me out, and I went to him; he said to me, "Come, now, you thief, we have the right pull to get; come along with me down to Paddy Woodlock's, who lives about a mile from my house." I went with him; I remained at the back of his house. Grady went in; he came out with Paddy Woodlock. "Good night, Phil," says Paddy Woodlock; he then took a bottle of whiskey out of his pocket; I took some of it—so did Paddy Grady and himself. With

that he whispered Paddy Grady; he said to Woodlock, "You need not fear him; he is loyal." Paddy Woodlock then took a book out of his pocket; "here," says he, "swear by the virtue of this you will not let your wife or any person know anything of this." Paddy Grady took the book, and swore the same as I did. Paddy Woodlock then took a purse out of his pocket and handed me £5—one three pound note and two single pounds. "Here, Paddy," he says, "is your share of the spoil." I don't know how much money he got, but he said to Paddy Woodlock, "You need not fear Phil; he is a good shot, as he is in the habit of firing at rabbits, and he will down Gore Jones." I said to Paddy Woodlock, "What spite do you owe Mr. Jones?" "Ah, you fool," he said, "it is not me, but another fellow in Thurles." Woodlock said then, "I think it would be the way for Phil to come to my house in the morning to breakfast, and you could go round the road, afraid any notice would be taken, and himself and my son James can go over the pollock fowling." Woodlock has three sons, James, Pat, and Johnny. We then separated, and I came home to my own house; it was late. I did not tell my wife; she wondered I remained out so long. The next morning I went to Paddy Woodlock's; he called me into a little parlour he has until we eat our breakfast; he then called out James. He came back again, and said, "Come out, Phil, over the pollock to fowl; there is a great deal of plover out to-day." I went with him; he carried the gun. We crossed a river, and got out, until we went up to the ditch where Paddy Grady was waiting for us. James Woodlock put out some caps he had in his pocket; Paddy Grady put one of the caps on the pistol, put the rest in a piece of paper, and put them into his pocket. The gun I had was loaded, and a cap on it. James Woodlock said it was all right; he then said, "As soon as you do the job, place the gun down here in the ditch, and I will come for it as soon as I can get an opportunity." He then went away. Paddy Grady and myself parted; he went out across the ditch; I took another direction, afraid we would be seen going together. We met at the ditch of the road at Lisarew; we concealed ourselves under the briars—they were growing over the ditch—until we saw Mr. Jones riding upon horseback. "Come, now, you thief," says Paddy Grady, "don't be undaunted; for you know we will get plenty of money to send us any place we like." Accordingly I put out the gun through the briars; Gore Jones was about five or six yards away from me, when I covered him and fired. Paddy Grady was at the other side of me; he had him covered with a pistol. When I fired, the horse leaped and jumped away. Paddy Grady said, "Upon my oath, we missed him. Stand," said Paddy Grady to me, "until I put on another cap," as the one he had missed. He put his hand in his pocket, and he could not find any of them; he said he lost them. Mr. Jones at this time turned round his horse; he looked at us over the ditch. I then pulled my hat over my face; he said, "Well, my lads, I know you, and will make you suffer." We then ran away along the ditch as fast as we could. I separated from Paddy Grady, and don't know where he went. I went to the place where Woodlock desired me to put the gun, and

placed it there. I then ran home as quick as I could, and took off my shoes. I met John Purcell, who is one of Mr. Ryan's tenants; he was breaking stones near his own house. I asked him was his brother within; he might give me the loan of an ass and car to take out some bonneves on Tuesday. He said he was not in the house, but might be at Ned Fahy's, who lives beside Purcell's in Gortkelly. I asked Ned Fahy to lend me an ass and cart; he promised to lend me the ass, but he had no cart. I then went up to Mr. Ryan's place in Gortkelly, thinking he might see me; I found no one there. I went then to Paddy Stapleton's for the loan of a car, and that I would give him one day's sowing potatoes if he would give it to me. He said he would, but he would not take any loan of me setting potatoes for the loss of the car that day. I then took home the car, with Ned Fahy's ass, to bring the bonneves the next day to the fair of Thurles. I went to the fair, sold the sow and borneves for about two pounds ten shillings. I then came home with my wife. I got up about 12 o'clock on Wednesday night to go to America. I went to Templemore, as I was afraid to go to Thurles, as Mr. Jones would know me. When I got to Templemore, I went into Michael Laffan's, a ship agent, to ask was the Galway line opened, as I wanted to go to Galway. She told me she could not tell; that they were only doing from Liverpool. I then went to the pawn office to pawn my wife's mantle, which would not be taken from me. I then went to a house to sell it. The woman of the house was in the act of buying my trousers and waistcoat when a policeman came in and arrested me.

PHILIP HAYES.

Truly read by me to Philip Hayes, who has signed his name in my presence, and acknowledged same to be correct.

JOHN FLEMING, B. M.

Dated Nenagh Gaol,
23rd March, 1863.

The evidence for the Crown having closed, the case was adjourned till the next day, and the jury locked up.

Second day of trial.—Mr. Curtis, for prisoner, addressed the jury, and concluded amongst other things that the prisoner should not be prejudiced by the statements in his confession, on the ground not only of the circumstances under which it was made, but also on the ground that the several statements in it of prisoner having committed the offence in question, and also the statement in it imputing guilt to P. Woodlock and M. Gorman were untrue. Counsel also stated that said Woodlock and Gorman were men of good character, and incapable of the conduct with which they were charged by the prisoner, and he contended that if the statements in prisoner's confession imputing guilt to Woodlock and Gorman were untrue, then that the jury should not rely on the statements in it admitting the prisoner's guilt.

Edward Fahy, Patrick Stapleton, Catherine Hayes, Mr. Samuel Ryan, Michael Sullivan, and Mr. Andrew Ryan, were examined as witnesses for the prisoner, some of them to shew that between nine and ten o'clock on the morning in question (2nd March, 1863) prisoner had been seen at his own house at Gort-

kelly, which, it appeared by the evidence, was about three Irish miles of the place where Mr. Jones was fired at; and others of them to shew that the prisoner was seen at Gortkelly at or about 11 o'clock on the same day, and was also seen publicly in the fair of Thurles on the following day, near Mr. Jones's house, and that prisoner got money at the fair for some bonneves that he sold.

It is not requisite for the purposes of this case to give their evidence in detail.

One of the witnesses (Mr. Samuel Ryan) was examined to prove that he saw the prisoner at Gortkelly between 9 & 10 o'clock on the morning. This witness further stated that he knew said P. Woodlock and M. Gorman, and he was then asked by prisoner's counsel whether he knew the character of said P. Woodlock and M. Gorman. This question was objected to by Serjeant Armstrong, for the Crown, who contended that any evidence on the part of the prisoner as to the character of said Woodlock and Gorman was not admissible. I refused to allow the question to be then put, with liberty, however, to prisoner's counsel to tender such evidence again after he had examined said Woodlock and Gorman as witnesses, which he stated he intended to do. Said Woodlock and Gorman were afterwards examined as witnesses.

Patrick Woodlock examined by prisoner.—I live at Pallas Hill, about 2½ Irish miles from Liscarrow. I know the prisoner. I am a smith. I had a license for repairing arms; it was in force the 2nd March, 1863, the day Mr. Jones was fired at. I was deprived of it shortly after. Upon my oath, I never employed the prisoner at the bar to murder Mr. Trant of Dovea; I never thought of it; I never employed prisoner to murder Mr. Gore Jones, or to shoot at either of the gentlemen, or to do either of them the smallest harm in the world; I never wished either of the gentlemen any harm. Mr. Gore Jones never did me any harm; he was a friend of mine, and granted me several requests I asked him; he had given my license. I knew Patrick Grady; he and the prisoner did not come to my house at night a day or two before the firing at Mr. Gore Jones; nor did I take any whiskey. I never swore prisoner or Grady to secrecy on a book. I did not, to the best of my recollection, see them together for about twelve months before. I never gave them or either £5. My place is about two Irish miles from Gortkelly by the road, and about one and a half Irish miles by the fields. Prisoner did not breakfast with me the morning of the 2nd of March last. I did not desire him to hide a gun in any place; I did not see my son James with the prisoner on that day, or at all, either for the pretence of fowling, or for any other purpose. I did not see the prisoner at all that day.

Cross-examined by the Crown counsel.—My license was taken from me some time afterwards by the police. When I had the license, I always required to see the licenses of parties who left arms with me to be repaired. I have kept a forge at Gortkelly about 12 months before last March, and when there I used to see prisoner and Grady often together. To the best of my belief, I have never seen them together for more than twelve months before 2nd March, 1863. I am positive I had not seen prisoner for a long time before,

not for six months before, to the best of my knowledge. It was on the night of the pig market in Thurles that I heard of this transaction; I heard of it the same night that it happened.

Several other questions were asked of this witness by Crown counsel on his cross-examination, which I did not take down at the time. The subject of said cross-examination was to impeach the veracity and character of this witness, and several questions, and the nature and manner of the cross-examination, were calculated for that object, and to impute to witness the crime with which he was charged by the prisoner's confession.

Re examined for the prisoner.—It was on the night of Monday, the day this transaction took place, that I heard it. Monday was the day for selling fat pigs in Thurles, and Tuesday for Bonn.

Michael Gorman examined for the prisoner.—I am steward of Mrs. Ryan (widow of the late John Ryan, and sister-in-law of Mr. George Ryan of Inch). I know said Patrick Grady. I recollect the day that said Mr. Jones was fired at, 2nd March, 1863. I did not before that day promise Patrick Grady to give him money to take him to America, or to any place. I did not know the prisoner. I never promised money to Grady or to any other man to do harm to Mr. Trant I never dreamed of it), or to any other man. I never promised anyone anything to do harm to Mr. Jones; he gave me license to keep arms; I had it when he was fired at. I never had any quarrel whatever with him. Mr. George Ryan, of Inch, and his nephew, Captain Ryan (son of late John Ryan, Esq.), were here at last Assizes to give me a character. I never directly or indirectly promised Grady anything to do harm to anyone.

Cross-examined by Crown counsel.—I have been living at Lisarrow all my life, about three miles from prisoner's house, but I don't know the prisoner. I never threatened any person. I have three brothers; I never threatened any of them. I have not any arms license now; it was taken from me by the police.

This witness was also, upon cross-examination, asked several other questions, which I did not take down at the time. The subject of said cross-examination was (as I have already stated with respect to Woodlock) to impeach his (Gorman's) veracity and general character, and the nature of said questions, and the manner of the cross-examination, were calculated for that object, and to impute to witness the crime with which he was charged in the prisoner's confession.

Mr. Samuel Ryan was then recalled by prisoner's counsel, and stated that he knew said P. Woodlock and Michael Gorman. Prisoner's counsel then proposed to examine this witness as to the character of said Patrick Woodlock, and accordingly asked witness, "What was Patrick Woodlock's character?" Serjeant Armstrong for the Crown, objected to this question, and contended that the witness should not be allowed to answer it, upon the ground that any evidence on the part of the prisoner as to the said Patrick Woodlock's character was not legally admissible. The question and the evidence were pressed by the prisoner's counsel upon the following grounds:—

1st. That the truth of the prisoner's statements in

his said confession was a material question, and that said Patrick Woodlock was charged by that confession with a crime; and 2ndly. upon the ground that the character and veracity of said Patrick Woodlock was directly impeached by his cross-examination by the Crown Counsel, and that such was the object of said cross-examination.

In the discussion of this matter a passage from 2nd. Taylor on evidence, S. 1330, p. 1191, (of edition of 1858) was referred to, and I stated that if I rejected the evidence, I would reserve the point for the consideration of the Court of Criminal Appeal. The Crown Counsel however again objected to the evidence, and contended that although the object of P. Woodlock's cross-examination was to impeach character and veracity, yet that the evidence tendered as to his character was not legally admissible, and that I should therefore upon legal grounds reject it and not allow the question to be answered; after some further discussion I ruled to that effect, that as the reception of evidence on the part of the prisoner was objected to by the counsel for the Crown, such evidence was not legally admissible, and that the reception or rejection of it was not merely matter of discretion with me. I accordingly rejected the evidence so tendered as to Woodlock's character, and refused to allow Mr. Saml. Ryan to answer the question so put to him, or to give any evidence as to P. Woodlock's character. I stated however I would reserve the point for this Court.

Prisoner's counsel also proposed to examine the same witness Mr. S. Ryan, as to the character of said Gorman; and accordingly asked witness what was Gorman's character? This question and the reception of any evidence as to Gorman's character were also objected to by the Crown Counsel, and pressed by the prisoner's counsel upon grounds similar to those which I have above stated with respect to the question and evidence tendered as to P. Woodlock, and my ruling was to the same effect. I accordingly did reject the evidence tendered as to Gorman's character, and refused to allow Mr. S. Ryan to answer the question so put to him respecting it, or to give any evidence on the matter. I stated I would reserve this point also.

The evidence for the prisoner having closed, Serjt. Armstrong for the Crown addressed the jury in reply, and in the course of his address commented amongst other things on the cross-examination of Patk. Woodlock and Michael Gorman, and on the non-production of Woodlock's son, James, as a witness for the prisoner. He also in his address impeached the veracity and character of Patrick Woodlock and Michael Gorman, particularly of Patrick Woodlock, imputing to him the guilt with which he was charged by the prisoner's confession.

It will be seen by reference to the prisoner's confession that several of the statements in it, imputing guilt to Patrick Woodlock, are statements of what said Woodlock said and did in prisoner's presence, whereas the statements in it respecting Gorman, are statements of what the prisoner heard from Grady.

In my charge to the jury, I told them (amongst other matters) to the following effect—that I had admitted the prisoner's confession to be read in evidence against him, because I was of opinion upon the evidence which had been given, that it was voluntarily

made by him, and was not obtained from him by any inducement, threat, or improper conduct on the part of others; but I also stated that the argument was not conclusive evidence against the prisoner, that the weight and credit to be attached to it were entirely for the jury, and whatever were the motives which may have induced the prisoner to make such confession, it was still for the jury to consider whether the statements in it admitting the prisoner's guilt were or were not untrue.

With respect to the statements in the confession, affecting Patrick Woodlock, and M. Gorman, I also told the jury (amongst other matters) to the effect that even if they should be of opinion, that such statements were false, still that it would be for the jury to consider whether the statements in the confession which admitted the guilt of the prisoner himself were or were not untrue, and that they might come to the conclusion that the statements in the confession as to the prisoner's guilt were true, even though they should be of opinion that the statements in it as to said P. Woodlock and M. Gorman were false.

The jury found the prisoner guilty, and I sentenced him to penal servitude for twenty years.

I now respectfully request the opinion of the Court of Criminal Appeal upon the following points:—

1st. Whether the prisoner's said confession was legally admissible, and was properly received by me in evidence, and whether the said directions which I gave the jury respecting it were correct?

2nd. Whether I should have allowed the said several questions put by prisoner's counsel to Mr. Samuel Ryan, as to the character of Patrick Woodlock and Michael Gorman respectively, or any of said questions to be answered, and should have allowed evidence to have been given on the part of the prisoner as to the character of said Patrick Woodlock and Michael Gorman or of either of them.

3rd. Whether I decided according to law in ruling that the answers to such several questions, and any evidence on the part of the prisoner as to the character of said Patrick Woodlock or Michael Gorman, were not legally admissible in evidence. This of course involves the question whether the reception or rejection of such evidence was matter of mere discretion with me.

If this Court should be of opinion that the prisoner's said confession was not legally admissible and properly received by me in evidence, or that any of my said directions to the jury, or any of my said rulings respecting the several questions put on the evidence tendered on the part of the prisoner as to the character of said P. Woodlock and M. Gorman, respectively, was not according to law, then the conviction of the prisoner is to be reversed.

6th May, 1864.

JAMES O'BRIEN.

Curtis and Lover for the prisoner. We should have been allowed to produce evidence of Woodlock's character. There is authority to shew that even where, as in this case, the impeachment was by cross-examination, general evidence of character may be produced. *Starkie on Evidence*, 4th ed. 252. There are two exceptions to this: one is in the case of attesting witnesses to documents, in which it is laid down that

the witness must be dead, before you can give general evidence of character. But the same case lays down an opposite rule as to witnesses actually produced in court. *Provis v. Reed* (5 Bingham 435) *Doe dem. Walker v. Stevenson* (3 Esp. 284) *The King v. Clarke* (2 Stark. 241) *Doe dem. Reed v. Harris* (7 Q. & P. 330). This evidence was beyond a doubt received in *Annesley v. The Earl of Anglesea* (17 St. Tr. 1348). [*Fitzgerald, B.*—The impeachment of the character of Downes in that case did not arise on his cross-examination merely, for Ryan who had been examined, had given what amounted to evidence of the character of Downes] (2 Tayl. on Evidence 3rd ed. s. 1330); *Bishop of Durham v. Beaumont* (1 Campb. 207). *The Queen v. Furley* (1 Dears. C. C. 456). *The Queen v. Burke* (4 Ir. Rep. N. S. 11 S. C. 8 Cox. C. C. 44). There was not a sufficient caution given to Hayes before his confession. *The Queen v. Furley* (1 Cox. C. C. 76). [*Monahan, C. J.*—That case is overruled in *The Queen v. Bauldry* (2 Den. C. C. 439).

The Solicitor-General, Serjeant Sullivan, and O'Hara, Q.C., for the crown.—Neither on principle nor on authority can it be contended that the evidence of general character should have been received. If it should it would lead to an endless series of witnesses being produced. *The King v. Francis* (3rd Esp. 116). *Dodd v. Norris* (3 Campb. 519) and *Doe v. Harris* (7 Q. & P.) are decisive on the point. *The King v. Clarke*, is distinguishable and does not support the proposition, for which it is cited by the text-writers. Taylor in par. 1327 limits the cases, in which general evidence of character may be produced to those in which the general reputation of the witness has been impeached by other witnesses. There is a confusion on the other side between character and reputation. As to the other point *The Queen v. Bauldry*, is decisive. There need not have been any caution at all. *The Queen v. Parker* (30 L.J., M.C., 144). There was no attempt to impugn the general character, properly speaking, of Woodlock or of Gorman. The questions asked did not tend that way.

Lover in reply cited *The Queen v. Sutland* (4 Cox. C. C., 270). *The two Bourne's case* (Greenl. on Evid.) Petersdorff's Abr. 2nd ed. witness 672, *Sharpe v. Scagius* (Holt's N.P., 541) *Timothy Murphy's case* (19 St. Tr. 694) *The King v. Overton* (2 Mood. O.C., 263) *Foulkes v. The Manchester and London Insurance Company* (3 F. & F. 440) *The Queen v. McKenna and Bush* (Cr. & Dix. 579) observations of Pennefather B. in *The Queen v. Dunne* (8 Cox.)

June 1.—LEFROY, C. J.—In this case we are unanimously of opinion, that the evidence was properly rejected. The question may be stated generally thus, whether when any imputation as to character arises upon facts, stated in answer to questions put upon cross-examination to a witness, when that cross-examination does raise imputations, either by the admissions made upon it, or by the view with which the questions were put, for both views are suggested by the case as reserved—whether in answer to imputations thus raised or designed to be raised, it is open to the party to give evidence of general good character, in order to do away with the imputations, either brought on his character, or designed to be brought

on it by the cross-examination. Both upon authority and principle, it appears to us that the evidence of general character is not admissible in such a case. The cases where it has been admitted will be found to be cases of exception, confined to cases of rape and seduction, or a third class where the civil rights of parties who are interested in the character of a dead witness, are in dispute, such as the case of attestation to a will; but upon general principles it appears that evidence of general character does not meet in truth, the issue that it raised by the admission of particular facts upon which an imputation upon character arises. One goes to the matter of fact from which the imputation arises. That is not met by mere general evidence of character, and therefore the matters are not *ad idem* so as to form a proper issue. If, indeed, distinct evidence is adduced of a character of this description that the party is not entitled to belief on his oath, there it may be met by evidence shewing that the party has such a general character as entitles him to credit on his oath, but that is meeting one matter of fact by a contradictory matter of fact, and not a specific matter of fact by a general allegation. There is another reason, also, why general evidence of character should not be resorted to in this case—namely, that there is an opportunity of investigating the particular matters brought out on examination, of giving an explanation shewing that the inference sought to be drawn is not well-founded, of accepting the facts elicited by other facts which may be brought out by a re-examination of the witness. He may be re-examined so as to do away with the effect of that which is produced upon his cross-examination. It is not, therefore, necessary for the more perfect administration of justice, that this course should be admitted, which really would lead to an infinite extent, for there is no reason, if this evidence was once admitted in the first instance, why the same thing should not be repeated as to every witness brought to support the general character of the antecedent witness, whose character is impeached, if his character is impeached, by his cross-examination, and why evidence should not be brought to support his character so as to lead to an infinite series of collateral issues. Besides, it will be found, on looking into the authorities, that the most eminent judges of their time, such as Lord Kenyon and Lord Ellenborough, and other judges of that day, have decided the question most distinctly for the rejection of this species of evidence. And though some of the modern text-books give a different view of the law, it will be found on examination that the cases from which they appear to have drawn their results were cases which do not sustain them to the extent of the admissibility of general evidence of this sort in answers to imputations arising from matters appearing on cross-examination. Upon the whole, therefore, it appears to us on full consideration and examination of the authorities, that the evidence was in this case properly rejected, and that the confession was properly received.

11307, C.B.—I wish to say a word in explanation of my concurrence in the unanimous judgment of the Court. I do not think it can be maintained as an universal proposition that in no case can a witness's character be sustained by general evidence unless first

impeached by general evidence. The cases must be very rare in which general evidence can ever be of the slightest use where the witness has impeached his own character on cross-examination. But if a case should arise in which a general imputation on the character of a witness at a particular time, equivalent to that which might be made by evidence *aliunde*, is made on a witness's cross-examination by his answers, I am of opinion that general evidence can be produced to shew his more recent reputation. In the present instance nothing of that kind appeared. The whole impeachment was in questions, and no impeachment arose on any answers given by the witness.

The other judges concurred.

Conviction affirmed.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

[BEFORE O'BRIEN, HAYES, AND FITZGERALD, JJ.]

SHAW v. GALT.—Dec. 5, 7, 17, 1863.

Partnership—Participation in profits—Salary.

J. W. and W. W., trading under the style of "J. & W. W.," and W. G., entered into an agreement, by which W. G., "in consideration of the salary and others hereinafter expressed," bound himself to manage the business of J. W. and W. W., under their superintendence, for three years; and in consideration of the services so to be rendered, J. W. and W. W. bound themselves to pay to W. G. a salary of £500 for each year of his engagement; and further, W. G. was to be "entitled to a sum equivalent to one third part of the free profits for the aforesaid space of three years of the business of J. W. and W. W." The agreement contained a provision for taking balances at times to be fixed by J. W. and W. W., who were to be entitled each to take credit for a salary of £500 before ascertaining the free profits; and it was also provided that while the salary of £500 should be payable to W. G., the other sums to which he should be entitled should not be demandable by him during the period of his engagement, but should be payable in three instalments after its conclusion. Held, that this agreement did not constitute a partnership as to third parties between J. W. and W. W. on the one hand, and W. G. on the other, so as to make W. G. a partner as to third parties in the firm of "J. & W. W."

THIS was a motion on behalf of the plaintiff to make absolute a conditional order obtained on the 4th November, 1863, that the verdict had for the defendant at the last Summer Assizes for the County of Antrim should be set aside, and instead thereof a verdict entered up for the plaintiff for the sum of £2,383 3s. 3d. (being the balance due on the four bills of exchange sued on), pursuant to the leave reserved by

the learned judge at the trial, on the ground that the agreement of the 4th September, 1856, proved at the trial, constituted the defendant a partner in the firm of "J. & W. Wallace," unless cause shewn. The action was brought to recover the sum of £2,383 3s. 3d. alleged to be due by the defendant to the plaintiff upon foot of four bills of exchange. The summons and plaint contained sixteen counts. Each of the bills of exchange sued upon was declared upon in two counts. The first of these counts stated that the plaintiff, on the day specified in the count, by his bill of exchange now overdue directed to the defendant and certain other persons, to wit, James Wallace and William Wallace, under the designation, style, and firm of "J. & W. Wallace," under which the defendant and the said James Wallace and William Wallace then traded together in partnership (and which said James Wallace and William Wallace afterwards and before the commencement of the action became and were, pursuant to the statute in that behalf, duly discharged by bankruptcy from all liability and cause or causes of action on foot or in respect of the said bill, and were now resident out of the jurisdiction of this Court, to wit, in Scotland), required the defendant and the said James Wallace and William Wallace, to pay to the plaintiff's order the sum mentioned in the count in the time mentioned, and the defendant and the said James Wallace and William Wallace duly accepted the said bill under their said style or firm of "J. & W. Wallace," but did not, nor did any or either of them pay the same. The second count on each of the bills stated a drawing by the plaintiff on the defendant under the designation, style, or firm of "J. & W. Wallace," under which the defendant then traded, an acceptance by the defendant under the said style or firm of "J. & W. Wallace," and non-payment by him. The summons and plaint also contained the common money counts. The defendant as to the first set of counts on the bills of exchange, as to so much of each of them as alleged that the defendant and the said James and William Wallace traded together in partnership, said that he never traded in partnership with the said James Wallace or William Wallace as in said counts alleged; and as to the residue of each of said counts he said that he and the said James Wallace did not accept the said bills of exchange in said counts respectively mentioned, or any of them as in said counts respectively alleged. As a defence to the second set of counts on the bills of exchange, he said that he denied that he ever traded under the name, style, or description of "J. & W. Wallace," as in said counts alleged. And he further said that he did not accept the said bills of exchange or any of them, as in said counts respectively alleged. He traversed the money counts in the ordinary form. Upon these defences issues were taken, and the case was tried at the Summer Assizes of 1863 for the County of Antrim before Fitzgerald, B. At the trial the case turned altogether upon the question whether the defendant was a partner in the firm of "J. & W. Wallace" at the time of the acceptance of the bills of exchange, which were accepted in the name of the firm, in the handwriting of William Wallace who was unquestionably a partner. A great deal of evidence was gone into, but the only part of it material to be

now stated was an instrument produced by the defendant, dated the 4th September, 1856, (anterior to the date of any of the bills of exchange) which was executed by the defendant and the Wallaces, and of which it may be assumed that the plaintiff was aware when he drew the bills on the firm. That instrument continued in force down to the date of the bankruptcy of the Wallaces. It was as follows:—"Minute of agreement between James Wallace and William Wallace, sewed muslin manufacturers in Glasgow, co-partners carrying on business there as sewed muslin manufacturers under the firm of J. & W. Wallace, on the one part, William Galt, presently in the employment of the said J. & W. Wallace, on the other part. 1st. The said second party, in consideration of the salary and others to be paid to him as hereinafter expressed, hereby agrees and binds, and obliges himself to take the entire charge of, and to manage efficiently under the superintendence and directions of the said James Wallace and William Wallace, or either of them, the department of the said first parties' business; and that for and during the entire space of three years from and after the 1st day of August, 1856, which is hereby declared to have been the commencement of his engagement under these presents, notwithstanding the date hereof, during which space or period the said second party shall devote his whole time and attention to the conduct and management of the said department of said business, and faithfully and honestly discharge the duties thereof, as well as attend to all the instructions which from time to time he may receive from the said James Wallace and William Wallace, or either of them in relation thereto, and he shall not engage himself, or be concerned directly or indirectly, either by himself or by others on his account, in any other business whatever. 2nd. In consideration of the services to be rendered to the said first parties by the said second party in manner hereinbefore expressed, the said second party shall be entitled to receive, and the said James Wallace and William Wallace shall be bound, as they hereby agree to bind and oblige themselves as co-partners aforesaid, and as individuals, and their said company firm of J. & W. Wallace, to pay to the said second party a salary of £500 for each year of the aforesaid period of his engagement, and that by monthly, quarterly, or half-yearly instalments, as he may think proper; and further, the second party shall be entitled to a sum equivalent to one-third part of the free profits for the aforesaid space or period of three years of the business of the said first parties, as to said profits shall be ascertained by balance sheets to be prepared by the said first parties on the principle hitherto adopted by them in taking their balances, and at such periods as to them may seem proper, and it being understood that before ascertaining the free profits credit shall be given to each of the said James Wallace and William Wallace for a salary for individual services at the rate of £500 per annum; but declaring always, and it is hereby specially provided and declared and agreed to by the said second party that while the said salary shall be payable to him as before expressed, the other sums to which he shall be entitled in virtue hereof shall not be demandable by him during the period of his engagement, but shall be payable by three equal

instalments as follows, viz., the first instalment on the 1st day of August, 1859, the second instalment on the 1st of December following, and the third and last instalment on the 1st of April, 1860, together with interest on the two last instalments at the rate of £5 per cent. per annum." The third article of the agreement provided for a reference of disputes to arbitration, and the fourth bound the parties in the sum of £500 to the performance of the agreement. There had been a previous agreement between the parties dated the 18th of August, 1853, which had, however, expired before the execution of the instrument given above. The learned judge told the jury "that where there was mutual participation of the profits and loss of a trade between parties, they were partners between themselves, and of course liable to such liabilities; that where there was participation by a person in the profits of a trade, he was a partner as to creditors, because he took a portion of the fund to which the creditors had a right to look for payment, even though he might not have the rights and liabilities of a partner as between himself and the other persons concerned in the trade; that consequently, if by the agreement of 1856 the defendant was to participate in the profits of the trade of J. & W. Wallace, he would be liable to the plaintiff on the acceptances of that firm, even though the same agreement might shew that he had not all the rights and liabilities of a partner between himself and the Wallaces; that the participation in the profits to make a party so liable, must be a participation in the profits *as such*, and that a salary regulated by, and varying with the amount of the profits, or the making the profits in whole or in part the sole fund for the payment of the salary, would not constitute a participation in the profits *as such*." He also told the jury that he was disposed to think, and so directed them as a matter of law, that the defendant was not, by the instrument of September, 1856, entitled to participate in the profits *as such* of the trade of J. & W. Wallace. The jury found for the defendant, the learned judge reserving liberty for the plaintiff to have the verdict entered for him for the amount remaining due on the bills (as to which there was no controversy) if the Court of Queen's Bench should be of opinion that the agreement of September, 1856, gave the defendant a right to participate in the profits *as such* of the firm of J. & W. Wallace. It will have been observed that the rule obtained by the plaintiff was not in the precise form of the reservation; but in his report the learned judge stated that unquestionably he meant that the plaintiff should have the benefit of the verdict if the Court should be of opinion that the instrument gave the defendant a right to participate in the profits *as such*, even though it might not constitute him a partner to all intents.

Joy, Q.C., Law, Q.C. and W. Andrews, were for the plaintiff.

M'Donogh, Q.C., Harrison, Q.C., and Falkiner, for the defendant.

Cheap v. Cramond, (4 B. & Ald. 663); *Blocham v. Pell*, (2 Wm. Bl. 999); *Greenham v. Gray*, (4 Ir. C. L. R. 403); *Gilpin v. Enderbey* (5 B. and Ald. 954); *Heyhoe v. Burge*, (9 C. B., 431); *Ex parte Wilson*, (Buck's Bank. Cas., 481); *Young v.*

Axtell, (2 H. Bl., 242); *Ex parte Chuck*, (8 Bingham 470); *Ex parte Hamper*, (17 Ves. 404); *Stocker v. Brockelbank*, (3 M.N. & G. 250); *Pott v. Eden*, (3 C. B., 39); *Wheatcroft v. Hickman*, (8 H. of L., 268; s.c. 9 C. B., N.S., 47); *Waugh v. Carver*, (1 Sm. L. C. 491); *Ex parte Reader*, (8 Jur. N.S. 629); *Davis v. Harris* (9 Jur. N.S., 850); *Harrington v. Churchward* (29 L.J. Ch. 821); *Smith Merc. Law*, 22; *Lindley on Partnership*, 13, were referred to.

Dec. 17.—The judgment of the Court was delivered by O'BRIEN, J., who said that, This case of *Shaw v. Galt* was an action to recover a sum of £2383 3s. 3d., the amount due on four bills of exchange, drawn on the firm of J. & W. Wallace, and accepted in the name of the firm by one of the Wallaces. The ground taken on the part of the defendant was that he was not a partner in the firm at the time of the acceptance. At the time of the trial some evidence was given by the plaintiff to establish a partnership by admissions, which, it was alleged, the defendant had made by holding himself out as a partner. It appeared that there was a conflict of evidence on this part of the case, and that the opinion of the jury was in favour of the defendant, but that eventually the liability turned altogether on an agreement of September, 1856. That was given in evidence by the defendant. The plaintiff's counsel contended at the trial, that whatever might have been the effect of the instrument as between the parties themselves, yet as between them and third persons, it was to be considered as a contract of partnership, and rendered the defendant liable to be sued, as he was entitled by it to a participation in the profits. The learned Baron who tried the case was of a different opinion. (His Lordship read the directions of the judge at the trial as given above.) The jury found for the defendant, and liberty was reserved to the plaintiff to have a verdict entered if the court should be of opinion that the instrument gave the defendant a right to participate in the profits *as such* of the firm. The plaintiff accordingly obtained a conditional order to enter a verdict against which cause had now been shown. The terms of the order were different from the reservation at the trial, as by the conditional order the ground was that the agreement constituted by itself the defendant a partner, whereas by the leave reserved the question was whether the instrument gave the defendant a right to participate in the profits *as such*. Strictly speaking, the agreement should be construed according to the terms of the leave reserved; but it did not seem to the Court that the result would be different. The question in both cases turned on the construction of the agreement. At the time of the argument it was observed by the Court that the agreement was executed in Scotland, and that the instrument should be construed according to the law of that country. No question, however, was raised at the trial on that point, nor was any evidence given as to the law of Scotland being different from that of England, and counsel had now, at all events, consented that the instrument should be construed as if it had been executed here. He would now refer to the material portions of the agreement. He might add that it appeared that there had been a previous agreement. It was said that the

terms of the previous agreement were different from the present one, but they could not refer to it in construing this agreement. (His Lordship then read the first and second paragraphs of the agreement). The third merely contained provisions for the settlement of disputes to which he need not refer. The bills were given for the ordinary purposes of the establishment in 1857, so that the defendant was clearly liable if he was a partner. It had not been contended that the effect of the instrument between the Wallaces and the defendant, was to constitute the latter a partner with them as amongst themselves, and it was clear that it could not be so held; but it was not necessary that it should bear that construction, as it had been settled that although as between the parties the relation might be only that of principal and agent, or master and servant, yet as to third persons, it might be considered a contract of partnership, and attaching on them all the liabilities of partnership. The plaintiff contended that the instrument had that effect; that the defendant became entitled to a share of profits, and that he accordingly ought to be considered a partner, as a participation in profits constituted a partnership as to third persons, and he relied upon *Grace v. Smith* (2 Wm. Blackstone,) where De Grey, C. J. says—"Every man who has a share of the profits in trade ought also to bear his share of the loss, and if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment." This was also acted on in *Waugh v. Carver*, where it was held that A. & B. became liable as partners to all persons, even though the agreement between them provided that neither should be answerable for the acts or losses of the other, but each only for his own; and though from the terms of that agreement, it was plain that they did not intend to be partners. Eyre, C.J., stated the question to be, whether they had not by parts of their agreement, constituted themselves partners in respect to other persons, and he adopted the reasons stated by De Grey, C.J., for making a participation in profits a test of partnership. This principle of participation had been recognized and acted on in several other cases cited in the argument. To the extent he had stated the plaintiff was borne out by the cases; but in *Wheatcroft v. Hickman*, the reason was put on a different principle. According to that case, the law of partnership was a branch of the law of principal and agent. Each party was to be regarded as principal, and each as agent for the other. The case was reported in 8 H. of L., 268, and in 9 C.B., N.S. 47; he would refer to the report in 9 C.B., N.S. At page 92, Lord Cranworth said, "It was argued that as they would be interested in the profits, therefore they would be partners; but this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is, nevertheless, in contemplation of law a partner, is, whether he is entitled to participate in the profits; this, no doubt, is in general, a sufficiently accurate test; for, a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim;" and again, "It is not strictly correct to say that his right to share in

the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is, to say that the same thing that entitles him to the one, makes him liable to the other, namely, the fact that the trade had been carried on on his behalf, i.e., that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made." At p. 98, Lord Wensleydale said, "The law of partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify, and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view;" and again, "If two or more agree that they should carry on a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another; that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability. Perhaps the maxim, that he who takes the profits ought to bear the loss, often stated in the earlier cases on this subject, *Waugh v. Carver, &c.*, is only the consequence, not the cause, why a man is made liable as a partner." He referred to this case, because it was important to bear in mind in putting a construction on an instrument that if we held generally that a man was liable because he took a portion of the profits of the concern, it was hard to say where we should stop. He thought the true rule was laid down in this case, and it was adopted by the other judges who adopted those reasons. In the application of the old principle, that is to say, that a share of the profits constituted a man a partner, a distinction was taken as to net profits, and what are incorrectly called gross profits, but what should be properly called gross proceeds or earnings. In *Heyhoe v. Burye*, Lord Wensleydale on the trial said to the jury, "This agreement purports to give the defendant a fourth part of the clear profits, not the gross profits of the contract. A person who shares gross profits is not a partner, but a person who shares net profits is, *prima facie*, to be considered a partner." If the principle of charging was that they took away a portion of the fund, it would be hard to see why a person would be liable for a participation in net profits, and not in gross profits. The net profits were not ascertained till all the liabilities were paid; the gross profits might be taken away the moment the sum constituting them was received. It was difficult to see why it should be so in one case, and not in the other. In this case the expression used was "free profits," which counsel had agreed should be taken to mean the same thing as net profits; but he referred to the distinction, because of the argument of counsel; but the application of this principle was also subject to another very material qualification, which bore on the question before the Court; namely, that to produce such a result, the participation must be that of a person having a right to a share of the profits as such,

a right to an account, and not that of a mere servant or agent receiving a salary proportioned to the profits. That was laid down by Lord Eldon in *Ex parte Hamper* (17 Ves., 403), where he said, "The question whether the joint commission can be supported, turns upon two or three circumstances, first, whether Thomas and Rogers were partners, not upon the present state of the agreement between them, as they may clearly agree that all the property which is the subject of that agreement shall be the property of one exclusively, but that the other shall participate in the property arising from it. The cases have gone farther to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration, that if a trader agrees to pay another person for his labour in the concern, a sum of money even in proportion of the profits, equal to a certain share, that will not make him a partner; but, if he has a specific interest in the profits themselves as profits, he is a partner." And again at page 412 he said, "Thomas is clearly a partner as to third persons; whether as between him and Rogers in a different consideration. The ground as to third persons is this. It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profit, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and in a question with third persons, no stipulation can protect him from loss." It had been urged that this was to be construed as only applying to cases where the party was entitled to a share of the gross profits. The ground of this was that in some other cases, the participation was in the gross earnings; but there was nothing in the judgment to warrant the supposition that in laying down the law as he did, Lord Eldon used the words otherwise than in their natural and legitimate sense, and his Lordship did not find that in any of the subsequent cases such a limited interpretation was put on Lord Eldon's words. It was also said that the opinion expressed by him was not called for, that it was to a certain extent extra-judicial. He could only state that the *dictum* of so eminent a judge as Lord Eldon, was of itself entitled to respect, and we did not find that it had been disapproved of. In *Ex parte Rowlandson* (1 Rose 91), the same judge said it was settled, "that if a man, as a reward for his labour, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is as to third persons a partner, and no arrangement between the parties themselves could prevent it." The former proposition was nearly identical with that in the case before the Court. It might be said that the distinction was fine drawn, but it appeared to be well settled. In the judgment of De Grey, C.J., it is a distinction not more nice than usually occurs. Then in *Heyhoe v. Burge*, Lord Wensleydale in charging the jury said, "Sometimes cases arise in which a person, although he is taking a share of the profits, is not a partner for some purposes; such, for instance, is the case in the whale fisheries; it is well known by per-

sons conversant with that trade, that the master, the mates, and the seamen all take a share in the ultimate profits of the voyage, proportioned to their rate of wages; but that does not constitute them partners, so as to render them liable for articles supplied in the equipment of the vessel; it is only a mode of remunerating them for their services; but where a person stipulates for a share in the net profits of a concern, and has a right to an account of the net profits as a partner, he is liable, although the partnership is limited to a single transaction or adventure." The words "ultimate profits" there would seem to refer, not merely to the amount of fish caught, but of the net profits. Let us consider how far the principle in this case was applicable here. By the agreement, there was not only a share of £500, but the provision for participation in profits was expressly stated to be his remuneration for service. If it stood on the first paragraph alone, there could be no question. [His Lordship read the first paragraph of the agreement.] This word "others" manifestly referred to what was mentioned in the second paragraph as a sum equivalent to the free profits. (His Lordship read the second paragraph.) Plaintiff's counsel had commented on the circumstance that the provision commenced as a distinct sentence, which he said shewed that the provision was for a different purpose, and of a different character from the provision for salary; but that was subsequently explained by the subsequent provision for ascertaining the profits, which could not have been intelligible if in the same sentence. They also contended that allowing £500 was putting the defendant on the same footing as the Wallaces, but that was not so, because the defendant's £500 was to be paid without reference to the profits, which might be insufficient to pay the Wallaces. Looking to the other provisions could it be said that the defendant was entitled to a participation in the profits *as such*? These words were used by the learned baron in his direction to the jury. If he was, he would be entitled to an account in the usual manner, to have his share ascertained and paid, and in default of an account and payment he would be entitled to file a bill in equity for an account and a receiver. But under the present agreement he had no such right. It appeared that the profits were to be ascertained by balance sheets, and at such several periods as the Wallaces should see fit. Under that they might wait until the expiration of the three years; and even if the profits were ascertained from year to year, the payment was postponed till the expiration of the term, and was then to be paid by three instalments. Besides, the liability on the agreement was merely personal on the part of the Wallaces. The defendant might, after the three years, perhaps file a bill in equity. His Lordship was just looking this morning in a case in 29th L. J. Ch., where on an agreement more favourable to the party than this, the Vice-Chancellor held that the servant must have the account taken, and therefore the balance was ascertained, but that in that bill he would not be entitled as an ordinary partner to a lien for his demand on the property of the firm, nor to a receiver. As to the defendant's position under the deed, the case of *Stocker v. Brockelbank*, in 3 M.N. & G., 250,

was not immaterial. By the deed there the plaintiff covenanted with the defendants, who were manufacturers, to serve them as manager of their partnership business during a certain term. By the indenture there were to be quarterly accounts of debts and credits for the purpose of ascertaining the amount of salary to be from time to time paid the plaintiff, and then it was covenanted that as a remuneration to the plaintiff for his services, he should within sixty days after the expiration of the term, be paid such a sum as should be equal to £40 per cent. on the net profits of the business, amounting to £2,100. He was to have the management of the concern, and there was a provision that the defendants, who were the former partners, were to terminate the engagement, if there was default on his part, by giving notice. The defendants did serve notice, and thereupon he filed a bill stating that there was no default by him, and praying for an injunction to restrain the defendants from excluding him. The injunction was granted by the Vice-Chancellor, and on appeal it was discharged, on the ground that the contract was merely one of hiring and service, and that the case would not constitute a partnership. There were one or two passages in Lord Truro's judgment which he would refer to. It was true the partnership sought to be established was one between the parties themselves, and there was a provision in the deed that nothing in it was to be taken to constitute a partnership; but Lord Truro went beyond that, and said—"The contract is in express terms one of hiring and service; and the question, therefore, is, whether in the absence of every incident of partnership, except that of sharing in the profits, that circumstance constitutes a partnership, and I am of opinion upon principle and authority that it does not. There is nothing in common between the parties, neither capital, liability, nor participation in loss. The plaintiff has neither the liability, nor the authority, nor the interest of a partner: he could not be joined as a plaintiff in any legal proceeding to assert the rights of the partnership, nor could he be made defendant in respect of any partnership liability." There was a distinct statement that the plaintiff would not be a partner as to third persons. It was true there was a provision in the deed against a partnership, but it was equally clear that if the other provisions would constitute a partnership as to third persons, the insertion of that proviso would not be sufficient. Well, he might also remark that in that case the plaintiff had extensive powers over the concern, but in the present case the defendant was bound to conduct the business under the Messrs. Wallace. Much reliance was placed on the case of *Greenham v. Grey*. In that case the instrument was held as between the parties to constitute a partnership, but it was enough to look at the provisions of it. The plaintiff was to have full control over the concern; he was to direct the management, see all the accounts, and then he was to receive £150 per annum, and one-fifth share of the profits. Nothing was said about this being remuneration only for services, and we found that the judges, Barons Greene and Richards, relied on the provisions to which he referred. Baron Greene said—"On the first clause *prima facie*, the plaintiff and defendant enter into a joint contract to carry on the trade, of which Mr.

Greenham is to have the entire control and management, and is not to enter into any other trade—that is, that he should confine himself to that trade, and not engage in any other.—(Read second clause as to the accounts.) I understand from this that the plaintiff and the defendant were both to be furnished with proper accounts, the one as well as the other, and certain particular charges are specially provided for; and then follows the proviso, "should it be considered advisable to extend the business." The word "advisable" I understand to be the language of both parties, and that each was to have a voice in the propriety of extending the business. So far, the terms of the contract indicate the relation of partners, and not that of master and servant." Baron Richards relied on the circumstance that there were provisions which it was impossible to reconcile with the relation between the parties being that of master and servant, for he said—"If there be a difference of opinion, is the opinion of the servant to overrule that of the master? The plaintiff agrees not to enter into what? into any other trade;—this shews that the plaintiff contemplated he was entering into a trade. The plaintiff had the right to dismiss or employ all persons as he chooses. This is a very unlimited and exclusive power, and one which a master would hardly give a servant, thereby depriving himself of his authority as master, and that without any adequate reason." It was plain that that case was no authority for the plaintiff. In *Cheap v. Cramond* (4 B. & Ald. 663) it was held that the plaintiff was a partner as to third persons with a house in America, but the agreement there was simply to divide all commission upon certain sales. There the only circumstance was the participation of profits. *Barry v. Nesham* (3 C. B. 641) went on the same principle; and in *Heyhoe v. Burge* (9 C. B. 431) the agreement was to give in consideration of circumstances not merely some equivalent to profits, but a certain share of profits. That did not fall within the principle laid down by Lord Eldon, and from the evidence in that case and the observations made by Parke, B., in charging the jury, it was rather an authority for the defendant in this case. On those grounds the Court had come to the conclusion to discharge the conditional order. The question turned really on the deed, and as to that the Court thought the verdict should stand, and that the conditional order should be discharged with costs.

HAYES, J., and FITZGERALD, J., concurred.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

McELVY V. CONNELLAN.—May 26.

Production of documents—Privileged communication
—16 & 17 Vic., c., 118, sec., 64—19 & 20 Vic., c., 102, sec., 55.

The plaintiff having been dismissed from his situation of hatchman in the prison of the Marshalsea, in

consequence of a certain report made by the Inspector General of Prisons to the Lord Lieutenant, brought an action for a libel contained in said report, against the defendant, the said inspector-general. On application to the Court for an order that the defendant should furnish to the plaintiff, certified copies of all minutes and notes in the power, possession, or procurement of the defendant, of the evidence of the several witnesses at the investigation, upon which said report was founded, as also a certified copy of said report, it was held, that the said several documents were privileged communications, and that the motion should be refused with costs.

THIS was an application for an order, that the defendant do furnish, to the plaintiff, certified copies of all minutes and notes in the power, possession, or procurement of the defendant, of the evidence respectively of the plaintiff; and also of Eliza Connolly, John Armstrong, William Kelly, Laurence Dillon, and John Skelton, whom the defendant in his several defences to the first and second counts, respectively, says he examined on oath as witnesses, and also a certified copy of so much of the defendant's report in his said defences mentioned as appertains to the investigation of said defences referred to, or to the conduct of the plaintiff, as hatchman in the Four Courts Marshalsea, and such other parts of said report, if any; and all such other writings or documents as the defendant intends to rely on, in support of his defence at the trial of this action.

The action was brought by the plaintiff, a hatchman in the Marshalsea, against James Corry Connellan, an inspector-general of prisons, for a libel contained in a report made by the defendant to the Lord Lieutenant. The summons and plaint complained, "for that before and at the time of the committing of the grievance hereinafter complained of, the plaintiff was a hatchman and door-keeper in the marshalsea, of the city of Dublin, and thereby gained and earned considerable emoluments and salary for discharging the duties of such situation, and whilst plaintiff was so engaged and employed, the defendant falsely and maliciously wrote and published of, and concerning the plaintiff, and of, and concerning him in his said employment, the following false and libellous words, that is to say, 'I find that John McElveny (meaning thereby the plaintiff) has been guilty of aiding, assisting, and assenting in a fraudulent transaction, and corrupt bargain with Dillon, by consenting to subscribe part of the hush-money, and for giving part of the hush-money to prevent and keep back the witnesses;' (meaning thereby that plaintiff had been guilty of giving money to keep back evidence against himself on a certain enquiry, which had been theretofore held concerning alleged misconduct and violation of duty, as such hatchman and doorkeeper, by the said plaintiff.) by reason of which false and malicious libel, the plaintiff was dismissed from his employment as such hatchman as aforesaid, and otherwise greatly injured in his character and reputation, to the plaintiff's damage of 300*l*. And the plaintiff further complains, that whilst so employed, as in the first count mentioned, the defendant falsely and maliciously wrote and published of and

concerning plaintiff, and of and concerning him in his said employment as hatchman, the following false and defamatory words, that is to say—"If those hatchmen, namely—John Skelton, John Armstrong, and John McElveny' (meaning thereby the plaintiff) 'are not removed it will be impossible to carry out the discipline of the prison,' (meaning thereby that by the misconduct of the plaintiff, and violation of prison rules, that plaintiff was an unfit and improper person to be continued in said employ of hatchman,) and by reason of said libel, the plaintiff was dismissed from his employment, and otherwise greatly injured in his character and reputation, to the plaintiff's damage of £300. And plaintiff prays judgment against the said defendant, to recover the said several sums of £300 and £300 making together the sum of £600, and his costs of suit."

To the above plaint the following defence was filed. "The said defendant appears, and takes defence to the action of the plaintiff, and says as to each of said counts, distributively, that he did not publish in manner and form, therein respectively alleged.—And for a further defence to the said first count, the defendant says that before, and at the time of the publication, in said count alleged, the plaintiff was a hatchman, in the Four Courts Marshalsea Prison in Dublin, and by virtue of the statutable enactments in that behalf, removable from his position as such hatchman, at the will and pleasure of the Lord Lieutenant of Ireland; and says that the defendant was at said time one of the Inspectors-General of Prisons in Ireland, and that it was the duty of the defendant as such inspector-general, by virtue of the statutable enactments in that behalf as often as he should see fit, to visit among others, the Four Courts Marshalsea Prison, and to examine concerning the due performance of the rules and regulations prescribed, and required to be observed therein respectively, and also concerning all matters connected with the discipline, or regularity thereof respectively, and to examine on oath all persons concerned therein, and also all other persons whom he should think proper so to examine, touching any matters concerning the said Four Courts Marshalsea Prison, and it was also the defendant's duty to report thereupon to the said Lord Lieutenant. And the defendant says that before said publication, defendant in discharge of his duty as such inspector-general of prisons, duly held an investigation in the said Four Courts Marshalsea Prison, concerning certain matters connected with the discipline and regularity thereof, and on the said investigation examined on oath, certain witnesses, and among others the plaintiff, Eliza Connolly, John Armstrong, William Kelly, Laurence Dillon, and John Skelton, and that on the said investigation, the said witnesses gave evidence on oath, which the defendant believed to be true, and which satisfied the defendant, as such inspector-general, that the plaintiff aided and assisted, and assented in a fraudulent transaction, and corrupt bargain with Dillon in said count named, by consenting to subscribe part of the hush-money, and for giving part of the hush-money to prevent and keep back the witnesses, and that the plaintiff had been guilty of giving money to keep back evidence against himself, on the enquiry in said count, in this behalf mentioned.

And the defendant says, that after the termination of the said investigation, he in further discharge of his duty, as such inspector-general of prisons, wrote a report of such investigation, and the evidence taken thereat to the Lord Lieutenant, and in the said report wrote and published the words in the said first count mentioned, and in the sense thereby imputed, which is the publication by said first count complained of, and the defendant says that he wrote and published the said report, and the said words contained therein upon the occasion and under the circumstances aforesaid, and solely in performance of his duty as Inspector-General of Prisons, and that he wrote and published the same in good faith and without malice, and believing the said words to be true in substance and in fact.—And for a further defence to the second count, the defendant says, that the plaintiff being such hatchman, and the defendant such inspector-general, as in the last defence mentioned, the defendant, in the discharge of his duty as such inspector-general, held the investigation and examined the witnesses in the said defence mentioned, and that on the second investigation the said witnesses gave evidence on oath, which the defendant believed to be true, and which satisfied the defendant, as such inspector-general, that if the hatchmen in the said second count mentioned were not removed, it would be impossible to carry out the discipline of the prison, and that, by the misconduct of the plaintiff and violation of the prison rules, the plaintiff was an unfit and improper person to be continued in said employ of hatchman; and the defendant says, that after the termination of the said investigation, he, in further discharge of his duty as such inspector-general of prisons, wrote a report of the said investigation and the evidence taken thereat to the Lord Lieutenant, and in the said report wrote and published the words in the said second count mentioned, and in the sense thereby imputed, which is the publication by said second count complained of, and the defendant says, that he wrote and published the said report and the said words contained therein upon the occasion and under the circumstances aforesaid, and solely in performance of his duty as inspector-general of prisons, and that he wrote and published the same in good faith and without malice, and believing the said words to be true in substance and in fact, and therefore he defends the action."

On the 9th of May, 1864, the plaintiff made the following affidavits, which were used in support of this motion:—"That in the month of May, 1858, deponent was appointed to a situation in the Four Courts Marshalsea Prison, in the city of Dublin, and was afterwards in due course of advancement appointed to the situation of hatchman in the said prison, and continued duly discharging the duties of the said employment until the 9th June, 1863, when he was summarily dismissed therefrom in consequence solely, as deponent verily believes, of a certain report in writing, made by the defendant as inspector-general of prisons, and by him forwarded to his Excellency the Lord Lieutenant; and deponent was dismissed without a day's notice and without being apprised of the grounds of such dismissal, and without any opportunity given of explaining as to any imputation against him.—Saith deponent is not conscious of ever having

committed any breach or default of his duties as such hatchman, or done any other act to justify or afford reasonable cause for such dismissal, or for the imputations against him which are complained of in this article. Deponent saith that the said report of the defendant, was made in or about the month of June, 1863, and contained as deponent verily believes the words and statements in the summons and plaint alleged, as defamatory against deponent; and this deponent has not any copy of the said report, but he verily believes that the defendant has now in his power or possession a copy of the said report, or could upon application to the proper authorities, procure the said report or a copy thereof; and deponent believes a disclosure of the contents of said report, so far as appertains to the conduct of deponent, and other persons employed as hatchmen, at the same time at said prison, and such part thereof deponent intends to rely upon at the trial, would be most material and necessary for enabling deponent to adequately prepare for trial, and in order to have ample justice done between the parties, saith that the defendant in his special defences to the two several counts of the summons and plaint, has pleaded to the effect of justifying the said statements so made in his report as made in discharge of his duties as Inspector General of prisons, and has alleged that he published the words in good faith, and without malice, and believing the words to be true in substance and fact; and states that he wrote a report to the Lord Lieutenant, of a certain investigation, and of the evidence taken thereat, and in the said report wrote and published the words in question. Saith that the defendant in his said several defences states, that upon the said investigation, he examined on oath six witnesses, whom he names; and that they gave evidence on oath, which the defendant believes to be true, and which satisfied the defendant as such Inspector General, that deponent had been guilty of the matter charged against him by the said report; but the defendant does not otherwise set forth or state what were the grounds or what was the precise evidence so given which did so satisfy him, the defendant. And deponent positively saith, that deponent was present at the giving of part of the evidence referred to in said defence; and while deponent was so present, deponent saw that the evidence was taken down in writing; and deponent believes that the entire of the said evidence of said six witnesses was in like manner taken down in writing at said investigation; and the said written evidence is now in the power or possession of the defendant; and deponent believes that the said written evidence of the said witnesses together with the said report, is preserved and is recorded in a certain book in the Castle of Dublin, to which defendant has access. And deponent verily believes that the said written evidence, if produced, would sustain deponent's case upon the merits in this action; and would show that any charge or imputation made against deponent, at said investigation warranted from a source which rendered it totally unworthy of weight and credit, and was made under circumstances well known to defendant, at and by means of the said investigation, and which could satisfy a jury, (as deponent verily believes) that the report so made by the defendant, so far as it affected deponent, was not made in good faith; but was made

without any probable cause. Saith that deponent is advised and verily believes he has a good and substantial cause of action on the merits in this case; and he verily believes that the true facts and circumstances as disclosed by the evidence in writing hereinbefore mentioned, will so establish. And deponent is advised and believes he cannot safely, or fairly proceed to trial in this cause; or be properly prepared in point of evidence, without having previously a disclosure of the contents of said report, and of the written notes of the evidence of said witnesses. Saith that by the innuendo in the first count of the said plaint it is represented, as if at a time previous to the investigation, at which said witnesses were examined as aforesaid, an enquiry had been held concerning alleged misconduct and violation of duty by deponent, whereas no enquiry had been ever theretofore held as to any alleged misconduct or violation of duty on the part of deponent; but in fact the enquiry intended to be referred to was an enquiry into certain charges of misconduct alleged against one John Armstrong, who was also a hatchman of said Marshalsea, and on which charges the said Armstrong was acquitted, which enquiry took place in the month of December, 1862. Saith that the mistake in said innuendo, occurred solely as deponent believes from deponent's then attorney, having mistaken that part of deponent's case, and having given erroneous instructions in that particular to the counsel who prepared the said plaint. Saith he is informed and verily believes, that on the 28th day of April last, a written notice in this cause was served upon the defendant's attorney, requiring within one week certified copies of all minutes and notes in the power, possession, or procurement of the defendant, of the evidence of the said witnesses in said defence to the first count mentioned; and also a certified copy of the said report, but to which notice no answer has been received. And deponent refers to the copy of the said notice marked "A" and on which deponent has endorsed his name.

In answer to this affidavit, the defendant filed the following, dated the 21st of May, 1864:—"That I am the defendant in this action. That the plaintiff in this action was in the month of May, 1863, one of the hatchmen of the Four Courts Marshalsea in the city of Dublin, and by virtue of the statutable enactments in that behalf was removable from his situation of hatchman at the will and pleasure of the Lord Lieutenant. That I am one of the Inspectors-General of Prisons in Ireland appointed under the Act for consolidating and amending the laws relating to prisons in Ireland, and that amongst other matters it is my duty as such Inspector-General, under the provisions of the said Act, to visit among other prisons the said Four Courts Marshalsea Prison, and to examine concerning the due performance of the rules and regulations prescribed and required to be observed therein, and also all matters connected with the discipline or regularity thereof respectively, and to examine on oath all persons concerned therein, or holding any other office therein, and also all other persons whom I may think proper so to examine, touching any matters concerning the said Four Courts Marshalsea Prison, and it is also my duty under the said Act to report thereupon to the said Lord Lieutenant. That before the writing

and publication of the alleged libel complained of in the summons and plaint in this action certain complaints of misconduct in the said Four Courts Marshalsea having been brought to my knowledge, I, in discharge of my duty as Inspector-General of Prisons, in the month of May, 1863, held an investigation at the said Four Courts Marshalsea Prison concerning certain matters connected with the discipline and regularity of the said prison, and at the said investigation I examined upon oath touching the said matters several witnesses, and among others the plaintiff, and the several persons named in my second defence to the first count in this action. That after the conclusion of the said investigation in further performance of my duty I wrote to the Lord Lieutenant a report of the said investigation, and the evidence given on oath thereat, and the plaint does not in terms refer to said report, defendant has no doubt that the action is for statements supposed or assumed by plaintiff to be in said report. I say that I wrote the said report, and sent it to the Lord Lieutenant solely in discharge of my duty as Inspector-General, as I was bound to do. And (as to the part of said affidavit, in which plaintiff alleges his belief that the said written evidence, if produced, would sustain plaintiff's case upon the merits in this action, and would shew that any charge or imputation made against plaintiff at said investigation, emanated from a source totally unworthy of weight and credit, and was made under circumstances well known to defendant at and by means of the said investigation, and which could satisfy a jury as plaintiff verily believes that the report so made by the defendant, so far as it affected deponent, was not made in good faith, but was made without any probable cause.) I say that I framed the said report on the evidence so given on oath by the said witnesses before me upon the said investigation, and upon that evidence alone, which evidence I believed to be true to the extent to which I grounded my report of it, and which evidence, so far as it affected the plaintiff, I believed to be true, and that I was not, at the time of said investigation, or at any time since, nor am I now aware of any circumstance to induce me to doubt said evidence, so far as it affected the plaintiff. And I say I do not believe that by any of the means, or for any of the reasons by said affidavit of the plaintiff suggested, or by any other means, or at all, a jury could or would ever be satisfied, or suppose that said report, so far as it affected plaintiff, or at all was not made in good faith, but was made without any probable cause. And I say that there was not only probable cause according to the best of my judgment and belief, for my making said report, but it would have been a dereliction of my duty if I had not made it as I did.—I say I made said report, so far as it affects the plaintiff and otherwise, in all its parts without malice and in good faith, and with a belief of its truth in substance and in fact, and solely in discharge of my duty as Inspector-General, and that the said report was not published further or otherwise than by so communicating it to the Lord Lieutenant as aforesaid, and I am advised and believe that the plaintiff is not entitled to the discovery he seeks, and that I should, if a trial takes place, rely on the said plea denying publication, and it is my intention to do so.

Phillips in support of the motion—This application is made to the Court under the 64th section of the Common Law Procedure Act. That section makes it lawful for any party to demand the “production, inspection, or copy of any other deed or instrument whereof inspection could be obtained by a bill of discovery; and such copy, when furnished, shall be certified to be a correct copy by the attorney furnishing the same; and in case such copy shall not be delivered, or such inspection or production shall not be granted, the party demanding same shall be at liberty to apply to the court or a judge for an order for such copy, or inspection or production, or copy and inspection and production, as such judge shall think fit.” The question, then, for the consideration of the Court is simply this—Would an inspection be attainable by a bill of discovery of the documents here sought for. It is submitted on the authorities that such would be attainable. In the second edition of Wigram on the Law of Discovery, page 46, the proposition is laid down that “it is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff’s case about to come on for trial, and which the defendant does not, by his form of pleading, admit;” and it is said at page 217 of same book that “when the relevancy of documents to the plaintiff’s case is admitted, that the defendant cannot, merely by denying the effect of such documents, protect himself against an order for producing them, or in other words, that when the relevancy of documents to the plaintiff’s case is admitted, the plaintiff is the party to judge of their effect.” The plaintiff then insists that those documents here sought for are essential to the plaintiff’s case. *Luscombe v. Martin* (7 Ir. Jur., 24, Ex.) was an action upon a guarantee, and the defendant applied to the Court that he should be furnished with a copy of the document by the plaintiff, stating in his affidavit that he had no copy of the guaranty in his possession, and that he was advised and believed that the production of the instrument might be material to his defence; and the Court granted the motion, although it appeared that the instrument had been prepared by and was in the handwriting of the defendant, who was a solicitor.—*Perrit v. Morris* (1 Ir. Jur., N. S., 334). There the marginal note says that in an action of libel the Court will grant an inspection of the letters in which the alleged libel is contained; and Monahan, C. J., says that to produce documents of this kind is in every case a furtherance of justice, and that he, for one, was always anxious to give a liberal construction to the section; and in *Lynch v. Creagh* (7 Ir. Jur., 268), in an action for libel, where the defendant was unable to procure a copy of the document, which was lodged in a public office, the plaintiff was obliged to give a copy of his copy.—Upon the authority then of the above cases, we insist that we are entitled to the inspection of the several documents sought for,—but even assuming that discovery would not be granted, and, that, therefore, the documents could not be obtained under the 64th section of the Common Law Procedure Act of 1853, yet even so, under the 55th section of the Procedure Act, of 1856, we are entitled to demand and obtain the docu-

ments now sought for. That section goes much further than the 64th and is much larger, for that section applies to all documents which the party is entitled to the production of, for the purpose of discovery, or otherwise the 55th section enacts that “upon the application of either party to any action, suit, or other civil bill proceedings in any of the superior Courts, upon an affidavit by such party of his belief, that any document, to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or judge to order that the party against whom such application is made, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody, they or any of them are in, and whether he or they objects or object (and if so upon what grounds) to the production of such as are in his or their possession or power; and upon such affidavit being made, the Court or judge may make such further order thereon as shall be just.” This last section is a verbatim transcript of the 50th section of the second English Procedure Act of 1854, (17 & 18 Vict., c. 125, s. 50, upon which several decisions have been made. *Hill v. Great Western Railway Company* (10 Scott’s C. B., N. S., 148)—that was an action by a superintendent against a railway company for improperly dismissing him from their employment, and it was there held that the plaintiff was entitled to have an inspection of all minutes or entries in the company’s books having any reference to the plaintiff’s employment: But the main objection that will be presented on the other side is, that the documents sought for will be a disclosure of the defendant’s case, that, however, can be no objection, and so it was held in *The London Gaslight Company v. Chelsea* (6 C. B., N. S., 411), the marginal note there says, “that it is no objection to an order under the 14 & 15 Vict., c. 99, s. 6, for the inspection of a document in the possession of a defendant that its production will disclose his case, provided that it be satisfactorily shown that it also supports the plaintiff’s case; so also in *Steadman v. Arden* (15 M. & W. 587), which was an action by an allottee of railway shares against a member of a provisional committee, to recover back his deposit, the court ordered that the plaintiff should have an inspection and copy of the subscribers’ agreement, and parliamentary contract, which both the plaintiff and defendant had signed, and which were in the hands of the solicitors of the company; the plaintiff’s affidavit stating that an inspection was necessary to him for the purpose of the framing his case, and the defendant shewing that they were not in his power or control. [*Fitzgerald, B.*—You do not show in your affidavit that you have taken any steps to procure the documents you require the defendant to produce]. We swear that the defendant took the evidence, and we have traced it to him, and we charge that if he have not the evidence, he can get it. [*Fitzgerald, B.*—Must not the party making the application show that he himself cannot procure it elsewhere?] The defendant’s answer is, that he sends us about the world to fish for it. [*Fitzgerald, B.*—No, he tells you that it is in the Castle]. The defendant is not bound to go out of his way to get

the documents; we, as of right, demand the production, inspection or copy of those documents under the 64th section of the Procedure Act of 1853, or under the 55th section of the Common Law Procedure Act of 1858—*Germaine v. Athenæum Life Insurance Company* (1 Ir. Jur., N.S., 331) was an action on a policy of insurance; the defendant pleaded that several representations were made by the insured at the time of effecting the answer which were false and untrue, and that therefore the policy was void. Upon an application by the plaintiff, that copies of representation might be furnished, or that the plaintiff might be at liberty to inspect them if any such existed, it was held that the defendants were bound to furnish their documents.

Clarke, Q.C., with Waters, contra.—The defendant resists this application on several grounds, the principal one of which is, that the documents sought for are state secrets, and therefore are privileged from being inspected by the plaintiff. The defendant here is inspector general of prisons, and by the 55th section of the Grand Jury Act, 7 G. IV. c. 74, the counties in Ireland are apportioned into two circuits, the prisons of which shall be visited yearly by an inspector-general; by the 59th section, it is enacted that, "it shall and may be lawful for the said inspector-general or either of them, from time to time, whenever and so often as they shall see fit, to visit any jail, bridewell, madhouse, marshalsea, or other prison in Ireland, and to examine concerning the due performance of the rules and regulations prescribed and required to be observed therein respectively, and also concerning all matters connected with the expenditure, discipline, or regulating thereof respectively, and to examine on oath all persons concerned therein, or holding any office or emolument therein, and also all other persons whom they shall think proper so to examine touching any matters concerning any such jail, bridewell, or other prison; and it shall and may be lawful for either of said inspectors-general, and they are hereby severally empowered and required to report thereupon to the Lord Lieutenant, or other chief governor or governors of Ireland, or to the Court of King's Bench, or judges of assize, whensoever they shall have occasion so to do." By this section of the Grand Jury Act, the defendant was justified in examining witnesses, and in making his report as such inspector to the Lord Lieutenant; it is then submitted that the evidence given in such examination of witnesses is a state secret; and if such evidence were admitted, it would be the ground of an exception. In Taylor on Evidence, par. 866, where the cases are all collected, it is said that the official transactions between the heads of the department of government and their subordinate officers, are, in general, treated as secrets of state; for example, the report of a military commission of enquiry made to the commander in chief—*Cook v. Maxwell* (2 Stark. R. 183). Thus also the communication between a colonial governor and his attorney-general, on the condition of the colony, on the conduct of its officers, or between such governor and a military officer under his authority; the leading case as to when communications are privileged on the ground that they are secrets of state, *Home v. Bentick* (2 Brod. & Bingham, 130); the marginal note of that case is—"The commander in

chief of the army, having directed an assemblage of commissioned military officers, to hold an enquiry into the conduct of H. a commissioned officer in the army; and H. having sued the president of the inquiry for a libel stated to be contained in a report thereupon made. Held, that this report was a privileged communication; that it was properly rejected in evidence at the trial, and that an office copy of same was also properly rejected." The one narrow point here for the consideration of the Court is, are the documents sought for privileged communications? privileged on the ground that they contain state secrets; then supposing them not to contain state secrets, can the plaintiffs call upon us to produce a document equally accessible to him as it is to us, for in his affidavit, he alleges that he believes that the evidence is recorded in a book, in a certain book, in the Castle of Dublin. [*Fitzgerald, B.*—Your affidavit does not deny that you have a copy of the document in your possession.]

Serjeant Armstrong followed on the same side.—This a privileged communication on subjects connected with state affairs. In *Black v. Holmes* (1 Fox and Smith, 29.) the plaintiff being a merchant in the town of Sligo, addressed a letter to the commissioners of customs on revenue business, and stated that he sent this communication direct to them, instead of sending it through the defendant (who was collector of the post) in consequence of recent declarations of ill will, connected with the mercantile transactions expressed towards him by the collector of the post. The commissioners of the customs enclosed this letter to the defendant, and required an answer to the allegation contained in it. The defendant's letter to the commissioners giving the answer required, contained the alleged libel. Held, that the letter of the defendant was a privileged communication, and not admissible in evidence. If then the documents sought for are privileged communications and not admissible in evidence, neither are they now to be got at under the 64th or 50th section, of the first or second Common Law Procedure Act; the Court will therefore refuse the application.

Phillips, in reply.—Even supposing the documents to be privileged, and to be recorded in a book in the castle, still, under the 50th section of the Procedure Act, of 1866, we are entitled to see a copy thereof, now in the defendant's possession; and the Court will take notice of the fact, that it is not denied that the copies are in the defendant's possession, and plaintiff actually swears they are in his possession. On the point that those documents were privileged communications,—it can not be held that they were privileged. In the case of the *Seven Bishops*, (4 State Trials, 342), the clerk of the privy council was compelled to state what passed in the council chamber, nay, what was said by the king himself, although the counsel for the Crown resisted it most strenuously. The same evidence was also allowed to be given in *Lord Stafford's case*, (1 State Trials, 727). And notwithstanding the oath administered to the collector of the property box by the commissioners, that he will not disclose anything he hears in that capacity, except by their command, or by virtue of any Act of parliament, he is bound when subpoenaed as a witness to give evidence

of all facts within his knowledge touching the matter in question.—*Lee v. Birrell* (3 Campl. 337), the case of *Robinson v. May*, (2 Smith, 3) proves that if a communication to the government be false and malicious, it may be the subject of an indictment or an action.

May 27.—*PICOT, C.B.*—In this case, which was at hearing yesterday, it appears to me that we cannot yield to the application; the reasons that influence my mind are very short. We are here called upon to enforce the production of certified copies of all minutes and notes in the power, possession, or procurement of the defendant of the evidence of certain persons examined on an investigation that took place in the Four Courts Marshalsea; and also a certified copy of so much of the defendant's report in his said defences mentioned, as appertains to the investigation of the said defences referred to, or to the conduct of the plaintiff as hatchman in the Four Courts Marshalsea, and such other parts of said report, if any; and all such other writings or documents, as the defendant intends to rely on, in support of his defence at the trial of this action. In *Home v. Bentick* (2 Brod. and Bing. 130), where the commander in chief directed an assemblage of commissioned military officers, to hold an enquiry into the conduct of an officer, who afterwards sued the president for a libel stated to be contained in a report thereupon made, it was decided that the report was a privileged communication; and Chief Justice Dallas in giving judgment in that case says, p. 163, that "the report in its very nature was a confidential communication, in consequence of a direction of the commander-in-chief, for the information of his own conscience in the exercise of his public duty, as to whether he should suffer the plaintiff to condemn an officer or not. Now what is the proceeding, but consulting with those who are bound to give the advice which is required as to the exercise of a public duty—and whether the case be that of an attorney-general of a province during a governor, or of an officer present at a Court of inquiry directed to be held by the commander-in-chief, it is equally a case of advice and information given for the regulation of a public officer." In the case before us an inquiry is held by the inspector general of prisons, in the exercise of his duty with a view to ascertain the state, discipline, and condition of the prison of the Marshalsea. In the case of *Anderson v. Hamilton*, (2 Brod. & Bingh., 156, note b.), Lord Ellenborough refused to admit in evidence, the contents of a letter written by an agent of government in one of the colonies (Heligoland) to Lord Liverpool, then secretary of state or his Lordship's answer. In that case Lord Ellenborough treats official communications made to the secretary of state, as secrets of state, which were not to be taken out of the hands of his majesty's confidential servants. I think the report of the defendant, and the copy thereof, is within the privilege of *Home v. Bentick*. If the defendant held an inquiry without having to report confidentially as in this case, and had notes of the evidence in his possession, I think the plaintiff would be entitled to get a copy of them, such notice would be the exclusive property of the defendant, as in the case of title deeds, it would be evidence not for defendant alone, but for both parties.

FITZGERALD, B.—I agree with my Lord Chief Baron that the documents sought for are privileged communications. It appears to me that the application is under the 64th section of the Act of 1853, the Common Law Procedure Act. I am further of opinion that the plaintiff does not show himself sufficiently interested in the document, or that it is evidence for him.

DEASY, B.—I also concur, that the Court ought not to yield to the application. I am of opinion that the documents sought for were not of such a nature that their production should be ordered by the Court, and that the Government as the guardians of the public should insist on keeping them secret.

Application refused with costs.

MOYNEHAN v. BARRY—May 30.

Action for malicious prosecution—Pleading.

A summons and plaint for malicious prosecution which pleaded matters of evidence by way of inducement was Held bad.

THIS was an application to set aside the second count of the summons and plaint, on the ground that same was framed to prejudice and embarrass the defendant, inasmuch as it contained averments of matters of fact by way of inducement, which were not properly so pleadable, and which being so pleaded by inducement are not properly traversable, and inasmuch as the admission of the truth thereof would prejudice the defendant at the trial of the cause. The plaint consisted of two counts; the first count was for trespass in breaking and entering plaintiff's lands. The second count, which it was now sought to set aside, was for malicious prosecution, and was as follows:—"That the plaintiff was in the possession of his said lands, in the said first count mentioned, and defendant forcibly attempted to expel plaintiff therefrom, and plaintiff in defence of his said possession, did necessarily and rightfully assault the defendant, and the defendant well knowing that the plaintiff's necessarily and rightfully assaulted him the defendant in defending his, the plaintiff's, said possession of said lands, against and from the said attempted forcible expulsion of plaintiff therefrom by said defendant, and the plaintiff did necessarily and rightfully commit said assault in the actual defence of his said possession against the said defendant; yet the defendant maliciously intending and continuing to harass, oppress, and injure, the plaintiff did falsely and maliciously, and without any reasonable and probable cause, cause and procure a summons to issue, and be served on the plaintiff, charging plaintiff criminally with an assault on defendant, and requiring plaintiff to appear before the magistrates at the Middleton Petty Sessions, to answer said charge, and which summons the said defendant falsely and maliciously, and without any reasonable or probable cause, caused and procured to be signed by a magistrate having jurisdiction over plaintiff, and over said criminal charge,

and said magistrates at said petty sessions also had jurisdiction to entertain said charge against plaintiff; and plaintiff further says that said defendant afterwards attended the hearing of said summons before said magistrates at said petty sessions, and falsely and maliciously, and without any reasonable or probable cause, caused and procured the said magistrates to return to Middleton Quarter Sessions, being the proper Quarter Sessions, having jurisdiction over plaintiff, and over said charge; defendant's information on oath, falsely, maliciously, and without reasonable or probable cause, charging plaintiff with such offence; and defendant falsely and maliciously, and without any reasonable or probable cause, caused such proceedings to be had and taken at said Quarter Sessions in the prosecution of said charge against plaintiff; that plaintiff was given in charge at said sessions to a petty jury, and was tried before Daniel Ryan Kane, Esq., the Chairman at said Quarter Sessions and said jury for said offence, but was by them duly acquitted of said offence, and said proceedings are fully determined and at an end, and plaintiff necessarily incurred great expenses and costs, to wit, £20 in and about his said defence, and is greatly injured in his credit and circumstances to plaintiff's damage," &c.; then follows counsel's signature to the above plaint.

E. Barry appeared in support of the motion.—This pleading is bad: it pleads matters of fact by way of inducement, and further, it pleads evidence; and it is well known law that traverse is not to be taken on matters of inducement; that is, matters brought forward only by way of explanatory introduction to the main allegations—Stephen on Pleading, 208. In 6 Comyn's Digest Pl. G. 14, it is said that a traverse of an inducement is bad. If then it is not open to the defendant to traverse the inducement, he must admit it, for by the 86th section of the Common Law Procedure Act, all facts stated in any summons and plaint and not denied in the defence, shall be deemed to be admitted for the purpose of the suit. Again the plaint is vicious in pleading evidence; evidence shall never be pleaded—Stephen on Pleading, 263; where all the authorities on that point are collected from the earliest times—*Digby v. Alexander* (8 Bingh. 416).

O'Reardon, contra.—This plaint may with great ease be traversed, and an issue knit; the plaint simply states facts, and that is the system of pleading that it was the object of the Common Law Procedure Act to introduce.

Pigot, C.B.—The summons and plaint is open to all the vices which the defendant's counsel insists upon; first, it is pleading evidence by way of inducement, but its chief vice is that there is no connexion between the inducement and the complaint. Grant the motion in the terms of the notice.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

IN THE MATTER OF THE ESTATE OF ALEXANDER COLLIS, OWNER; THOMAS BREHON, AND NICHOLAS WADE MONSERRAT, PETITIONERS.—May 10.

Jurisdiction—Principles upon which the Court will order a reconveyance of land which it ought not to have conveyed.

The Court will not re-open a question of title to lands sold and conveyed by it unless upon clear evidence, that it has conveyed lands which ought not to have been conveyed through the fraud, negligence, or misconduct of the party having the carriage of the sale, in which case, the Court has jurisdiction to compel a reconveyance, or award compensation; but when the Court is called upon to exercise this jurisdiction, there must be a real and substantial pecuniary grievance to redress.

THIS was a motion for an order that the owner and petitioners, or such of them as might be necessary parties, do execute a proper deed, conveying to Lieut. Colonel Charles Kearney that part of the lands of Ormond Rathcash, containing 6 perches or thereabouts, erroneously comprised in the map annexed to the conveyance of the said lands made by the Commissioners for sale of Incumbered Estates in Ireland to petitioners, bearing date the 26th January, 1854, and for which said owners and petitioners brought their ejectment against Michael Hart and Mary Hart in the Court of Exchequer in Ireland, on the 22nd June, 1863, the said Lieutenant-Colonel Charles Kearney, undertaking to demise said plot of ground to said Michael Hart and Mary Hart, for the same term as they held the same under lease dated 29th July, 1847 and for the costs of the motion. It appeared that by lease bearing date the 29th day of July, 1847, Lieut. Colonel Charles Kearney, being then seised in fee, demised to Edmund Hart part of the lands of Ormond Rathcash, in the County of Kilkenny, then in possession of the said Edmund Hart, containing 67a., 1r., 37p. Irish plantation measure, described in a map annexed to said lease; and the piece or portion of ground hereinafter mentioned to have been conveyed by the Commissioners of the Incumbered Estates Court to petitioners, Thos. Brehon and Nicholas Wade Monserrat, was comprised in said lease and map, and was so found by the jury upon the ejectment as hereinafter mentioned. Edmund Hart had been in possession of said piece of ground, as tenant to said Lieutenant-Colonel Kearney, for many years before said lease of 1847, and on the death of said Edmund Hart, his widow and son Michael Hart, who became entitled-continued in possession down to the time of the recovery of the judgment in said ejectment, and such possession was so found by the jury. Alexander Collis, the owner, was entitled to a certain other portion of the lands of Rathcash, under a lease for lives renewable for ever, bearing date the 16th of April, 1756, but it was stated that the small portion of the plot of ground hereinafter mentioned was not included in said lease of the 16th April, 1756, and

that it was so found not to have been included therein by the jury. Alexander Colles being so seized of his portion of Rathcash, conveyed same some time in the year 1841, to said Thomas Brehon and Nicholas Wade Monserrat, as trustees of the said Alexander Colles' marriage settlement, to secure a certain sum of money advanced by them as such trustees. Thomas Brehon and Nicholas Wade Monserrat being so entitled as mortgagees of the premises, demised by the lease of the 7th of April, 1756, presented a petition in the Incumbered Estates Court on the 19th of February, 1852, for the sale of said premises so demised by the lease of the 16th of April, 1756. On the 17th of April, 1852, a conditional order was made for the sale of part of the lands of Rathcash, as demised by said lease of 16th April, 1756, which order was made absolute on the 12th of June, 1856. Pending the proceedings for sale, by indenture bearing date the 8th of February, 1853, and made between James Charles Kearney (who was then seized of the reversion of said lease of the 16th of April, 1756, of the one part, and said Alexander Colles, of the other part, said James Charles Kearney, granted in fee-farm to said Alexander Colles, the said lands, so demised by the lease of the 16th of April, 1756. By deed of conveyance bearing date the 26th of January, 1854, the Commissioners for the sale of Incumbered Estates in Ireland, in consideration of the sum of £450, ascertained to be due to Thomas Brehon and Nicholas Wade Monserrat, on foot of their incumbrances affecting said lands, conveyed to Thomas Brehon, and Nicholas Wade Monserrat, amongst other lands part of the lands of Rathcash, containing by estimation 19a., 1r., 34p., and described in a map annexed to said conveyance, and the 6 perches which formed the subject of the present application were included in the map annexed to the conveyance of the commissioners. Alexander Colles brought his ejectment in his own name, and in the names of said Thomas Brehon, and Nicholas Wade Monserrat, and of one Patrick Kelly, his tenant, on the 22nd of June, 1863, against said Michael Hart and Mary Hart, to recover the possession of these 6 perches; and Michael Hart and Mary Hart, on whom said ejectment was served, took defence, but the ejectment was not served upon the said Lieutenant Colonel Kearney, the landlord of said Harts. The ejectment came on to be tried before Mr. Baron Hughes, at the last Summer Assizes for the County of Kilkenny, and it was proved at the said trial by plaintiffs, and found by the jury, that the 6 perches were included in the map annexed to the conveyance of the 26th of January, 1854, from the Commissioners of Incumbered Estates to said Thomas Brehon and Nicholas Wade Monserrat, that it was not included in the original lease of the 16th of April, 1756, under which said Alexander Colles and his trustees derived title, and that it *had been in the exclusive possession* of the Harts for 35 years, and had been enclosed and planted by them. On these findings, counsel in the ejectment submitted on behalf of Hart that the conveyance from the Court for the sale of Incumbered Estates only passed to the said Thomas Brehon and Nicholas Monserrat what was included in the original lease of the 16th of April, 1756, but the learned judge ruled that said piece or plot of ground

being included in the map attached to the said conveyance, passed to Brehon and Monserrat thereby, and directed a verdict for the plaintiffs, which verdict was confirmed by the Court of Exchequer upon a new trial motion.

Warren, Q.C., and Ryan for Lieutenant-Colonel Kearney.

Flanagan, Q.C., for the purchasers under the conveyance from the Incumbered Estates Court.

JUDGE HARGREAVE gave judgment on the 23rd of May, and said—This is an application by Lieutenant-Colonel Kearney, calling upon the Court to compel the petitioners in this matter, who were also the purchasers of the property sold in it, to convey to him a small piece of land, containing something less than 10 statute perches, which he alleges was improperly included in their rental and conveyance. The petitioners were the only creditors who were paid out of the produce of the sale; and they obtained credit for their purchase money against their demand, which I understand was vested in them as trustees of the owner's marriage settlement. A case in many points similar to the present was decided in the Incumbered Estates Court (*In re Langley*). The case is not reported, and its authority is perhaps a little impaired by the circumstance of the appeal from the order having been compromised. I have endeavoured to learn the precise grounds on which the order in that case is based. I believe the principle may be stated thus—that if by any fraud, negligence, or other misconduct of the party having the carriage of the sale, he procures the Court to sell and convey to them property which ought not to have been sold or conveyed, the Court has jurisdiction to compel him to reconvey if the property remains in his hands, and to make good the loss by pecuniary compensation if the property has passed from him into the hands of a purchaser for value. And if it is made clear that a mistake has been made, the Court will presume misconduct unless and until the contrary be proved. In *Langley's case* there was negligence of this character; for the property in controversy was placed on the rental as being "The National School," a circumstance showing sufficient knowledge to put the solicitor on enquiry, and proving that no enquiry had been made. In the present case I am not satisfied that any conveyance has been made in excess of the owner's title, and the circumstances of the case conclusively negative misconduct on the part of petitioners or their solicitor. It appears that the property which the Court has conveyed includes a narrow strip of land (part of Rathcash), which terminates in a road passing through the townland. Colonel Kearney alleges that the portion of the strip which immediately adjoins the road to a depth of about seven or eight yards, belongs to him. The property sold is held under a fee-farm grant made in 1853. That grant contains a map which represents the road as the boundary of the farm thereby granted. This grant is based on an old lease of 1756. That lease also contains a map which represents the road as the boundary of the demised premises. If the piece of land in question was not included in the lease, it is merely because it was at that date part of the road. So far, therefore, as the documentary title goes since 1756, it undoubtedly included this piece of land as

part of Mr. Colles's farm, and the solicitor and parties having the conduct of the sale had no knowledge, and could not, by any ordinary enquiries, arrive at the knowledge of any circumstance adverse to Colles's title. In this respect the case differs a little from that of *In re Langley*; for there the title which the Court destroyed was in privity with that of Langley himself, and the solicitor having the conduct of that case would have discovered it, if they had made the enquiries which the knowledge of its being a school of some kind ought to have induced them to make. It now appears from Mr. Shortal's affidavit, which states what was proved at the trial of the ejectment which the purchasers brought to get possession of this strip, that it was enclosed and planted by a tenant of Colonel Kearney some 35 years ago; that the tenant regarded it as Colonel Kearney's property, and had it included in a lease from him which he got in 1847, and he kept possession of it until the purchasers brought their ejectment. Having regard to the position of this piece of land, and the kind of use to which Hart (Colonel Kearney's tenant) appears to have put it, I am not satisfied that there was any possession of a character adverse to Colles's title, at all events prior to 1847; and if it was included in the lease of 1766, there could be no possession adverse to Mr. Kearney (Colles's landlord). It is true the jury found it was not in the lease; but as the plaintiffs relied on their conveyance, and therefore could not properly go into evidence to prove the fact (which was irrelevant to the action), I attach no weight to that finding. In fact I am satisfied that it *was* included in the lease, either expressly by the map, or impliedly by its being part of the continuous road. The injury done to Colonel Kearney, therefore, at the utmost consists in his having lost the opportunity of establishing his title to the piece of land when the sale was made; but as this circumstance arose in the ordinary course of things (having regard to the then practice of the Court), and without any misconduct of the petitioner, I think the Court ought not to go back, and re-open a question which, whether accidentally or otherwise, has, fortunately for both parties, been closed, without litigation. I think it right to add that when this Court is called upon to exercise this peculiar and rather inconvenient jurisdiction, there should be a real pecuniary grievance to redress, a *dignus vindice nodus*. This does not exist in the present case. The piece of land has no other important value except what it derives from having become an object of contention to two adjoining proprietors. Land in Rathcaah is worth about £20 an acre; the intrinsic value of this bit is therefore about 25s., and having regard to its position, it may perhaps be worth £6 or £8. On such a question the Court would, under any circumstances not involving fraud, decline to undo anything which it may have done. If the purchasers had claimed the actual possession of this bit of land between the date of their conveyance and the month of June, 1855, when their credit was made absolute, it is possible that Colonel Kearney and his tenant might have availed themselves of an opportunity to litigate the title; and I therefore refuse the motion without costs.

Order accordingly.

Circuit Cases.

Reported by John Norwood, Esq., Barrister-at-Law.

ARMAGH SPRING ASSIZES.

CROWN COURT.

[CORAM FITZGERALD, J.]

WADE v. STRANGWAYS—March 7, 9.

Board of Superintendence—Jail chaplains—The Prisons Act, 7 Geo. 4, c. 74, ss. 68, 71, 74; 19 & 20 Vic., c. 68, s. 18; 15 & 16 Geo. 3, c. 17.

A vicar-choral is not, in right of that office, a clergyman ordinarily official within the parish within the meaning of the 7 Geo. 4, cap. 74, secs. 68, 71, 74, and the board of superintendence are not warranted, by the provisions of that statute and of the 19 & 20 Vic. cap. 68, sec. 18, in appointing a vicar-choral to be chaplain of the county jail, to the exclusion of the incumbent of the parish and his curates having actual cure of souls.

A TRAVERSE was entered by the Rev. Benjamin Wade rector of the parish of Armagh, to the payment of the salary of the Rev. M. S. Strangways, A.M., as chaplain of the county-prison of Armagh.

Law, Q.C., on behalf of the rector of the parish of Armagh, appeared in support of the traverse entered to the payment of the salary of the Rev. Mr. Strangways, as chaplain of the prison. He relied on the affidavit of the Rev. Benjamin Wade, M.A., rector of Armagh, which stated that by the Act for the consolidation and Amendment of the Laws relating to Prisons in Ireland, 7 G. 4, c. 74, s. 68, it is enacted, *inter alia*, that "it shall and may be lawful for each and every grand jury in Ireland, and they are thereby required to appoint a person, being duly ordained in Holy Orders, and of the Established Church, to be chaplain of the several gaols," &c.; and further, "that in the appointment of such chaplain, preference shall be given to some clergyman of the Established Church officiating within the parish in which the gaol shall be situated, if duly qualified." That one of the officiating curates of the parish of Armagh had been, invariably, appointed to the office of chaplain of the gaol of the county, with the exception of the appointment of the Rev. J. S. Strangways, to which Mr. Wade now objects. The Rev. John W. Murray, late one of Mr. Wade's curates, was such chaplain until August, 1863, when he ceased to be curate, having received an appointment in Dublin. Mr. Wade, the rector, forwarded to the Board of Superintendence of said gaol, in the latter end of August, 1863, or beginning of September, 1863, the resignation of the Rev. Mr. Murray, and recommended the Rev. William G. Murphy, Mr. Wade's new curate, as his successor; but he (the rector) was afterwards surprised to learn that the Rev. Mr. Strangways was appointed to be the chaplain, he being one of the vicars-choral of the Cathedral Church of Armagh, and not (as was submitted by Mr. Wade) a clergyman officiating within the parish within the meaning of the Act; that the Rev.

Mr. Strangways is not a curate of the parish, and has no cure of souls therein, and is not licensed in any way to officiate as a clergyman within the parish. Mr. Wade admitted the cathedral to be the parish church, but stated that it was so constituted by the 15 & 16 Geo. III., cap. 17, for a special purpose, viz., to legalise the assessment of parish-cess voted at the vestries held in the cathedral when the parish service used to take place within its walls; that all marriages in the cathedral are performed by the rector, or by one of his licensed curates, except by permission given by him as such rector; and no marriage license is ever addressed to the cathedral authorities, even when the marriage is intended to be therein celebrated. The rector has, as such, no jurisdiction over the cathedral, save as specified in the Act of Geo. 3, which, he submitted, cannot be so construed as investing the clergy of the cathedral with any parochial character, where no such provision is specified with regard to them; and that the appointment of the Rev. Mr. Strangways as vicar-choral shows, clearly, that, in right of that office, he could not be considered an officiating clergyman within the parish; that the vicars-choral and organist of the cathedral are a corporate body, the members of which are not necessarily in holy orders, and the organist is always a layman, and Mr. Wade has known another member to be a layman, their funds consisting of lands adjacent to the city of Armagh. The 19 & 20 Vict., c. 68, s. 18, which transfers the appointment from the Grand Jury at large to the board of superintendence, does not show any material difference in the language from the former Act. No question here arises as to the fitness or qualifications of the Rev. Mr. Strangways, who is, admittedly, eminently well qualified. The 71st section, which is a little more precise in its phraseology, meets the case where there are two gaoles in a parish, and mentions the clergyman ordinarily officiating in such parish. He alleged it meant the parochial clergy. It cannot be contended that the vicars-choral have any cure of souls within the parish. Counsel cited *Shaw v. Woods* (5 Ir. C. L. R., 156) as deciding that the office of vicars-choral is not connected with the cure of souls, and that they are merely officers, whose ministerial duties are confined to the cathedral. The very question now under debate is decided in the case of *The Vicars-choral of the Limerick Cathedral* in 5 Ir. C. L. R. 181, which decides that a vicar-choral attached to a cathedral is not a clergyman officiating within the parish. Lord Hardwick in *Trebeck v. Heath* (2 Atk. 498), says that "officiating" means acting officially throughout the parish. The vicars-choral can do nothing save by the permission of the rector; and he or his curates celebrate marriages in the cathedral, and the vicars have no power outside its walls.

Ferguson, Q.C., for defendant, Rev. Mr. Strangways, said that the Cathedral of Armagh was, by the 15 & 16 Geo. III., c. 17, constituted the mother church of the parish, and therefore, it differs from the case of cathedral of Limerick. This was done, not for purposes connected with assessment, as alleged, but because the parish-church had disappeared, so that even its very site was undistinguishable. The Rev. Mr. Strangways was appointed to the

county-infirmiry, which is also within the parish, and must therefore be considered as officiating within the parish. He is an M.A., a priest in holy orders, and having been 13 years a clergyman in the parish, was considered by the Board of Superintendence to be the fittest person for the appointment, as being conversant with the people, and because he discharged the duties of a curate over a district carved out of the parish by the Rev. Mr. Irwin, when rector, and in which district the county infirmiry was situate. The use of the words "some clergymen" shows that the board of superintendence have a discretion vested in them, which they exercised in favour of the Rev. Mr. Strangways, rather than appoint a gentleman who had been only a few days, or, at least, a very short time, curate of the place. The rector does not state that his curate was, at the date of the appointment, actually officiating within the parish. Mr. Strangways is an officiating clergyman, performing divine service, administering the communion, &c. It is not competent for this Court now to review the act of the board of superintendence, who are by law constituted the judges of the fitness of the candidates, whom they can remove at any time in their discretion. Counsel relied on the case of *Reg. v. The Poor Law Commissioners* (3 Ir. C. L. R. 147) as ruling the point under an analogous statute. The rector had waived all claims, and as far as here appears, there was not at the time, any curate officiating within the parish. The rector has, therefore, no *locus standi*. The words of the section can never be construed to amount to an exclusion of all other clergymen save the rector and his curate, for that would be to limit the selection and discretion which the law gives to the Board of Superintendence. He asked that a special case should be stated for the solemn decision of the case by the Court of Queen's Bench.

Acheson Henderson for the Board of Superintendence, questioned the power of the Court, in the present frame of the presentment and traverse, to review the Act of the Board of Superintendence, or deal with the question in its present form, or quash the presentment.

Law, Q.C., replied.

Cur. adv. vult.

Mar. 9.—HIS LORDSHIP said—Gentlemen, before I discharge you, I wish to call your attention to the case which was brought before me upon a traverse to the presentment in reference to the salary of the Protestant chaplain of the jail. It was opposed on behalf of the Rev. Mr. Wade, the Rector of the parish of Armagh, and on the other side supported by counsel on behalf of the Rev. J. M. H. Strangways, who was appointed sometime in the course of last summer, upon a vacancy in the office, by the Board of Superintendence; and there is no question in the case that the Board of Superintendence, in appointing Mr. Strangways, made a very excellent selection. It seems to be agreed on all sides that he is a gentleman of long experience, and long connected with the people of Armagh, knowing its people, and, as I am informed, unusually respected. Further, the question of law which the rector raises is for my determination. I have looked over the case after having heard the case very ably argued by coun-

sel upon both sides upon the matter of law, with the view to see upon what basis the Board of Superintendence acted. I have before me a document which was furnished to me yesterday on behalf of the Board, and it states that "The Board being informed, with reference to the question of the Protestant chaplaincy, that the judge of Assize wished to know the grounds on which the appointment of the Rev. Mr. Strangways was made, state they knew nothing of the Rev. Mr. Murphy" (who was what is called the new curate)—"he was a perfect stranger to them and to the county, and being totally unacquainted with his competency to discharge the duties of the office, in addition to his duties he had to discharge as curate of the parish, and knowing the Rev. Mr. Strangways as a clergyman resident, and acting in the parish for many years, and believing that he was qualified, and that they had the right to appoint him, they did so, and he has since discharged the duties of the office to the satisfaction of the Board." From that I learn the Board proceeded upon the basis of having a legal right to select any clergyman to fill the office of jail chaplain who was duly qualified—that is, a resident clergyman of the Church of England—and was a discreet and proper person; and the question I have now to express an opinion on is, whether the course pursued by the Board of Superintendence in that respect is according to law? The question arises upon the construction of the Prisons Act, 7 Geo. 4, sec. 74, by which the grand jury are empowered, at any presenting town or assizes, to appoint a discreet person, being duly qualified as a clergyman, and of the Church of England, &c. But, in exercising that power to appoint a discreet and proper person, they are to give the preference to some clergyman of the Established Church officiating within the parish in which the jail should be situated, if duly qualified; or, taking the 71st sect. of the Act, they are to give the preference to the clergyman ordinarily officiating in the several parishes within which the jails may be respectively situated, if properly qualified; so that you see the Board of Superintendence have to do two things—to select a discreet and proper person, and upon that, as far as I can form an opinion as to the person being a discreet and proper person, they are the sole judges, and I for one would be slow to interfere with the decision of the Board of Superintendence as to the propriety of the choice. But, then, in selecting a discreet and proper person they are to give the preference to the clergyman of the Established Church ordinarily officiating within the parish. That Act of Parliament is since altered, but I don't think it necessary to advert to it further than this, that in reference to the appointment of chaplains is substituted the Board of Superintendence for the grand jury. But it appears from the document before me that when the office became vacant the Board did not proceed to consider whether Mr. Murphy, who was recommended by the rector, and was the new curate, was a discreet and proper person, but to select a man that, in their judgment, was a proper person to fill the office. I should be very slow to interfere with anything the Board of Superintendence has done in this county. I know most of the members of it, and I am fully impressed with the idea that they would exercise

their discretion and power with reference entirely to the public good, and I have no doubt they did so, and I am unwillingly forced to come to the conclusion that, in the course that has been pursued by the Board of Superintendence, they have not followed out the law. It seems to me now that this is the conclusion I should arrive at, from the reading and construction of the Act of Parliament, even if I was unaided altogether by authority; but strengthened as I am by authority, I have no doubt whatever that in the Act of Parliament I have read the intention and showing is that the grand jury or the Board of Superintendence now, in the appointment of a chaplain, are to give the preference to the clergyman ordinarily officiating within that parish—that the Legislature intended, in reference to the clergyman of the Church of England, to point out, and did, in unmistakeable terms, point out the incumbent of the parish—that is, the incumbent having actual cure of souls, and his curates acting within the parish, and it seems to me that in dealing with this case the course the Board of Superintendence should have pursued was this—They were to select a discreet and proper person; but their first inquiry should have been if Mr. Wade himself—that is, the rector—was willing to perform the duty, and whether he was a discreet and proper person—if he was unwilling to perform it, as it appears he was, for he appointed his curate, Mr. Murphy, to inquire whether he was a discreet and proper person. I do not mean to suggest that any curate Mr. Wade would appoint would not be, in the ordinary sense of the word, a duly ordained person; but the Board of Superintendence might think if any clergyman, though otherwise qualified, did not possess those peculiar qualifications which should be possessed by the chaplain of a jail, they might possibly have come to the conclusion that the Rev. Mr. Murphy was not, in that sense a discreet and proper person; and if they had exercised their solemn judgments on that question, and come to the conclusion that he was not a proper person to fill the office, and selected another, I should have held my hands tied, and that I had no authority to interfere with the Board of Superintendence, or, indeed, if I had any such authority, it would require the most persuasive and coercive case to induce me to act against their discretion. But I am now informed they did not take into consideration the name of the Rev. Mr. Murphy—they did not inquire into his qualifications—they did not determine that he was not a discreet and proper person; but, assuming that they had power to appoint any qualified clergyman, and that they were not bound to give preference to the parochial clergy, they proceeded to elect the Rev. Mr. Strangways. I think that in point of law I must decide that the Board of Superintendence committed an error, and, therefore, that the Rev. Mr. Strangways has not been legally elected Protestant chaplain. A question has been raised that, in point of law, the Rev. Mr. Strangways could not be said to be an officiating clergyman acting in the parish. It appears he is one of the vicars choral of the cathedral, and it also appears that he was at one time a curate, and that he was, up to the time of his appointment, a jail chaplain, acting as infirmary chaplain; but I am clear, both upon authority and upon the reasonable construc-

tion of the Act of Parliament, that that does not make him one of the clergymen ordinarily officiating within the parish of Armagh. I think the preference pointed out by the Act of Parliament is a preference to be given to the incumbent of the parish having actual cure of souls, and to his curates. If none of these are willing to accept the office, or if their qualifications have been examined by the Board of Superintendence, they should come to the conclusion that they were not, from some circumstance, age or otherwise, discreet and proper persons, they might pass them by and exercise their judgment. I think they are the sole judges; and, having passed over the parochial clergy as not being fit, their choice is then at large, and they may select any clergyman, always taking care they select a discreet and proper person, and that he is duly qualified, by being an ordained clergyman of the Church of England. I am therefore obliged to withhold my fiat to the presentment you have made. Of course, if the counsel for the Board of Superintendence think it necessary—having regard to the importance of this question—that the case should be reserved for the twelve judges, I will do so, though upon the question I entertain no doubt myself.

Court of Chancery.

Reported by R. Ruxton Bolton, Esq., Barrister-at-law.

KING v. KING—June 1, 2; 13.

Attempt to impose a condition on the appointees of a fund—Superadded condition—Legacy—Election—Express condition.

A testatrix had an exclusive power of appointing by will a sum of money among her children, and having by her will duly exercised this power, in a subsequent part of her will she bequeathed certain legacies to the appointees of the fund, on condition that they should settle not only these legacies but their appointed shares on themselves for life, then to their issue absolutely; and in case they did not comply with these conditions, she declared that these legacies were to be absolutely forfeited, and in that event she made a gift over. The appointees contended, that as this was an attempt to impose a fetter on the appointed shares, that this condition was altogether void, and that they were entitled to both the legacies and their appointed shares absolutely, and free from any condition. Held, notwithstanding Moriarty v. Martin, (3 Ir. Ch. R.) that as to the appointed shares this was a mere superadded condition, and therefore void; and that it did not raise the case of election in favour of the grandchildren. Held, as to the legacies, on the authority of Boughton v. Boughton, (2 Ves.) that there was an express condition, and that, unless this condition was complied with, the appointees forfeited their claim. Blackett v. Lamb adopted; Moriarty v. Martin commented on.

DAME ELIZABETH KING, widow of the late Sir Gilbert King, having under her marriage settlement a power of appointing by will, absolutely among her children, the sum of £10,000, by her will made in 1857, exercised this power in favour of all her children (excepting Sir Gilbert King, her eldest son, who was amply provided for) equally. She then bequeathed three legacies to each of her three sons, George King, James King and Robert King, the present petitioners, to be paid to them 12 months after her decease, provided that they should, within a year from her death, settle both the legacy and each of their shares in the appointed fund in the manner mentioned in her will, which was, that these sums should be vested in trustees upon trust to pay interest and dividends to the petitioners for their respective lives, then upon trust for their issue as they might appoint, in default of appointment to such issue equally; and in default of issue then upon trust for the appointees of the petitioners, with the proviso, that in case these settlements were not made, the legacies bequeathed to the petitioners should sink into the residue of testatrix's property, which she bequeathed to her daughter, Jane King, the respondent. Lady King died in March, 1863, and all the petitioners declined to make the prescribed settlement of both the funds, but offered to settle their respective legacies of £1000 in the manner required by the will, and filed the present petition praying that they might be declared entitled to have said legacies settled without settling any portions of the sums appointed to them under the power; and that it might be declared that the testatrix had no power to attach or attempt to attach any condition to the sums so appointed under the power; and that it might be declared that the petitioners did not forfeit their legacies in the event of their refusing to settle their appointed shares. The respondent contended that unless both sums were brought into settlement the condition was not complied with, and that therefore the petitioners were not entitled to those legacies.

Serjeant Sullivan (with whom was *E. Johnstone*) for the petitioners.—This is an attempt to impose indirectly a condition upon the appointment, which clearly cannot be done directly. This proviso is merely a superadded direction, and is void not only in part but altogether. The Case of *Woolridge v. Woolridge*, (Johnson 63) where it was held that the proviso was swept out of the will for all intents and purposes, was not nearly so strong as this case, for there the testatrix in the first instance makes an appointment which is not authorized by the power, nor did she contemplate the possibility of the legatees refusing. In our case she has made an appointment strictly in accordance with the terms of the power, and has actually given the legacies over on an event, but leaving the appointed shares—vide *Observations of V. C. Page Wood* in that case, page 69, as to the principle of *Carver v. Bowles*, where he lays down, that where an absolute appointment is made, followed by restrictions as to the same, the testator's intention will be frustrated. *Mayer v. Townshend* (3 Beav. 448) is no authority in this case, for there the testator made an absolute gift, which he qualified by restrictions only as to the mode in which it was to be enjoyed. The case of *Carver v. Bowles* (2 R. & M. 304) is exactly the same as

Woolridge v. Woolridge, *Blackett v. Lamb* (14 Beav. 482) is directly in point and rules this case. Nor is *Moriarty v. Martin*, (3 I. Ch. R. 19) inconsistent with this doctrine. Vide *Fearon v. Fearon*, (3 Ir. Ch. R., 16); *Stroud v. Norman* (1 Kay. 313); *Reid v. Reid* (25 Beav. 469).

Brewster, Q.C. (with whom were *Chatterton*, Q.C. and *Reeves*) for the respondent.—There can be no question as to whether bequests can be made subject to the performance of conditions by the legatees. The only question that can arise is, has the condition been properly annexed in this case? It is clear law that a residuary bequest is not a gift over unless the bequest is expressly to form part of the residue on non-performance, as in this case. It is clear then that this case is exactly within the authority of *Wheeler v. Bingham* (3 Atk. 365) before Lord Hardwicke; and of *Lloyd v. Branton* (3 Merivale, 109). This is a real gift over and not one *in terrorem*, therefore it must be enforced. The settled money would belong to the children immediately on Lady King's death, in default of appointment. No condition could therefore be imposed on that appointment; but it is not so as regards the testatrix's absolute property, as to legacy upon condition. Vide *Toplin v. Duke of Portland* (1 Nev. R. 496; s.c. 32 L. J. R. Ch.) where all the doctrine as to powers are reviewed. *Woolridge v. Woolridge* is not applicable in this case, vide *Whistler v. Webster* (2 Ves. Jun. 367); *Reid v. Reid* (25 Beav. 480); *Fearon v. Fearon*, (3 Ir. Ch. R. 19); *Moriarty v. Martin*, (ib.); Sugden on Powers, 8th Ed., p. 581, where the distinction in the case of *Carver v. Bowles* is discussed—the testatrix placed no condition on the appointed fund, but on the legacies: the only question now is, whether these petitioners can take these legacies without performing those conditions?

Chatterton, Q.C., same side.—We are entitled to a decree, whether on the ground of election or on the ground of an express condition. If the case of *Blackett v. Lamb* be in favour of the other side, it is in direct contravention of the case of *Moriarty v. Martin*, decided by Lord Chancellor Blackburne, and approved on the high authority of Lord St. Leonards. The case of *Woolridge v. Woolridge* when rightly understood is in favour of our contention, for this condition was imposed on the legacies, not on the appointed shares.

Johnstone in reply.—This is an attempt to impose indirectly a condition on the appointees of a fund which was to be appointed unconditionally. This Court cannot sanction an attempt to fetter such a fund contrary to the express and long-established rule of law. The case of *Blackett v. Lamb* is decisive on the point, and has been adopted in the case of *Langslow v. Langslow*, (21 Beav., 552). This condition cannot be retained as to the appointed shares, therefore it must be struck out altogether.

THE LORD CHANCELLOR.—There seems to me a good deal of doubt as to this case. The books show that no condition can be imposed so as to interfere with the disposition of a trust fund; but the testatrix could impose any condition she pleased, on the disposition of her own property. It is a common case that legatees cannot take legacies without performing the conditions attaching to them; but then can a con-

dition be imposed on the appointees of a fund indirectly through the medium of a legacy? My present impression is, that this cannot be done, and that this condition cannot therefore be enforced; but the cases of *Fearon v. Fearon* and *Moriarty v. Martin* cited at the bar and decided here may raise a distinction. The cases are clear that the ordinary doctrine of election does not apply here.

Cur. adv. vult.

June, 13th.—THE LORD CHANCELLOR having reviewed the facts of the case said: This is a question as to what construction the Court will put upon the condition, which Lady King in her will imposed on those who took a share in the sum of money, over which she had a power of appointment, and whether that condition is void or not. (His Lordship read the clause from the marriage settlement giving the power.) The will recites that settlement. (His Lordship here read the material parts of the will.) The testatrix in making the appointment acted strictly in accordance with the terms of the power, and states so in her will, and she makes a complete and perfect appointment of all the funds or shares, and quite within the compass of the power, given by the deed of settlement. She directs certain bequests to be paid to her sons, for their sole and separate use; she then makes other dispositions, and then follows the express condition, that these legacies are not to pass unless the legatees execute a settlement of both the trust fund and these legacies in accordance with the directions in the will, but are to be absolutely forfeited and sunk in the residue which is specially bequeathed. We have here now a testatrix validly and clearly exercising a power of appointment, in exact accordance with the terms of her power, but subsequently endeavouring to fetter the appointees indirectly, through the means of a condition attached to a legacy. This petition is filed by three of the appointees, objects of the power, who contend that they are not bound by these conditions, but that they are absolutely and altogether void, that the petitioners are entitled to take both sums absolutely, and that this proviso ought to be struck out of the will for all intents and purposes. This is a question of some importance, and raises the question of election. Now as to the grand-children, the testatrix did not give any sum to them, she only declares that she expects that the grand-children would be provided for by their fathers, and that for that purpose they would only settle the fund as she wished. It is now perfectly established, that a super-added declaration and expression of wishes must be struck out of the will. The case of *Carver v. Bowles*, (2 R. & M. 307) decides this question. In the case of *Whistler v. Webster* (2 Ves. Jun. 367), the Court omitted any reasons for its decision (or perhaps the report is defective) but it is explained by *Blackett v. Lamb* (14 Beav.) which is as near this case as one can well conceive; where the Court held that there was an absolute appointment, and that all the rest of the clause were mere precatory words, and that the children were not bound to elect, though there the testator had it present to his mind, that he could not execute this power in favour of his children. (His Lordship read the judgment in this case at length.) In the

case now before me, I must on the authority of *Blackett v. Lamb*, treat this condition as a superadded condition, which is void and useless; the case of *Moriarty v. Martin*, (3 Ir. Ch. R.) is quite irreconcilable with *Blackett v. Lamb*, and overrules it, but the latter case was not I think regularly reported when *Moriarty v. Martin* was decided. However, I think I may say now the recent confirmation which has been given to the case of *Blackett v. Lamb*, in *Langslow v. Langslow*, (25 Beav. 552) strengthens the case, and I cannot treat the case of *Moriarty v. Martin* as overruling it. I think it is the English cases I am bound to follow more closely, and as *Tomkins v. Blane* (28 Beav. 422), and *Woolridge v. Woolridge*, go on the very same ground, I must hold that these cases govern this, and that there is here no question of election. Another question seems to me to arise in the second part of the case, as to what is the effect of the express condition, and the clause of forfeiture attached to the legacies, and whether the petitioners can claim these legacies, without performing these conditions. The question turns on the case of *Boughton v. Boughton* (2 Ves. 12.) before Lord Hardwicke, and the decision in that case seems to be decisive on this point; there it was in effect held, that a person could not take as both heir and legatee, without complying with the condition in a will, which was executed so as to pass personal property only. (His Lordship read the judgment in this case at length). The case of *Shedden v. Goodrich* (8 Vesey, Jun. 481) confirms the doctrine, established in the case of *Boughton v. Boughton*. I cannot distinguish this case from that before Lord Hardwicke, it was a much stronger case than this, for here we have no informality of execution, interfering with the effect of the express condition, as there was in that case. Sugden on Powers, 7 ed., 152. Under all these circumstances, and unless I directly overrule the case of *Boughton v. Boughton*, which I am not prepared to do, I cannot hold that the petitioners can take under and against the will; they must comply with conditions, and settle both funds in accordance with the will, or they must forfeit their legacy; and I dismiss this petition, but without costs.

Decree accordingly.

Exchequer Chamber.

[Reported by John Munroe, Esq., Barrister-at-law.]

COPE v. MOONEY.

[CORAM LEFROY, C.J., PIGOT, C.B., O'BRIEN., HAYES, J. FITZGERALD, B., HUGHES, B., DEAST, B., AND FITZGERALD, J.]

Testamentary Guardians—Probate Act—Evidence—Notice.

The Probate of a will appointing testamentary guardians, being tendered in evidence, under the 68th section of the Probate Act, as proof of such appointment, Held, that it was inadmissible; and that in

order to come within the terms of the section, the devise or other testamentary disposition must directly affect real estate.

Held also (Lefroy, C.J., dubitante,) that the notice to be given under that section, must specify the particular purpose for which the probate is to be given in evidence.

Irwin v. Callwell disapproved of.

THIS was an appeal by the plaintiffs, from an order of the Court of Common Pleas, made in this cause on the 8th of May, 1863, allowing with costs the cause shown by the defendant, against a conditional order obtained by the plaintiffs on the 16th of April, 1863, whereby it was ordered that the non-suit had for the defendant at the Nisi Prius sittings of Hilary Term, before the Lord Chief Justice of the said court, should be set aside, and a verdict entered up for the plaintiffs pursuant to leave reserved; or that a new trial be had on the ground of misdirection of the learned judge. This was an action of ejectment on the title, brought by the plaintiffs against the defendants, on a notice to quit. The summons and plaint was issued in the names of "Francis Robert Cope, an infant, under the age of twenty-one years, by Cecilia Philippa Cope his mother and next friend, and Sir Thomas Staples, Bart.," against "Lawrence Mooney, administrator of Michael Henry Connolly, deceased;" and sought to recover a certain messuage or tenement in Fownes-st. in the city of Dublin. To this the defendant pleaded, that the plaintiffs were not entitled to the premises, but that they belonged to the said Lawrence Mooney, as of right. Issue was taken on this traverse, and the parties went to trial, on the 4th February, 1863, before the Lord Chief Justice of the Common Pleas. The first witness, who was the plaintiff's attorney, deposed that Michael Henry Connolly, the deceased, had been in the possession of the premises as tenant from year to year of one Arthur Cope, that he died in 1843, leaving Robert Wright Cope Cope him surviving, who rented and received the rents till his death, in 1854; and that he was succeeded by the plaintiff, Francis Robert Cope, his only son and heir at law. Witness received the rents, and accounted for them to the minor, since his father's death. The plaintiffs next produced from the registry of the Court of Probate, a document purporting to be the last will and testament of Arthur Cope, dated 7th August, 1840, and to devise the said premises to the use of Robert Wright Cope Cope for life, remainder to his issue in tail male, and it was witnessed by two persons whose signatures were proved. They then proved service of a notice in the terms following:—

Sir—Take notice that, at the trial of the issues in this cause, the plaintiffs propose to give in evidence the probate copy, or an attested copy of the last will and testament of Arthur Cope, Esq., deceased, bearing date the 7th day of August, 1840; and also, the probate copy of the last will and testament of Robert Wright Cope Cope, Esq., deceased, bearing date the 22nd of June, 1854, and take notice that this notice will be used hereafter as occasion may require.

To Wm. Mooney, Esq., Dated 26th day of Jan.,
attorney for defendant. 1863, W. J. Cooper,
attorney for plaintiffs.

They then tendered the probate of the will of Robert Wright Cope Cope, Esq., the reception of which was objected to on the grounds, that the notice did not state that the said probate was to be given in evidence as proof of any devise or testamentary disposition, nor did said notice specify the particular devise which said probate was intended to prove; and that said notice was not in conformity with the stat. 20 & 21 Vic., c. 79, s. 68; and that to prove the appointment of testamentary guardians, a will must be proved *per testes*. The probate was read subject to these objections, the learned judge stating he would decide the question as to its being admissible in evidence as proof of the will, at the close of the plaintiffs' case. The will bore date the 22nd of June, 1854, and appointed the plaintiff, Cecilia Philippa Cope, the Earl of Gosford, and another who had since died, guardians of the said Francis Robert Cope. Service on the defendant of a notice to quit was next proved. It bore date the 26th April, 1862, and commenced thus:—"I hereby give you notice to quit and deliver up to me on behalf of Francis Robert Cope an infant," &c., and was signed 'Cecilia P. Cope, testamentary guardian of said Francis Robert Cope, on behalf of said Francis Robert Cope.' The plaintiffs' case here closed, and the defendant's counsel called for a nonsuit on the following grounds: 1. Because probate cannot be received in evidence as proof of the appointment of testamentary guardians, which is a personal relationship, not directly and necessarily affecting real estate, and in no wise the kind of testamentary disposition comprised within the provisions of the 68th section of 20 & 21 Vic., c. 79. 2. Because even if the appointment of testamentary guardians was such a kind of disposition affecting real estate, as was contemplated by the provisions of the said section, yet no sufficient notice to warrant the reception of said probate in evidence had been served. 3. Because the notice to quit which had been served on behalf of Cecilia P. Cope, one of the testamentary guardians *alone*, was insufficient, and did not determine the tenancy. 4. Because the testamentary guardians should have been joined as co-plaintiffs. The learned judge intimated his intention of directing a nonsuit on the first ground, viz., that there was no proof of the testamentary guardianship. The plaintiffs then insisted that the question should be left to the jury, whether said Cecilia P. Cope as guardian in socage, and also as natural or elective guardian, and in receipt of the rent, had authority to determine the tenancy. The learned judge declined to leave any question to the jury, and directed a nonsuit, reserving leave however to the defendants to move to set aside the nonsuit, and to enter a verdict for them, if the Court should be of opinion that they were entitled thereto upon the facts stated. On the 16th of April, the plaintiff obtained a rule nisi to set aside the nonsuit. On the 2nd of May, the defendants shewed cause, and after argument, the conditional order was set aside, and the nonsuit confirmed, on the ground that the appointment of a testamentary guardian was not a devise 'of or affecting real estate' within the 68th section of 20 & 21 Vic., c. 79. No opinion was offered on the other points.

From that order the plaintiffs now appealed.

Battersby, Q.C., (with him J. F. Walker) for the

appeal.—1. The probate should have been admitted as proof of the appointment of the testamentary guardians under the 68th section of the Probate Act. The statute 1 Vic. c. 26, and the 20 & 21 Vic. c. 79, are in *pari materia*, and are therefore to be construed together. By the first section of the former Act, it is provided that the word "will" shall extend to an appointment by will, or in the nature of a will, an exercise of a power, and also to a disposition by will and testament, or *devise of the custody and tuition of any child by virtue of the Act 14 & 15 Car. 2, c. 19*; and the words "real estate" shall extend to messuages, lands, hereditaments, whether of freehold, tenant right or of any other tenure, and whether corporeal, incorporeal or personal; and to any *estate, right or interest*, (other than a chattel interest) therein. The appointment of guardians by will confers the right of assuming the possession of the real estate to the use of the infant, and leasing same during the infants minority, such will is therefore a "testamentary disposition affecting real estate" within the meaning of the Probate Act. The testamentary guardian appointed under 14 & 15 Car. 2, c. 19, has just the same authority, and stands in the same position as the guardian by socage—*Bedell v. Constable* (Vaugh. 179.) As regards the guardian by socage, the rule is laid down thus—"Tenant in socage could not devise or demise his land in trust for him *directly*. But by a mean and obliquely he can, for by nominating who shall have the custody and for what time, by a consequent the land follows, as an incident given by the law to attend the custody."—Vaughan, 178; Swinburne, 266; *Batler's Co. Litt.*, 88 b, n 13. He may let and set the ward's land during minority, avow in his name, grant copyhold estates, and the like—Vaughan, 182; *Shockland v. Roger* (Cro. Jac. 98). So he may maintain trespass and ejectment in his own name, and he has therefore not merely an office and authority, but an interest in the ward's estate.—*Rex v. Inhabitants of Oakley* (10 East. 495)—per Ellenborough, C.J., *Re Johnstons minors*, (2 Jones & Lat. 233); *Shaw v. Shaw*, (Vern. & Scriv., 607); *M'Creight v. M'Creight*, (13 Ir. Eq. 314). The appointment of a guardian is therefore such a testamentary disposition as "affects real estate" within the meaning of the Act. But, even if there had been no evidence of the appointment of testamentary guardians, the learned judge should have left it to the jury to say, whether the plaintiff, being called "guardian" in the notice, was not guardian in socage, or guardian by election, and as such having authority to determine the tenancy. Guardian by socage does not necessarily terminate at 14, although the ward is then at liberty if he so pleases, to elect another guardian.—*Rex v. Pearson*, (Andrews, 313). 2. On the second point, as to the sufficiency of the notice, the case of *Irwin v. Callwell*, (12 Ir. C.L. 144), is an express authority. It is there laid down, in the unanimous judgment of the Court, that the notice need only state that the party giving it means to rely on the probate, and that there is no necessity to specify the particular purposes for which it is to be used. 3. Although the notice to quit is signed by only one of the testamentary guardians, this is quite sufficient. Each guardian is complete in himself, and may act without the others.—1 Swinburne, pt. 3, s. 7. In

Eyre v. Countess of Shaftesbury, the Lord Chancellor says, "Where several guardians are appointed by will, each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden." So in the case of executors, each is complete in himself.—*Bac. Abr. Executor D.*; 2 Wms. on Exec. 819; *Nation v. Tozer*, (1 C. M. & R., 174). So notice to quit signed by one joint-tenant on behalf of the rest is sufficient.—*Doe v. Hughes*, (7 M. & W. 139); *Wright v. Cuttem*, (5 East. 491); *Doe v. Chaplin*, (3 Taunt. 120); *Doe v. Wheeler*, (15 M. & W. 623). 4. It is unnecessary that the guardians should be plaintiffs in the record. The seisin is in the infant—*Doe d. Thomas v. Roberts*, (16 M. & W. 778); *Madden v. White*, (2 Term. R. 159). He may serve notice to quit—*Furlong, L. & T.* 598-601, and sign it himself.—*Duncan v. Couch*, (1 Ir. Cir. R., 573). So he may bring ejectment in his own name.—*Touch v. Parsons*, (3 Burr. 1806); *Cole on Ejectment*, 584; *Adams on Ejectment*, 64.

J. F. Walker, followed on the same side.

John O'Hagan (with him *P. Martin*) in support of the judgment of the Common Pleas.—In order to succeed in an action of ejectment, it is necessary to shew the existence of a tenancy: a proper determination of that tenancy; and, further, that the necessary parties are before the Court. On the first point there is no controversy in this case; but important questions arise on the other two. The argument has been conveniently reduced under four heads, to each of which it is necessary to advert. First, then, it is submitted, that, under the 68th section of the Probate Act, the probate of a will is in no case admissible to prove the appointment of testamentary guardians. Prior to the new Wills' Act, there were three different species of wills—(1) those devising real estate, which required that the testator should be 21, and that the will should be attested by three witnesses. (2). Wills of personal estate, which might be made at 14; and for which no attestation was required. (3). Wills appointing testamentary guardians, which merely required the attestation of two witnesses. Prior to 1 Vict., c. 26, there can be no doubt but that wills appointing testamentary guardians must have been proved *per testes*. Where a will bequeathed personalty and appointed testamentary guardians, the probate was not sufficient proof of the latter disposition, since the spiritual court had no jurisdiction in regard to it. The Probate Act gives the Probate Court jurisdiction over wills devising real estate under certain circumstances. By the 68th section it is provided that where, by the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party to serve notice that he intends at the trial, &c., to give in evidence the probate of the said will, &c. &c.; and the same shall be sufficient evidence of such will, its validity and contents, &c. &c. The question, then, is whether a will appointing testamentary guardians is a devise or other testamentary disposition of or affecting real estate? It is evident it is not. No doubt if the infant possessed real estate, the guardian would have the custody of it. But this is a mere collateral or acci-

dental result. He gets it by the law and not by the will—*Bedell v. Constable*, (Vaughan, 178). To bring the case within the section, the will must affect the real estate directly and not obliquely. Some words in a will relating to a pedigree might affect real estate; would this bring such testamentary disposition within the provisions of the statute? Having regard to the plain language of the statute, its terms include only the first class of wills above referred to, viz., those which, prior to 1 Vict., c. 26, required attestation by three witnesses. This is therefore a *casus omissus* in the statute, and the original will appointing testamentary guardians must still be proved *per testes*. (2). Even if the probate be admissible under this section, no proper notice has been served in this case. The notice, to be valid, should have stated the particular devise or testamentary disposition which was to be proved by the production of the probate. The statute provides that the party is to give notice that he intends at the trial or other proceeding to give in evidence *as proof of the devise* or other testamentary disposition, the probate of the said will, &c. &c. What is meant by the devise unless the one referred to in the notice? No doubt *Irwin v. Callwell* seems opposed to this view, but that case is open to be reviewed by the Court of Appeal. The party on whom such notice is served might be willing to admit the probate as proof of one matter and yet to reject it as proof of another. It is therefore absolutely necessary that the particular purpose for which such probate is to be used should be stated in the notice. (3). Supposing the probate to be used and the testamentary guardianship established, yet where there are two persons acting as testamentary guardians, signature by one on his own behalf is insufficient. The notice is to "*deliver up to me*," It is signed "*Cecilia P. Cope, Testamentary Guardian*," &c., and there is no notice or mention of there being another. The notice must be such as the tenant can act upon at once without being liable for future rent, (per *Ellenborough, C.J.*, in *Right d. Fisher v. Cuthill*, (5 East. 496). It is not even expressed in this case to be given by one on behalf of the others. How was the tenant to know but that the other would disavow the act of his co-guardian and sue him for the rent. Testamentary guardians are not analogous to executors. They stand in the same position as the guardian in socage. By the express terms of the statute the power is given to them *collectively*, and *collectively* they must exercise those rights. The decision in *Eyre v. Countess of Shaftesbury*, (2 P. Wms.) only goes to this, that the *surviving* testamentary guardians may exercise the rights given to them collectively. This, however, is evidently distinguishable from the case in which all the parties on whom the power is conferred are still surviving, and yet it is exercised by only one, without even stating that such one is acting on behalf of the others. The expression in the judgment of *Eyre v. Countess of Shaftesbury* that each is a complete guardian, is a mere *dictum*, and is the less to be attended to as the analogy of churchwardens on which it is based is not correct—(*Burns' Ecc. Law*, tit. Churchwardens, 408 c.) In almost all the cases cited on the other side, where notices were served either by one of several joint tenants or executors, it purported to be signed by

one on the part of all—*Doe v. Hughes*, (7 M. & W., 139): no such intimation is given here. As all have co-ordinate authority, the tenant might have a notice to quit served on him by one guardian, and an action for rent brought against him by the other. The notice should therefore be served by all the testamentary guardians, or at least by one purporting to act on behalf of all. (4.) The testamentary guardians should have been made parties to the record. The authorities are, no doubt, conflicting; but the preponderance seems to be in favour of the doctrine that the guardians have an estate in the infant's land. [*Deasy, B.*—Does not this conflict with the first branch of your argument?] Not necessarily: since the estate or interest taken by the guardians is not taken *directly* under the will. Testamentary guardians stand in the same position as the guardian by socage—(Vaughan, 179.) In *Rex v. Sutton*, (3 Ad. & E., 612), it is laid down that the guardian in socage, after entry, has the legal estate to the use of the infant. In *Rex v. Oakley* (10 East. 494) the law is stated by Lord Ellenborough thus: "The law considers a guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it. So also in *Wade v. Baker*, (1 Ld. Raymnd, 130). He may bring trespass and ejectment; if, then, he has not an estate, what has he? If there be no guardian, the infant must do all by his *prochein ami*. Guardians therefore having the estate should have been made parties to the record—*Doe d. Thomas v. Roberts*, (16 M. & W., 778). (5.) It was further argued at the trial that the question should have been left to the jury, whether the plaintiff, having signed herself guardian of the infant, had not authority as guardian by socage or by election to determine the tenancy. This point may be answered in two ways: (1.) The infant here took by purchase, and guardianship by socage can only exist where the infant takes by descent—(1 Thomas Co. Litt. 160). (2.) The guardian in socage is always the nearest relation to the infant, who can not by possibility take the estate. The mother can take the estate under the new law. The effect therefore of the Inheritance Act is incidentally to abolish guardianship in socage altogether. As to guardianship by election there was no proof of age or ability to elect; and a guardian by nature or nurture has nothing to do with the land—*Pigot v. Garnish*, (Cro. Eliz. 734). See further *Reid v. Kennedy*, (12 Ir. Law Rep. 567).

P. Martin followed on same side.

Battersby, Q.C., replied.

May 4th.—LEWIS, C.J.—In this case we are unanimous in affirming the decision of the Court of Common Pleas; though we have not the same grounds for arriving at that conclusion. Two points were principally discussed during the argument, and on one of them we are unanimous in affirming the judgment of the Court below, viz:—on the ground that the appointment of testamentary guardians does not come within the 68th section of the Probate Act. It was upon this ground that the Chief Justice of the Common Pleas rested his judgment. The words of the section are, "in any action of law where, according to the existing laws, it would be necessary to produce and prove an original will, in order to establish a de-

vise or other testamentary disposition of, or affecting real estates, it shall be lawful," &c.; now it is insisted in this case, that the real estate is not directly affected, and therefore it does not come within the terms of the section. The instrument appoints guardians, and constitutes a guardianship, but it is not by the instrument that the real estate is affected. Although consequentially, the appointment of guardians affects real estates, it is not by virtue of the instrument that the estate is affected. Consequentially and incidentally, and, I might say, accidentally, the real estate is affected, but it is not affected directly, and therefore the case does not come within the terms of the 68th section. With regard to the second point, discussed during the argument, viz:—the sufficiency of the notice, I am not prepared to say what my opinion might be if I had to consider the case again. The terms of the section are general, and it would seem to be inserting a qualification, not required by the section, if the notice should state the particular purpose for which it was to be used. However, as I affirm the judgment of the Court below on another ground, I do not feel called on to express any positive opinion regarding the decision in *Irwin v. Calhwell*.

Pigot, C.B., said that in this case the Court were unanimous in affirming the judgment of the Court below. On the first point argued in the case, the Court were entirely agreed, and but for the doubt expressed by the Chief Justice, he would have had no hesitation in giving his opinion against the validity of the notice. Unless it were to be stated on what devise or other testamentary disposition, the party serving the notice meant to rely, some words of the section must be omitted. The notice is described as a notice, not that he intends to give in evidence the probate or copy of the will, but that he intends to give it in evidence *as proof of the devise or other testamentary disposition*; and the words which follow the word "notice" in the 68th sec., and define what the notice is to be, describe its nature as a notice, not only that he intends to produce the probate, but that he intends to produce it as proof of the *devise or other testamentary disposition*. The devise or other testamentary disposition is that mentioned in the last antecedent part of the section, in which reference is made to any devise or other testamentary disposition of, or affecting real estate. The party must therefore specify in his notice, that he intends to give in evidence at the trial the probate, &c., as proof of the devise or other testamentary disposition, to establish which in proof he intends to use these documents. Acts of Parliament are to be construed like all other documents, according to their grammatical construction, assisted by the context of other portions, unless there be something in the document itself which presents an inconsistency, in which case the course is only to depart from that construction so far as the inconsistency renders it necessary. According to this view, the notice must describe not merely the intention to give the probate in evidence, but also the *devise or other testamentary disposition*, in proof of which it is intended to use such document. This 68th section is substituted for the 31st section of the Common Law Procedure Act, 1856, by which it was enacted, that the probate or letters of administration should be sufficient evi-

dence of the will and its contents, provided the party intending to use such probate, had given seven days notice of his intention to the opposite party. This is not a mere re-enactment of that section, for the important words "as proof of the *devise* or other testamentary disposition" are superadded. Why should these words have been introduced unless they are intended to have some meaning? The person on whom the notice is served may elect whether he will have the will proved or not; and it is, therefore, reasonable that the notice should specify the purpose for which the probate is intended to be given in evidence. The party may have no intention of objecting to the probate, so far as certain portions of the will are concerned. A will may be good in part, and bad in part; part may be forged, and part genuine; and if the will be validly executed the party may have no objection to the latter. The rule, it is argued, may be easily violated by the party stating in the notice, that he means to rely on all the dispositions. The objection, however, is obviated at once, by reference to the 69th section, which gives the Court a discretionary power in determining who is to pay the costs of proving the will. In this case it should have been stated that the will was only required to prove the appointment of testamentary guardians. On this point the Court of Common Pleas pronounced no opinion, considering themselves bound by the judgment in *Irwin v. Callwell*. This being a Court of Error, is not bound by that decision while it is called to express its opinion on that case although this is not an appeal from the Court of Queen's Bench. As regards the other point argued, the Court is of opinion that a will appointing testamentary guardians does not come within the words "of or affecting real estate." The testamentary disposition in that section is a testamentary disposition affecting real estate *directly*. If the Legislature contemplated the appointment of testamentary guardians as within the section, they have not so expressed themselves. It is a *casus omissus* in the Act; whether it were intended or not, that the section should apply to such a testamentary disposition, it does not come within its terms. There could be no person before the Court on the granting of the probate of the will, adverse to the appointment of the testamentary guardians named therein, whether the will related to real or personal property. On these grounds the decision of the Court of Common Pleas must be affirmed with costs.

Order affirmed.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[CORAM MONAHAN, C.J., PIGOT, C.B., AND BALL, KEOGH, CHRISTIAN, J.J., AND FITZGERALD AND DEASY, B.B.]

THE QUEEN v. CROSTHWAITE.—June 6.

Quo warranto.—*Towns Improvement Act, et. 17 & 18 Vict., c. 103—Franchise—Females.*

Women are incapable of voting at the election of Town Commissioners, under the Towns Improvement Act,

17 & 18 Vict., c. 103.—[Monahan, C.J., Pigot, C.B., & Ball, J., dissentientibus.]

ERROR from the Court of Queen's Bench. The particulars of the case together with the arguments in the Court below, will be found reported in 9 Ir. Jur. N.S., 148.

Ball, Q.C. and *Curtis* for the plaintiff.—The grounds upon which the Court below held that women were entitled to vote at the election of commissioners, under the Towns Improvement Act were—1, the occurrence of the word "person," *ex vi termini*. 2. The expressions in the glossary of the Act. 3. The analogy of the Poor Law Act. Whatever interpretation is given to the word "person" in the 22nd sec., must be put on it in the 25th section. The glossary has the saving "unless there be something in the subject or context repugnant to such construction." In the Poor Law Act, it is said male shall include females. [*Ball, J.*—Can you construe this Act by the Poor Law Act, they not being in *pari materia*?] No, but this is meeting the argument. Again, by the Poor Law Act females are expressly excluded from being guardians. Statutes are to be construed with reference to the principles of the common law.—*Dwarris on Statutes*, p. 564. Then what is the common law on this subject? The position of females is one of protection, not of privilege. They are prevented from voting for offices partaking of the character of government, for offices which concern the administration of government or the morals of the people. They cannot vote for members of parliament, or be members of parliament. Mr. Christian in a note to his edition of Blackstone's Commentaries, p. 445, denies the truth of the statement in the text, that the female sex is a favourite of the laws of England. The maxim that Acts of Parliament regarding the franchise, are to be construed favourably, does not apply to females, political incapacity being their normal condition. The Reform Bill introduced the expression "every male person." The first statute which according to Mr. Hallam interfered with the constitution of Parliament, was the 7 Hen. IV. c. 15. [*Deasy, B.*—What do you say disqualifies peeresses from sitting and voting in Parliament?] A disability inherent in their sex. 8 Hen. VI. c. 7. —"In many cases multitudes are bound by Acts of Parliament, which are not parties to the elections of knights, citizens, and burgesses, as all they that have no freehold, or have freehold in ancient demesne; and all women having freehold or no freehold, and men within the age of one and twenty years," &c. 4 Inst. p. 6. We say the disability in women, is the same as the disability imposed on a minor. It may be asked how can the sovereign be a female? The difference is shown by Montesquieu.—*Colt & Glover v. Bishop of Coventry and Lichfield*, (Hobart's Rep., 148); *Olive v. Ingram*, (2 Strange, 1114). [*Monahan, C.J.*—It was held there that a woman could vote and could be a sexton.] The duties within the church are simply ministerial, seating the people. There is no doubt that offices can be held and voted for by women, the duties of which are discharged by deputy.—*R. v. Lady Broughton*, (3 Keble, 32). There are duties set out in the 42nd, 47th, and 75th secs. of the Act which females could not discharge. [*Monahan, C.J.*

—There may be things in the duties of the commissioners, which would be repugnant to the feelings of women, but the voting might not.] Contesting election would be. By section 28 of 10 Vic. c. 16, which is incorporated with this Act, there are two questions which may be asked of any voter, one of which cannot be put to a proxy. A lady if elected a commissioner, would have the right to be elected chairman of the commissioners, and the chairman must be a justice of the peace,—section 29. [Christian, J.—The section says that the Lord Chancellor may select any of the commissioners to be a justice of the peace.] The present commission of the peace, is a translation from the old Latin commission, which has the words "*quorum aliquem*." A justice of the peace is an esquire—1 Bla. Com. p. 406. The other side will not show an instance in which a woman was a justice of the peace, and did not hold it by some hereditary tenure. [Ball, J.—It does not follow that the Lord Chancellor would appoint a female.] [Christian, J.—A strong argument in your favour might be made on the 4th section.] The Legislature would have expressly confined the office of commissioners to males, if they did not suppose that the words used sufficiently excluded females from voting.

Heron, Q.C. and Jellett contra.—Mr. Crosthwaite was properly elected. We may keep within the Towns Improvement Act, or go outside of it and compare with it recent legislation, on different franchises, Parliamentary, municipal, voting for churchwardens, &c. Wherever ladies have not the right to vote, they are excluded in express words. So under the Reform Act and the Municipal Corporation Act. The preamble of this Act reads—"Whereas it is expedient to make better provision for the paving, lighting, draining, cleansing, supplying with water, and regulation of towns in Ireland," showing that it concerns matters of local management, and has nothing to do with politics. *Prima facie* the Commissioners should be elected by persons possessing property within the parish. The machinery by which towns are to be brought under the Act is contained in the 4th and following sections. There is no doubt that the twenty-one persons who are to apply to the Lord Lieutenant, must be males. By the 6th section the notice of meeting set out in schedule A must be given. [Monahan, C.J.—There would be nothing in the nature of the thing to prevent women from taking part in the first step unless it were against the policy of the Act.] [Christian, J.—The 7th section uses language as general as the 22nd, and would therefore include females by your argument, but you have that explained to mean males.] There is a distinction. The 7th section would bear the same construction; but that by the notice in schedule A, no person is to be summoned but a male of full age. The qualification under the twenty-second section, is different from that under the fourth. [Christian, J.—If the Legislature meant a distinction between section seven and section twenty-two, why did they not express it in section seven by using the word "males?"] There is not any substantial difference between the interpretation of the Poor Law Act (1 & 2 Vict. c. 56) and this Act. In the former women get the franchise by means of the general words, and in the same manner in this Act the words are "every

person of full age who shall have occupied," &c. There is no authority for excluding females from words including both male and female. In section eighty of the Poor Law Act, the word "him" occurs. We are pressed by the argument that if we be right, women are also qualified to be commissioners. That is not necessary to the present argument. If the office be inconsistent with the character of the sex, a different construction may need to be put on the 25th sect.; but there is internal evidence that it was not intended that women should be commissioners, because the word householder is in sec. 25—"also any householder, or occupier of full age," &c. [Monahan, C.J.—What is there in the previous part of the section to exclude women?] The maxim *noscitur a sociis* applies. In the Reform Act, the right to vote is given to male persons of full age. So of 8 Hen. VI. c. 7. In the Municipal Corporation Act, 3 & 4 Vic. c. 108, s. 30, the franchise is given to every man of full age, who shall be an inhabitant householder. From these two franchises, women are expressly excluded. Another is that under 4 & 5 Vic. c. 90, s. 43, where the words are "every parishioner," and women vote under that Act—"A feme sole, liable to church rates, &c., may vote on the election of a churchwarden."—Finlay on Churchwardens, p. 25. [Christian, J.—Is it conceded as a fact, that women do vote for churchwardens?] It is.—*R v. Stubbs* (2 T. R. 395) decided that a woman might be an overseer of the poor. It was argued there as here that the duties of the office were inconsistent with the decency of the sex; but Ashurst, J. in giving judgment, says, "The only question then is, whether there be anything in the nature of the office that should make a woman incompetent, and we think there is not. There are many instances where in offices of a higher nature, they are held not to be disqualified," &c.—*Olive v. Ingram*, is fully reported in 7 Mod. Rep., 263, and at p. 265, Page, J. says, "I see no disability in a woman from voting for a parliament-man." Whether women may be commissioners is a question that may arise at a future time. What is contended is, that persons who have property in the place are to elect those who shall take care of the paving, lighting, &c. The Chief Justice in the Court below expressly confined his observations to the Act itself, and the construction of the Act. Women are excluded by positive enactment in 3 & 4 Wm. 4, c. 91, s. 1. It was intended by the Act, that women were not to be admitted to the first meeting, which would be one of discussion, but were to take part in the subsequent voting where there would be no discussion. In England the towns are governed by local Acts. [Fitzgerald, B.—Since the 9 Geo. IV. c. 82, has this claim ever been made?] We cannot tell. In Kingstown the women have been exercising this franchise for five years back.

Curtis in reply.—It is said—1. That the Commissionerships created under this Act relate only to private property. 2. That it does not follow that women would have the right to be elected commissioners under section 25. The title of the Act is the answer to the first argument—the chairman shall be a justice of the peace. [Ball, J.—Not shall, but may, if the Lord Chancellor chooses.] There is a power to impose fines. The other side have not answered our challenge

to show a case where a woman was a justice of the peace, and did not hold the office by some hereditary tenure. My answer to the second argument is, that the glossary has given a separate definition of the word "householder" and no definition of the word "occupier," denoting the sex. It is said by them to explain an incongruity which exists only in their own argument, that women were not to be admitted to the first meeting, but were to take part in the subsequent voting. [*Christian, J.*—What very much presses against you in my opinion is, that the Legislature expressly and twice over (not once which might happen by accident, but twice over) have excluded women in the two stages of considering if the town shall be brought under the Act, but after that the matter is left to stand on the general language of the glossary.] [*Deasy, B.*—And not only so, but the proposer and seconder must be householders.] The women in Kingstown have been voting only in the one ward of Glasthule.

Cur. adv. vult.

The Court desired to hear the question re argued by one counsel on each side.

June, 10th.—*Ball, Q.C.*—The assignee of tenant by courtesy or dower is within the letter of the statute of Gloucester, yet no action of waste shall be brought by the heir against him. Why is he not liable? Not because he is not within the statute, but because he is not liable by the common law. *Dwarris on Statutes*, p. 565. Acts *in pari materia* are to be all construed together. This holds of Acts relating to the franchise. It holds of the revenue laws. Thus though one Act made unstamped paper totally void, another made a provision to make it good. Again, an expired or even repealed statute may be used to explain an existing and operative one. *Dwarris*, page 569. There is no provision as to sex in the 9 Geo. IV. c. 82. [*Deasy, B.*—referred to the 6th section.] [*Monahan, C.J.*—There is no glossary.] [*Christian, J.*, referred to Lord Brougham's Act, 13 and 14 Vic., c. 21, as doing away with the distinction between Acts which have and those which have not a glossary.] The Municipal Corporation Act, the 3 & 4 Vic., c. 108, preserves the operation of the 9th Geo. IV. c. 82, and extends it to boroughs named in the schedules G. & H. The Commissioners' Clauses Act, 1847, 10 Vic., cap. 16, is the first statute which really operates on the present election, and in the glossary to it "person," is defined to include corporation. Then comes the Towns Improvement Clauses Act, 1847, 10 & 11 Vic., c. 34. [*Monahan, C.J.*—I am not quite sure that if you be right, the same construction ought not to be given to the Poor Law Act.] "Unless there be something in the subject or context, repugnant to such construction," are the words used in these Acts. The Poor Law Act does not use them, but has, "except where the context excludes such construction." [*Christian, J.*—Context keeps you within the statute: subject sends you out of it.] See the absurdity of allowing a female to be an engineer, surveyor, &c. Section 28 of 10 Vic., c. 16, is the section under which these ladies voted, and by that it is enacted that the voting is to commence at nine

o'clock in the forenoon, and close at four o'clock in the afternoon, unless in case of riot or obstruction. The questions which may be asked are 1. Are you the person assessed? 2. Have you already voted? and a false answer to either of these questions is a misdemeanour, and in Scotland perjury, for this Act is not confined to Ireland. With respect to the manner of carrying out the Act, there is a similar section in the statute of Geo. IV., with the difference that the rating is made at a vestry, and here it is for the relief of the poor; and there is a notice under that Act, concerning the persons who are to vote. [*Monahan, C.J.*—That notice leaves out a very important portion of this one, the declaring who may vote.] Supposing there were three classes mentioned in section 7, and two in the schedule A, could it be said that the schedule was to exclude one? The schedule operates by showing that the common law is presupposed to operate. There are only five towns in all Ireland excluded from the Towns Improvement Act. Is the whole policy of the law to be surrendered on the strength of an expression in an interpretation clause?

Heron, Q.C.—It is said that there is an inherent disability in women to exercise the franchise. Women vote for churchwardens and sextons, both common law franchisees. Coming to the recent legislation, women vote for poor law guardians. [*Ball, J.*—The objection is confined to government franchise.] From the time of Henry III., of Simon de Montfort, women were excluded from the parliamentary franchise, either by direct legislation or by the language of the writs, which the Crown issued to those who should summon the parties, who were to elect. A writ of A.D., 1254, the form of which is used to the present day, is given in May's Parliamentary Practice, p. 22. It requires the sheriff "to cause to come before the king's council, two good and discreet knights of his county, whom the men of the county shall have chosen for this purpose," &c. This is the original of Parliament. The two knights make the first trace of representation. [*Fitzgerald, B.*—Do you mean to say there was no common law before that, as to representation.] There is no analogy to this, of representation in ancient Greece, or in ancient Rome, or in the middle ages. [*Deasy, B.*—It was doubted down to the reign of Henry VIII., whether a woman could wear the crown.] It was doubted in revolutionary times: *inter arma leges silent*. In the two earliest statutes, the qualification is given expressly to males. Then in the Reform Act. [*Deasy, B.*—Do you contend that females could vote before these Acts?] No: these Acts with the Reform Act, mean this, that if there was an inherent incapacity in women to vote for members of Parliament, it would not have been necessary to use the words "every man," [*Keogh, J.*—Perhaps they did so in the Reform Act, because there was at that time a party claiming the franchise for women.] If there was, it had not much influence. There are only two offices of this kind which women cannot exercise. They have not the Parliamentary franchise, and they cannot serve on juries; and by 3 & 4 Vic., c. 21, the Jurors' Act, the qualification is confined to men. [*Monahan, C.J.*—All the franchises by your argument have been created or regulated by statute. There is no doubt that whenever they commenced there is no trace to be

found of a woman exercising such a franchise; you may say in the same way, women have in all times served the office of sexton, and there was one hereditary sheriff, the Countess of Pembroke. It occurs to me there is a code of which this Act is only a part, and the question is, what is the fair construction of these Acts as a body. I do not see a great deal of difference between the duties of a poor-law guardian and those of a town commissioner. Our poor-law is of very short duration, and there has been no decision of a Court of law on the question, whether women may vote.] They have voted since 1838. [Monahan, C.J.—It appears to me that the Legislature having at such a remote period, confined the franchise to males, was a kind of declaration, that females were understood to be excluded.] [Christian, J.—Read the words of the statute of Henry VI. which you say exclude females.] 10 Henry VI., c. 2, “not making express mention in the same, that every man that shall be chosen, of any such knights, shall have freehold,” &c. [Christian, J.—What is the Norman French?] Chascan. [Christian, J.—Then the difference of the *e*, is the only foundation you have for saying females were expressly excluded.] When from Henry, VI., to the Reform Act, the franchise is confined to males, I may argue that express legislation confining it to males was necessary. The same holds of petty jurors. There is no common law preventing women from being petty jurors. [Monahan, C.J.—With the exception of a jury of matrons in a criminal case, is there any instance of women having ever served on a jury; suppose on a coroner’s jury?] I do not know of any. When women kept castles in the marches, in the feudal times, they exercised criminal jurisdiction, as in the Lay of the Last Minstrel. [Christian, J.—A more historical instance is that of the Countess of Derby, who was queen in Man, the foundation of the novel, Peveril of the Peak.] [Deasy, B.—There is no doubt that a woman may hold a peerage, and that holding it she cannot exercise one of the functions of the peerage, which is voting in Parliament.] That a woman may be commissioner of sewers, see Viner’s Abridgment, vol. 13, title Feme, p. 159. The Countess of Warwick was a commissioner, Callis, 290. [Monahan, C.J.—I should like to know if women are in the habit of voting for poor-law guardians?] As an incontrovertible fact, they do in Ireland. I have no doubt they vote in England. *R. v. Stubbs* (2 Term Rep. 395), decides that a woman may be an overseer of the poor. The question is, as to the qualification for a privilege, that privilege being defined by Act of Parliament. 9 Geo. IV., c. 82, has no interpretation clause. It is very likely that the Legislature intended to exclude females, but that Act has no existence. Ball, J.—But if *in pari materia*, it may be referred to construe this.] The word “male,” only occurs three times in the Act, in the interpretation clause, and in schedule A. Therefore it is plain, that when the interpretation clause was being enacted, the Legislature had before it the places where the word occurs. What then was meant by the interpretation clause? It enacts expressly that words importing the masculine gender shall include females. [Monahan, C.J.—Unless there be something repugnant in the

context.] There is no authority for the proposition, that a common law disability, prevents women from voting either in public or private matters, whilst the highest offices have been exercised by them in England and Ireland; offices similar to that of town commissioner. [Keogh, J.—In *R. v. Stubbs*, where a woman was an overseer, Mrs. Stubbs was the only substantial householder: the other two were her tenants, and paupers, and the judge says there is no danger of making it a general practice. In the case in Callis, one of the grounds of the judgment was, that Semiramis was governor of Syria, and the Queen of the South, who came to visit Solomon, for anything that appeared to the contrary, was a queen sole.]

Ball, Q.C.—Stated that Archbold on the Poor-laws, contained nothing to show whether or not women voted, but referred to *R. v. Stubbs*.

Cur. adv. vult.

June 13.—DEASY, B., delivered judgment first He was of opinion, that the judgment of the Court of Queen’s Bench should be reversed.

FITZGERALD, B., next delivered judgment. — He could not see any office, to which women could not be admitted, if, having regard to the duties of the office of town commissioner, they could be admitted to it, consistently with common law. Women by common law were incapable of voting at such elections, and the municipal law which disqualified them, was but a recognition of this disability. He could not think that the Legislature by the mere force of an expression in an interpretation clause, which was now common in statutes, intended to make so great a change. Reasons grounded on the alleged inferior understanding, and powers of reasoning possessed by women, were to be more liberally dealt with now than formerly, but in substance the reason of the common law still applied, and their course of training, rendered women far less fit than men for the administration of government. Having regard to the common law doctrine, the inferiority of bodily strength possessed by women, and the inferiority he had alluded to, he did not regret being brought to the conclusion, that the judgment of the Court of Queen’s Bench ought to be reversed.

CHRISTIAN, J.—I am not ashamed to say, that I have changed my opinion more than once, during the argument of this question; but having heard the able argument of Mr. Ball, and the two judgments which have been delivered, I surrender my doubts, and concur in the decision, that the judgment of the Court of Queen’s Bench should be reversed.

KEOGH, J.—I also concur in the judgment pronounced, and in the reasons given. I do not think the words of the Act without the interpretation clause, sufficient to sustain the defendant’s contention. I do not think the words of the interpretation clause sufficient to override the context. It has the saying, unless there be something in the subject or context repugnant to such construction. I think there is much that is repugnant.

BALL, J.—I regret that I have the misfortune to differ from all my brethren who have preceded me. I think the judgment of the Court of Queen’s Bench ought to be upheld. By the 4th section of the Act

women are prevented from taking part in the first proceeding, which is to be by twenty-one householders; and "householders" by the glossary are made to mean male occupiers. Section 6 provides that a meeting is to be held and notice of it given. By section 7 "every person of full age who is the immediate lessor of lands, &c., also every person of full age who shall have occupied, &c., at a net annual value of eight pounds, or upwards," shall be entitled to vote. The first question that occurs is, whether, under the 7th section, having regard to Schedule A, women are entitled to vote at the preliminary meeting? The terms "every person of full age" unrestricted, would manifestly include women; but it is argued that the terms of the notice in Schedule A. make all the difference. Are we to construe section 7 as giving the right to vote to females? It is argued that what is called every person generally is made by the notice to mean every male. The notice is confined to those who shall have paid their poor rates, whereas section 7 has no such qualification. The pecuniary interests of women become unequivocally involved, and it is only fair they should have a voice in what concerns them so nearly. And the Legislature has carried that out by the terms of section 22. A great deal of discussion took place at the bar respecting the incompetency of women to discharge the duties of town commissioners. I abstain from expressing any opinion on the question, whether women should be commissioners, seeing it is not before us, save only that I do not accede to the opinion expressed at the bar that, acknowledging the right of women to vote, warrants the opinion that they are capable of being elected to the office of town commissioners.

PROR, C.B.—I concur in the conclusion at which my brother Ball has arrived. It appears to me that when the Legislature annexes to an Act an interpretation clause, the Legislature prescribes in peremptory terms the meaning, and imposes a necessity on the Court to adopt the interpretation it gives of the words the Legislature thinks fit to use. And if in this Act the Legislature enacts that the following words shall have the meaning assigned to them, unless there be something repugnant in the subject or context, I feel bound to give the meaning which the Legislature chooses to affix, with only the qualification the Legislature has itself expressed; and whatever may be my opinion on the inconsistency of the position of women in society with the exercise of certain functions, I do not feel at liberty to hold that, because there is that inconsistency, i.e., with the ordinary habits of society with reference to the position which women hold in society, something that I may consider is not consistent with the privacy and delicacy of their position, I am excused from giving to the words of the Act the meaning the Legislature has annexed to them; and I do not recognize any opinion I or anyone may form with respect to any of these reasons as amounting to a repugnancy within the Act of Parliament. With respect to the context, the reasons shortly given by my brother Ball are conclusive to show there is nothing in the context repugnant to the construction which the language of the interpretation clause gives to the terms. The only question is whether there is a repugnance in the subject,

i.e., in the character of women? I will not refer to the instances enumerated in which women have held offices. But I cannot embrace the proposition that there is a common law disability in women to exercise such a function as the election of a town commissioner. I cannot do that in a country in which it is the common law of the land that a woman may be the sovereign. And I can understand how this argument would be received at a period where we may fairly look for the understanding of the common law. In that curious Act, which is a declaratory Act, and which declares the right of a female to succeed to the Crown, I find, not only a declaration of the common law, but, a most indignant repudiation of the opinion, that by the common law women might not reign. The 1st Mary, session 3, c. 1, enacts, "Forasmuch as the imperial crown of this realm, with all dignities, &c., is most lawfully, justly, and rightfully descended and come unto the Queen's highness that now is, &c., nevertheless, &c., by occasion whereof the malicious and ignorant persons may be hereafter induced and persuaded unto this error and folly to think that her Highness could or should have, enjoy, and use such like royal authority, &c., for the avoiding and clear extinguishment of which said error or doubt," &c. And then comes the declaration that females should reign. And then come the reign of Elizabeth and that of Anne. I cannot hold that there is such a common law disability in that country in which by common law queens might reign. Instances have been referred to: some founded on long-established usage; some on Acts of Parliament, showing that women do not exercise a variety of functions. With respect to the elective franchise, we are all aware the elective franchise was originally enjoyed by the freeholders who did suit to the sheriff's Court. It was not till afterwards that Acts of Parliament named the sex of the persons who should enjoy the franchise, and I presume that was in order to prevent any ambiguity as to the privileges which, for feudal reasons, freeholders possessed. So as to the far more ancient privileges conferred on boroughs: the charters named the men of the place. No doubt the word *homines* may be ambiguous, but in early times burgesses, being of male sex, enjoyed the privileges which in boroughs were established; and on these privileges was founded their being convened to the Parliament, in which were knights, burgesses, and citizens. I apprehend this was founded on the physical inability of women for duties which in those days it was necessary for males to discharge. Above all, I can perfectly understand how the general sense of the whole community then, as now, and then more than now, recoiled from the idea of women being engaged in the turmoils connected with the functions referred to in argument. But that that imposed any disability on women to elect those who were to tax, and to tax a local community, I cannot see. To a certain extent it rendered them incapable of coping with men in physical power, and might make them dependent mentally on some men, but this is not sufficient to lead me to hold that there was a common law disability *in limine* in women to elect those who were to tax. It is singular there is no direct decision on this. There are several *dicta* indicating a contrast between offices which women did

hold and others for reasons given by the judges which women did not hold. With respect to all Acts of Parliament, why should there be express exclusion of a class of persons, if already excluded? Some, it may be, indicate, not a general policy of the law, but, the general policy of the Legislature. Coming down to instances of more recent legislation, one, perhaps I may say two, I cannot say two, therefore I only say one; we are entitled to consider what is a matter of public notoriety?—One Act has been passed recently, the Legislature conferring a right to vote on women. The Poor Law Act contains no such restriction as that in this glossary. It merely directs that certain words shall have certain meanings, "except where the context excludes such construction." In the section 80 or 81, which has been referred to, the franchise is conferred. In the interpretation clause, words importing the masculine gender are by express enactment to be construed as including females; and by that context and by that glossary it appears to be perfectly plain that women have a right to vote. But what is the fact of notoriety? That they do vote ever since: upwards of 20 years is this Act in operation. For 20 years the Legislature have never thought fit to interfere, although that statute has been over and over again before Parliament, and several amendments have been made; and, though in more than one instance the Legislature has dealt with the qualification and the mode of electing guardians, no attempt has been made by the Legislature to interfere. It is more than I can find that the Legislature thought women might not elect a body which has to a certain extent, within local limits, powers of government; but has also powers of taxation. Nothing in the context of the 22nd section do I find to prevent the application of that part of the interpretation clause which deals with females as well as males: "words importing the masculine gender shall include females." The subject-matter is as nearly analogous as it is possible to be with the exercise of the franchise in appointing guardians of the poor. I do not think we are at liberty to construe this Act otherwise than as its words plainly import. It appears to me we ought to affirm the judgment of the Court of Queen's Bench.

MONAHAN, C. J.—I am in this condition, I have during the argument and since considered the case with all the attention I could. I have come to the conclusion that so far as the words of section 22 are concerned, they include women. With respect to the words in that section which might raise an argument, turning to the interpretation clause, it is in terms enacted that words importing the masculine gender shall include females, unless there be something in the subject or context repugnant to such construction. The question we have to consider really is, is there or is there not anything in the context or subject of this Act of Parliament sufficient to exclude those who have got the right to vote by the express words of section 22? I have been unable to satisfy myself whether there is or is not anything in the subject. My impression is, that there is not. However, I am bound by a well-settled principle of law, that if I am unable on satisfactory grounds to dissent from the decision of the Court I am called to review, I am bound to affirm it. However, the majority of the

Court being of a different opinion, the judgment of the Court of Queen's Bench must be reversed.

Judgment reversed.

Landed Estates Court.

[Reported by C. J. Manning, Esq.]

[BEFORE JUDGE HARGREAVE.]

IN RE MEREDITH THOMPSON.—May 12, 1864.

Will—Construction—Whether certain clauses constituted an estate tail or an estate in fee defeasible.

A will, among other devises, contained the following— "I leave my third son, M. T., the lands of G. for ever, but in case he should die unmarried, or without leaving lawful issue, in that case he may will one-half of it as he pleases, and the other half to go share and share alike between my surviving sons and their families, as my executors may think most wanting it." *At the end of the will was the following clause—* "All the bequests given my son R., my grandson M., and also my other three sons, M., C., and H., of my property, no part of it shall or will be liable, or pay any debt they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs." Held, that the two clauses must be read together, and construed as one disposition: and that M. T. took an estate tail, and not an estate in fee defeasible, in the event specified of the devisee dying without leaving lawful issue living at his death.

MOTION to make absolute conditional order for sale, notwithstanding cause shown. The facts of the case sufficiently appear from the judgment.

The Solicitor-General (with Warren, Q.C., for the petitioner, contended that under the will of Meredith Thompson, dated 26th May, 1837, the testator's son, Meredith Thompson took an estate in tail male in the lands of Garvack, the last clause as above quoted cutting down the estate in fee to an estate in tail, with remainder over; but it was admitted that without the last clause the devise would have been of an estate in fee with an executory devise.

Hugh Law, Q.C., (with Jackson) contra, for William and Elizabeth Thompson, parties shewing cause against making absolute the conditional order for sale, argued that the words in the last clause were not dispositive, but parenthetical and referential. The testator's object was to protect the property from sale, and that object would be defeated by making the devise an estate tail. He contended that Meredith Thompson took an estate in fee liable to be defeated as to one moiety in the event (which happened) of M. Thompson, the devisee, dying without leaving issue living at his death.

Cases cited—*Moor v. Denn ex dem. Mellor*, in error and opinions of the judges (2 Bos. & Puller.

247); 2 Jarman on Wills, p. 298 to p. 305, and doctrines there laid down; *Mortimer v. Hartley* (6th vol. Exch. Rep. p. 47, and also reported in 3 De Gex & Smale, p. 316); *Boys v. Bradley* (10 Hare, 389); *Knight v. Knight* (3 Beav., 148); *Richards v. Davies* (13 C. B. Rep., N. S. 861); *Pye v. Bradbury* (3 Law Times, N. S., 327); *Thornhill v. Hall* (8 Bligh, 88); *Monk v. Mawdsley* (1 Sim. 286.)

May 23.—JUDGE HARGREAVE, in giving judgment, said—The will contains numerous devises to sons and grandsons, and amongst them the following—"I leave my third son, Meredith Thompson, the lands of Garvack for ever, but in case he should die unmarried, or without leaving lawful issue, in that case he may will one-half of it as he pleases, and the other half to go, share and share alike, between my surviving sons or their families, as my executors may think most wanting it." At the end of the will is the clause, "All the bequests given my son Robert, my grandson Meredith, and also my other three sons, Meredith, Charles, and Hugh, of my property, no part of it shall or will be liable, or pay any debts they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs." The petitioner, admitting that the first words of devise would confer a fee defeasible in the event specified, contends, that the clause at the end must be applied separately to each devise, and read as if it immediately followed such devise; that the words "always go in the male line" refer to generation or course of descent, and therefore are equivalent to a gift to the devisees in tail male; and that the fact that the testator's object in limiting an estate tail, viz., to prevent an alienation, could not lawfully be so effected, does not prevent the words having their natural operation. The parties showing cause contend that the last clause is not dispositive, but only a vague and incorrect reference to the prior devises; that the words "go always in the male line" are destitute of any definite meaning, as it does not appear who is to be the origin of the line, nor whether it is to be both an ascending and descending line; and that the object of the testator would be better effected by a devise in fee defeasible than by the limitation of an estate tail. Although I consider that all of these three last propositions are untenable, I still feel great difficulty in deciding on the true construction of this will. The last clause refers specifically to each devise, and must be read as if attached to them respectively; and in conjunction with each such devise must be regarded as part of it, and therefore just as much dispositive in its character as the more formal language which precedes it. It appears to me clear that the words "go always in the male line" refer to a continued successive ownership created by descent from the respective devisees named in that clause, and that they can have no other interpretation than "the heirs male of the body" of the devisees. The words are used here in a sense quite different from that in which similar words were used in the case of *Boys v. Bradley* (10 Hare. 339). There was no reference to successive ownership, to generation, or to descent; but the words were used merely to point out the character which a single person was to fill at a particular moment. I am not at liberty to give these words a different meaning, merely

because an estate tail would not (if docked) effect the testator's object of preventing alienation. The testator is not supposed to have in view the exercise of any tortious or statutory power which a tenant in tail may possess; but we are to interpret the will on the assumption that the testator supposes all his devises will take effect exactly as he limits them. This is a settled rule of construction, which it would be very unsafe to deviate from.—See *Richards v. Davies* (13 C. B. Reports, N. S. 861) The latter clause would, therefore, by itself, give each of the designated devisees an estate in tail male, and unless that estate is inconsistent with the prior devise, I think it must take effect in that way. In short, the two clauses must be read together, and construed as one disposition. Now, there is this peculiarity about an estate tail, that inasmuch as it cannot merge, it cannot be inconsistent with any larger estate given to the same devisees; for the two can subsist together. I therefore incline to the opinion that the defeasible fee first given is not to be considered as cut down to an estate in tail male. Unless compelled by the language so to do, we ought not to construe a will to give an estate in tail male, with a contingent remainder, to take effect only in case of a total failure of issue, both male and female, at the death of the devisees; for the existence of female issue would prevent the gift over from taking effect, and would cause an intestacy. I think, however that the two clauses may be reconciled by *interposing* an estate in tail male, rather than by cutting down the fee to an estate tail. That would answer the last clause by giving an estate going always in the male line, and incapable (so long as it was not docked) of being alienated, and at the same time giving to the devisee a fee which would enable him to provide for female issue, with a gift over in case of there being no such issue, the male issue being supposed to be fully provided for by the entail. On the whole, though I feel great doubt on this case, I think that Meredith Thompson took an estate in tail male, and that the cause must, therefore, be disallowed.

Order accordingly.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BEEWICK, J.]

RE JOHN SMART.

A trader executed a trust deed, purporting to be for the benefit of all his creditors, who would come in and execute it within a month, and it was advertised in accordance with the provisions of the 93rd section of the Irish Bankruptcy and Insolvency Act, 1857. A creditor who had at first assented to it, and afterwards, more than three months after its execution, obtained an adjudication against the trader, sought to compel the trustees under the deed to bring in and lodge in the bankruptcy matter, whatever they had realised under it, on the

ground that the deed was not protected, inasmuch as it was an act of bankruptcy. Held, that having been privy and assenting to the provisions of the deed, although he did not execute it, he could not question its validity; but Held that the form of the deed drafted from the ordinary lithographed precedent was objectionable, and did not entitle trustees to the benefit of the 93rd sec.; in fact, that such form is contradictory in its terms, as purporting to be for the benefit of all the creditors, and then attempting to exclude such creditors as did not execute it within a certain time named.

Semble, all creditors coming in before the trust fund is distributed are entitled to their dividends.

This case came before the Court upon the application of Isaac Burns, the petitioning creditor, that the trustees named in a certain deed of assignment, which had been executed on the 20th of October, 1863, should bring in, and lodge to the credit of the bankruptcy matter, the monies, which had been realised by the sale of the trader's effects and property, so assigned to those trustees for the benefit of certain creditors, named in a schedule to that deed. It appeared that the only object of the bankruptcy was to set aside the deed, and it further appeared that except the monies in the hands of the trustees, the trader had no assets whatever. When the case was first heard, it appeared that the deed had been duly executed, pursuant to the 93rd section of the Bankrupt and Insolvent Act, for the benefit of all the creditors of the trader, upwards of four months before the act of bankruptcy, on which the adjudication took place; but on its being pressed that the deed was not according to its trusts, for the benefit of all the creditors of the bankrupt trader, counsel for the trustees obtained liberty from the Court to file an affidavit shewing that the provisions contained in it had been assented to by the petitioning creditor. This affidavit had been accordingly filed, stating that Burns had been present at the first meeting of creditors, had assented to the clauses in the deed, and to a weekly allowance to the trader for assisting in the management of the estate. The deed, it appeared, was drafted from the ordinary printed form. It contained provisos or conditions excluding from any benefit under it all creditors who should not come in within one month from its date, and also clauses empowering the trustees to grant a weekly allowance to the trader for assisting the trustees in the management of the estate, and also to submit all questions concerning the regulation of the assets to a majority of the creditors, who might be convened for that purpose. No affidavit in answer to that of the trustees was filed by Burns.

P. Martin, for Burns, the applicant, submitted that the deed was, in itself, an act of bankruptcy, and not protected by the 93rd section, and it was not an assignment of the entire estate and property for the benefit of all the creditors of the bankrupt trader. First, because the benefit of sharing in the composition was extended only to those who should come in and execute the deed within a month. He cited *Copeman v. Hort* (14 C.B., N.S., 91; *Ex parte Morgan re Woodhouse* (22 L. J., Bank. 17); *Ex parte Rawlings* (22 L. J. Bank. 27); *Wallen v. Adcock*

(7 Hurl. and Nor. 541); *Berridge v. Abbot* (13 C. B. N.S. 507.) Analogous cases decided on secs. 224 to 229 of the 12 & 13 Vic., cap. 106, shew that the whole estate without any exception, must be assigned—*Drew v. Collins* (6 Exch. 670); *March v. Horwick* (2 Hurlstone & Nor. 158); *Snowden v. Bryce* (4 H. & N. 391). Then the special provisions in the deed prevent its being protected by the 93rd section. The surplus, if any, was to go to the trader himself; then there was to be a weekly allowance besides to be given at the option of the trustees. As to estoppel Burns had only agreed to execute a valid deed within the 93rd section, and not such a deed as the present; and he was not estopped from any proceedings he choose to take, and, in fact, he had repudiated it before the deed was perfected.

Kernan, Q.C., for the trustees, contended that the deed was in the ordinary form, and that under its provisions all the creditors might have proved—*Re Phelan, a bankrupt* (12 Ir. Chan. R. 467), a judgment by Judge Lynch, was a decision precisely in point, and the argument on the other side only applied to deeds relating to a corresponding section of the English Act, where the minority are conclusively bound by the majority—*Whitmore v. Turward* (4 L. J. Bank. 38.) As to the estoppel, Burns was privy to and assented to the deed, and having so assented, he could not then repudiate it—*Marshall v. Barkwell* (4 B. & Adol. 508), and the assignees could not now stand in a better position. If the provisions of the deed were held not to be within the protection of the 93rd section, then *Re Phelan* would be virtually overruled.

BREWICK, J., delivered judgment.—He said, This case comes before me on an application from the creditor, on whose petition the adjudication was made, for an order on the trustees named in a certain deed of arrangement of the 20th of October, 1863, to bring in and lodge to the credit of this matter certain monies, the produce of the estate of the bankrupt, which has come into their hands under the provisions of that deed. These trustees have most properly submitted to the jurisdiction of the Court, and set forth the grounds on which they resist the application in an affidavit filed as cause in this matter. The substance of their statement which is not controverted is, that the present bankrupt being unable to meet his engagements with his creditors, called a meeting of them on the 20th of October last, at which a considerable number attended, amongst whom was the present applicant, Isaac Burns, at which it was unanimously agreed that the property of the trader should be vested in trustees then named for the benefit of creditors, and that the trustees should proceed to realise the property, and divide the proceeds rateably amongst them all. A deed was accordingly prepared and executed by the bankrupt the same day, with the object of carrying into execution, the terms of said arrangement. It was registered under the provisions of the 93rd section of the Irish Bankruptcy and Insolvency Act; the trustees proceeded to realise the estate under its provisions, and acted so far as we can discover, with perfect *bona fides* thereunder, and honestly realised the whole estate with as little expense as possible, and offered to the present applicant

every facility to come in and execute the deed, and obtain the benefit thereunder, and having on the 19th of February last turned into money the last portion of the trust estate, were about to strike, and pay a dividend of four shillings in the pound, to the creditors who had become parties to the deed, when they were stopped by the present notice. It appears that on the 13th of February last, the petition in this matter was filed by the present applicant, grounded on a declaration of insolvency, signed by the bankrupt, John Smart, on the day previous, and he was adjudicated bankrupt thereon on the 16th of same month. I have been informed by the official assignee that there are no assets in his hands. In this matter, no estate is to be divided; no question of difficulty to be investigated, nor is any fraud suggested, and on this state of facts, I am required to take from the trustees the monies in their hands, which they are about to divide amongst the creditors without expense, and have it brought in here to be dealt with under the bankrupt act, and certain to be diminished by the serious costs consequent upon bankruptcy. No creditor complains of the conduct of the trader—no creditor has been precluded from the benefits of the trust deed, and except the petitioning creditor, no one asks for the intervention of this Court. Being fully persuaded that the proceedings in this matter are merely calculated to create expense, and waste the funds which were in process of being distributed inexpensively and honestly among the creditors who choose to take the benefit of the deed, under these circumstances, I feel bound to examine strictly the grounds on which the intervention of the Court is required before I yield to the application. For the applicant it is said the deed of the 20th of October is of itself an act of bankruptcy, and is not protected by the 93rd section of the Act, inasmuch as it is not for the benefit of all the creditors of the bankrupt, and contains provisions inconsistent with the provisions of that section, and is besides not duly registered thereunder. On the part of the trustees it is urged that the deed is strictly within the terms of the 93rd section, but that whether this be so or not, the present applicant is precluded from making any objection thereto in consequence of having attended the meeting of the 20th of October, and being an assenting party to the agreement then entered into, in pursuance of which the deed in question was prepared and executed. It might under ordinary circumstances be sufficient for me to say, that as Mr. Isaac Burns is admitted to have attended the meeting of the 20th of October as a creditor of the bankrupt, and as the fact of his assent to the arrangement then proposed is stated, not merely by the resolutions then passed, but also in the affidavit of the trustees, and has not been controverted by him, and as I am of opinion that the deed in question has been prepared in conformity with the arrangement then entered into, and that the trustees have honestly and fully acted in discharge of the duties imposed upon them, Mr. Burns is now estopped from impeaching that deed, or quarrelling with the acts of the trustees thereunder. It has long since been established by authority, and is fully in accordance with every principle of commercial justice, that where a petitioning creditor was party to, or acquiesced in a deed of trust

which amounted to an act of bankruptcy, though he did not execute it, he will be estopped from availing himself of it as an act of bankruptcy, and I never met with a case in which I should be better pleased to apply this principle. I therefore refuse his application with costs. But as in the course of the argument it has been insisted that the deed in question has been so framed as to be within the protection of the 93rd section, and as the form is that which I am told has been in such general use, that it is the lithographed form applied to all such cases, and as it appears to me to be so open to many of the objections that have been raised against it by Mr. Martin, that if I had been called upon to decide it on its merits, I should have been obliged to declare that it is not of such a character as to be entitled to the benefit of the 93rd section of the Act, and therefore should be treated as an act of bankruptcy. I think it right to make some observations on this view of the case, in the hope of inducing parties who are anxious to carry out similar arrangements to modify the form of deed they adopt, so as to ensure legal validity to their proceedings. The deed in question purports to be made between the trader of the first part, the trustees of the second part, and such creditors as have subscribed their names thereto of the third part, and it proceeds to assign all the real and personal property of the trader to the trustees in trust to sell and realise the same after payment of the costs and expenses of the deed, and in the execution of the trusts thereof, and also after payment of an allowance of a pound a week to the debtor for subsistence as long as they shall think fit to pay and distribute the residue of the said monies unto and amongst all and every the creditors who shall come in and execute these presents, or otherwise signify their assent thereto within one calendar month from the date thereof in proportion to their several debts, and in case of any surplus to pay the same to the debtor. Then follows a proviso that in case any of the creditors of the said debtor shall not agree to, or execute these presents within the space of one calendar month from the date thereof, then they and every of them shall be excluded from the benefit of these presents. The trustees are further authorised with the assent of the parties thereto of the third part, or such of them as shall attend a meeting duly convened after three days' notice thereof to enter into such arrangements respecting the trust premises, as the persons being creditors attending such meeting shall deem expedient, which arrangement shall be binding on all parties to the original deed. The deed was duly executed and attested in pursuance of the terms of the statute, and due notice given and published, and was intended to operate under and derive its effect from the 93rd section of the Bankruptcy and Insolvency Act, and whether it does so operate, or whether it is so protected, depends on this question—namely, whether the deed be substantially for the benefit of all the creditors of the trader, because the only deed protected by that section is a conveyance of *all* the estate and effects of the trader for the benefit of *all* his creditors. On this point a number of conflicting authorities have been referred to, and without either defining them, or attempting to explain them, I need only refer to the latest authority on this

subject, in which the present Lord Chancellor of England has not only decided the question, but has pointed out what appears to me to be the true grounds of distinction to be observed in all such cases. The case is *Ex parte Morgan in re Woodhouse* (1 De Gex Jones and Smith, p. 64), and which has been upheld and fully acted upon in a Court of Common Law in the case of *Berridge v. Abbot* (13 C.B. N.S. 507) in which the principle laid down by Lord Westbury is adopted as that by which all similar cases should be governed. In that case, like the present, the trusts of the deed were for such creditors parties of the third part who should execute the deed within twenty-eight days from the date thereof, and the question was, whether such a deed could be treated as one for the benefit of all the creditors of the trader. On that point Lord Westbury says, "I think it is perfectly clear that the section is only applicable to deeds which contain provisions for the benefit of all the creditors, and I believe if the trust deed exclude any creditor, it is not entitled to the benefits of the section of the Act relating to trust deeds. The question is, then, whether this deed may be properly denominated a deed which in its operation may exclude creditors of the debtor, and I think that is the result of this particular form of deed. By the trusts which are here declared, the trustees are not to hold the property on trust for all the creditors, but for such as shall execute the deed within twenty-eight days from the date thereof, a form of trust which confines its operation to the class of creditors who shall come in within that period." This view of the case taken by Lord Westbury appears to me the true, as well as the plain distinction to be attended to in all such cases, although it has been suggested that there are distinctions between deeds of arrangement under the 192nd section of the English Bankruptcy Act, and deeds which are protected by the 93rd section of the Irish Bankruptcy and Insolvency Act, which is the same as the 68th section of the English Bankruptcy Act of 1849. It appears to me, therefore, that in this respect the deed before me is faulty, and that the parties who wish to take advantage of its provisions, and to obtain the protection of the 93rd section, will fail in attaining their object if they adopt the present form of deed. I am not to be understood as saying that the introduction of a proviso limiting the time at which the trustees may safely distribute the trust funds, will affect the validity of the deed, provided, of course, that the time is reasonable, and the notice sufficient. Without some such provision, it is obvious that no trustee could ever be safe, or would ever undertake such trust—but the original trust must be for the benefit of all the creditors without excluding any who may claim its benefit up to any time before the distribution of the funds in regular course of administration. I may add that where any provision is made for the arranging trader, the parties should be careful to keep strictly within the terms of the 94th section, and certainly I should have found it difficult, were I called upon to decide the question, that the time mentioned in the last clause of the deed for calling a meeting of creditors for the purpose of binding the rest, for such arrangement as may be made respecting the trust premises, was so short, and the manner in

which they are to be convened so imperfect, that the whole was not illusory. By the 200th section of the English Bankrupt Act, 1861, and the Schedule D. therein referred to, a precedent of deed is given which contains a form of trust worthy of attention. I make these observations lest it might be supposed that I overlooked the objections made to the deed in this case, and with the desire to induce parties engaged in carrying out arrangements of this kind to see that the form of the deed provided shall be such as to carry their intentions into effect.

[BEFORE JUDGE LYNCH.]

RE PARTICK M'NEVIN.

Final examination—Charge of forgery and false entries in books—General misconduct as a trader.

Where a bankrupt is charged with forgery, and with making false entries in his books, and obtaining credit by false representations, his examination will be adjourned sine die; and although the documents alleged to have been forgeries have been destroyed, and none of them forthcoming, a prosecution for forgery will be directed, as well as a prosecution for frauds against the bankruptcy law.

THE bankrupt had been a pawnbroker, and latterly an auctioneer. He proposed in the first instance to carry a composition under the arrangement clauses, in which he failed, and the case was turned into bankruptcy. M'Nevin was examined principally with regard to bill transactions with other pawnbrokers, and on his final examination he was opposed by

Kernan, Q.C., for the assignees, on the ground of fraud, forgery, and general misconduct. He charged him with having obtained credit from Mr. Sullivan, a pawnbroker, by representing that he was in good circumstances when in fact he was hopelessly insolvent. He charged him with having put into circulation several bills of exchange purporting to be the acceptances of Mr. O'Carroll of Bray, which were forgeries. He put other bills of exchange into circulation which were forgeries, and he made false entries in his books. It was a case where he ought to be prosecuted for forgery and for mutilation of his books. [*Judge Lynch.*—How can you prosecute for forgery on bills that do not exist? the bankrupt destroyed them all.] There would be difficulty, no doubt, in a prosecution for forgery where the forged bills were not forthcoming, but for the other offences against the bankrupt laws there could be no doubt that he could be prosecuted successfully.

Larkin, solicitor, for the bankrupt, submitted that inasmuch as the schedule had been vouched, and although his transactions were irregular, there was no proof that he ever committed forgery—he swore he never did; there was no charge against him but what he admitted himself, and on the whole his case was one of misfortune, and not fraud.

JUDGE LYNCH said, In my opinion, almost every

crime that could be committed against the integrity of trade, as well as against the morality of trade, has been committed by the bankrupt now before me in his final examination. We have here, in the first place, fabricated books, books fabricated for the purpose of self-protection, and the only ground alleged for the fabrication was to defraud creditors, and seek to insure protection to him in another transaction to which I will refer hereafter; and this manner of dealing with the books is of itself sufficient to bring the party within the terms of the statute, as it was an offence against the bankrupt law. With regard to the bankrupt's dealings with Mr. Sullivan, his offence was of a much smaller degree, except in one particular, when he told an absolute falsehood to obtain a credit with that gentleman. With respect to Mr. Kennedy, the bankrupt committed a plain case of deliberate fraud without excuse, without the slightest circumstance of extenuation. He went to Mr. Kennedy's office, and for the purpose of procuring a further credit from that gentleman, he alleged he had a property in Dalkey, and he gave to Mr. Kennedy a security on that property, stating that he had no lease of it—that he had got it up from a squatter, while, at the same time, he had executed a mortgage of the lease to another person. Again, upon the whole case in evidence now, it is perfectly clearly proved that some of these bills of 1863 were forgeries committed by him. I have heard his attempted excuses; matters which are perfectly incredible are stated by him. On his own evidence originally the matter was not pressed against him, because he most distinctly admitted on that occasion that three of the bills impeached were not in the handwriting of Mr. O'Carroll; and, with respect to two which he said were in Mr. O'Carroll's handwriting, the case he had to make was one of gross fraud against himself. His case was this, that having blank acceptances given to him for a special purpose, he, regardless of that special purpose, and without the authority of the party that signed his name, caused two new bills of exchange to be filled up, purporting to be the acceptance of that party. I say that was a forgery quite as much as if he forged the name. No doubt it may be assumed to be a less offence to use the name of a party than to deliberately fabricate the name, but it is only in degree, it is the same class of offence that is committed in both instances. And what was the nature of the trade carried on during the last year? It was a trade deliberately carried on by reason of those forged instruments, and then just before he is to appear in the Court we have him taking up those instruments. Surely it is as plain to any man of common sense what his view was in taking up the bills, as if he had confessed it; it was to prevent those bills afterwards appearing against him here. The explanations given of the bankrupt, in opposition to the clear and satisfactory evidence of Mr. O'Carroll, I believe to be perfectly incredible—I do not believe there is a particle of truth in the statements he has made. This remarkable fact appears. Twenty two of these bills are impeached, yet not a single one of them is produced. It is impossible to believe that this can be the result of mistake or negligence. With respect to the last lot of five bills, it is to be borne in mind that

an allegation of forgery has been made against this gentleman, and his case here is, that so anxious was he to meet that case of forgery—so anxious was he to get the bill, and produce it to Mr. O'Carroll, that he sent his porter and his wife to show it to Mr. O'Carroll. Yet, instead of keeping that bill safe to meet the allegation of forgery made at the meeting of creditors, he committed the very act that a forger would have done—that nobody but a forger could have done—he destroys the instrument that it may be put out of the power of the creditors to produce it, and show the fabrication. And then, unfortunately, this man, in addition to his crimes against trade, commits the further offence of making deliberate false statements to excuse himself in respect of these transactions. Upon the whole case, I feel that trade would not be safe if I allowed such a man to go into trade again. My judgment, therefore, is, that the final examination of the bankrupt shall be adjourned *sine die*, and I direct a prosecution against this gentleman, for the forgeries that have been committed, for the frauds against the bankruptcy law, and for the false representations that he has made, adding, however to the order, that the directions for the prosecution shall not be acted upon until I am satisfied that there exists evidence sufficient to carry it out to a successful issue.

Agent—Mr. Dodd.

RE THOMAS SHEEHAN AND FEEHAN'S ESTATE.

Surety and principal—Right of creditors to prove for their original debt when composition fails—Election.

A party becomes security for the payment of a composition by an arranging trader, and when two of the instalments are paid, the case is turned into bankruptcy. The creditors prove against the estate of the principal for their first bills, giving credit for the instalments paid. The surety then becomes bankrupt, and the creditors seek to prove on his estate, for two sets of unpaid bills. Such proof will not be allowed, the creditors having made their election.

In this case Feehan was an arranging trader, and carried a composition of 7s. 6d. in the pound, to be paid by instalments, and Sheehan became surety for the instalments, by joining Feehan in promissory notes; two of the first notes were paid, and Feehan's case was turned into bankruptcy, and Sheehan was also made bankrupt, and the case now came before the Court, on a proof sought to be made by creditors on Feehan's estate, against the estate of Sheehan.

Rogers, Q.C., for the assignees.

Kernan, Q.C., for the creditors seeking to establish the proof.

LYNCH, J., said.—In this case the proposition argued before me, and now to be decided by me, is raised in the following manner:—Feehan was an arranging trader, and carried a composition for 7s. 6d. in the pound. The payment of this composition was

secured by four notes at 3, 6, 9, and 12 months respectively, and Thomas Sheehan was a party to these notes. The two first set of notes were duly paid, but default being made in the third set of notes, Feehan's case was turned into bankruptcy on the 24th of November, 1860. In Feehan's bankruptcy, Messrs. Vance and Co. claimed to prove for the whole amount of the debt, giving credit for the amount paid on the two sets of bills paid on foot of the composition of Feehan. They now claimed permission to prove for the two sets of bills unpaid against Sheehan's estate. In my judgment, they cannot do this. In Feehan's bankruptcy, I held that they could prove for the whole amount unpaid of the original debt, on the ground that default having been made in carrying out the arrangement, the parties could at their election, stand on their original rights, and renounce the agreement broken by the arranging trader. The agreement, so far as Sheehan was concerned, was operative; if the parties abided by it, Sheehan could never, in exoneration of himself, set up the breach of the agreement by Feehan. But when the parties themselves elect to go against Feehan on the basis of the agreement being at an end, as far as he is concerned, it seems to me impossible that they can treat it at the same time as subsisting against Sheehan's estate. The parties had their election on their original agreement, if they chose, but they cannot treat the agreement as subsisting against one estate, and as at an end against the other estate. This opinion I gave very early in the argument; and the case in *Re Ellis* (2 Mont. & Ayr. 370,) fully confirms me in this opinion. I therefore decide, that the parties having elected to proceed against Feehan's estate for the whole unpaid amount of their original claims, cannot now prove for the unpaid composition notes against the estate of Sheehan. In this particular case there is no room for choice as to the course to be taken by the creditors of Feehan. Feehan's estate pays 4s. in the pound on the amount unpaid; and 3s. 6d. having been paid already on the notes, of course the parties will elect to prove against Feehan's estate, according to my original ruling.

Court of Admiralty.

[Reported by William Chamney, Esq. Barrister-at-Law.]

THE MALVINA.

Collision—Merchant Shipping Act, 17 & 18 Vict., c. 104—Compulsory pilotage—Forfeiture of right to—The Waterford Pilot Act, 9 & 10 Vict., c. 292—Costs.

In a suit for collision against a steam-ship, where she was found to have caused the total loss of the pro-movent vessel, her owners will be exempted from liability, if it appear that she had a duly licensed pilot in charge, and that the pilotage was by statute compulsory.

In a case of collision where the impugnant steam-ship

was found in default, and relied on compulsory pilotage as exempting her owners from liability, the right of exemption will not be forfeited by the interference of her captain, if it clearly appear that the pilot alone was to blame for the collision, and that the acts of the captain were calculated to prevent or modify it.

Where an impugnant ship obtains the dismissal of a suit for collision by relying on the legal defence of compulsory pilotage, each party will be left to bear their own costs.

THIS was a suit of collision instituted by the owners of the brig Hope of New Ross, Edward James, master; James Daly Pears, the consignee of her cargo, and the master and crew against the screw steam-ship Malvina of Waterford, 343 tons burden, and 100 horse power, George Silly, master, to recover compensation for the total loss of the brig, estimated at £819. The petition stated that on the 17th of August, the brig, laden with coal and bound for Waterford, was proceeding up the river Suir at four o'clock in the afternoon, and was reaching across the river from the Smelting House, close hauled on her starboard tack, the wind being about N.W., blowing fresh, and the flood tide making when the accident occurred. Under these circumstances, it was alleged that the Malvina, bound from Waterford to London, with passengers and goods, was seen by the brig coming down from Waterford on a course about midway in the channel of the river, as the brig was at the time beating across it, and in a course likely to bring the two vessels into contact. A river steamer, called the Duncannon, which had but a short time previously gone down the river, passed under the brig's stern, and, in a great degree, was accused of inducing the pilot of the brig to believe that the Malvina would adopt the same course, and continue upon her starboard tack. Finding that the Malvina kept rather close to the Waterford shore, the brig hailed her to go more to northward and pass under her stern, and, at the same time, put her own helm down, fearing a collision; but before she could come about, voices from on board the Malvina called out to her, "Hard a starboard!" Obeying this order, the brig immediately starboarded, but, in a minute after, the Malvina it was alleged, which, to all appearance had also starboarded, drove right into the brig, her bowsprit running in between the brig's masts, and her stem cutting her amidships on her starboard side to the main hatchways. The brig forged ahead about her own length and sunk to the bottom, the master, pilot, and crew having been only able at the last moment to escape drowning by climbing or jumping into the steamer. Everything on board the brig was totally lost. The fault, it was alleged by the petitioners, lay altogether with the steamer, which should have, when there was time, gone astern of the brig, or slowed or stopped her engines. The defence was, that the brig was to blame; and also, that even if the steamer were in default, she was exonerated from the consequences because she had a licensed compulsory pilot in charge. The Court was assisted by Captain Abbot, R.N., and Captain Crosby, R.N.R., as nautical assessors, and the case was, by consent, heard *viva voce*.

Doctors Townsend and Chatterton, Q.C., for the petitioners.—The steamer was wholly to blame for the collision, and should bear the entire loss, including the costs of the suit. They cited *The Merchant Shipping Act, 17 & 18 Vict., c. 104*; *the Trident*, 1 (*Ecc. & Ad. Report*, 217); *The Shannon*, (2 *Hag.* 173); and *The Maria*, (1 *Wm. Rob.* 95). The steamer could not rely on her exemption on the ground she had a licensed pilot on board, as her captain and crew interfered in the ship's management.

Doctors Gibbon and Elrington, for the impugnant steamship.—The accident arose from the mismanagement of the brig, and the steamer was in no default; but, if even she was wholly or partly to blame, she was legally exempt from liability, as she was in the care of a duly licensed pilot, under a compulsory statute. They cited *The Merchant Shipping Act, 17 & 18 Vict., c. 104*; *The Joseph Somes*, (Swa. 185); *The Eysnoord*, (Swa. 374); *The Seine*, (Swa. 411); *The Argo*, (Swa. 462); *The Hand of Providence*, (Swa. 107); *The Unity*, (Swa. 101); *The La Plata*, (Swa. 220 & 298); and *Carruthers v. Sidebottom* (4 *Mau. & Sel.* 77).

JUDGE KELLY (after recapitulating the facts to the assessors) asked them the following questions:—1st. Was the manœuvre of the steamer in starboarding her helm, as set out in her plea and established in evidence, the proper and seamanlike manœuvre under the circumstances, and was it carried out in the right time? 2nd. Did the brig Hope contribute in any and what way, or to what extent, if any, to the collision? 3rd. To what is the collision to be attributed, and were both vessels in fault, or which, if either? 4th. Was the collision occasioned solely by the fault of the pilot or not, and did the act of the master, in stopping and reversing the engines without the authority of the pilot, contribute to the collision?

His lordship and the assessors, after a short adjournment for deliberation, returned into court, when the following answers of the assessors to the several questions propounded to them were read—To the first, we do not consider that, under the circumstances, starboarding was the best manœuvre for the steamer, as she might have hugged the Waterford shore closer, and by that means have gone clear of the Hope; but that having adopted the determination to starboard her helm, she did not carry out that determination until it was too late. To the second, we consider that the brig Hope did not contribute, in any way, to the collision. To the third, we say the steamer caused the collision, by not putting her helm to starboard, or slowing her engines in time, and that she alone was in fault. To the fourth, we are agreed that the pilot of the steamer was solely in fault for the collision, and that the interference of the captain in stopping and reversing the engines without his authority, did not contribute to the loss of the brig Hope.

JUDGE KELLY.—The facts of the case are now disposed of; but as a very grave and important question of law has arisen—namely, whether the owners of this wrong-doing vessel, because they had a licensed pilot on board, are exempted by the statute from all the consequences of this collision, as his presence was compulsory?—I must reserve that question for discussion, and until its decision, I respite my judgment.

Upon a subsequent day the case came on for argument upon the points reserved at the hearing, viz.: First, whether the owners of the steamer had the privilege of exemption on account of having had on board that vessel, a qualified pilot under compulsion of law? and secondly, whether that exemption was not forfeited by the participation of the master in the acts of the pilot?

JUDGE KELLY.—This had been a cause of collision, brought by the owners of the brig Hope against the screw steamer Malvina, of Waterford, a trader carrying passengers and goods between that city and London. The collision occurred on the afternoon of the 8th September last, in the river Suir, not far from Waterford, and by its effects the Hope was run into by the steamer, and, together with her cargo, sunk to the bottom. Upon the trial, the naval captains, by whom the court was assisted, were of opinion that the steamer alone was in fault for that collision; that the pilot of the steamer was solely to blame, and that the interference of the master of the steamer in stopping and reversing did not contribute to the loss of the brig Hope. The court having agreed in these opinions, the merits of the case were, thereby, fully ascertained; but two questions of law, both of which had been put forward in the pleadings of the parties, were reserved for argument and determination by the court itself, before final judgment was to be pronounced upon the finding upon the facts—namely, first, whether the presence of the pilot on board the steamer was compulsory under the statute relied upon, 9th and 10th Vic. cap. 292, an Act for improving the port and harbour of Waterford, as, if compulsory, then, under the general law the owners would not be responsible for the damages occasioned by his default, but would be exempt? and secondly, whether that exemption had been forfeited by any interference of the master in the acts or default of the pilot? These important questions were fully and ably argued, and the cause is now ready for judgment upon law as well as on fact. The court will begin with the latter of these two questions; and, for the purposes of its full consideration, will assume that the former of them has been sustained in the affirmative. There is no doubt of the soundness of the abstract proposition of law raised by this question; but in the judgment of the court, the circumstances of the case before it do not admit of its applicability, and for two reasons—first, because that the naval assessors, by whom the court was assisted at the trial, and who had all the evidence before them, did not find that the master should have interfered other than he did do; and secondly, because they found not alone that the only act of interference on his part proved by that evidence, namely, stopping and reversing the engines, without the authority of the pilot, did not contribute to the collision, but also that the pilot was solely in fault. The court having received and adopted these views of its assessors, upon points so exclusively within their professional knowledge, must therefore hold that the exemption contended for here by the owners of the steamer has not been forfeited through their master or crew. Now, then, to come to the consideration of the exemption itself, and therefore, to consider the real question—was the hiring or employment of the pilot compulsory by law

upon the owners of the steamer? To prove that it was compulsory, the defendants rely upon the Act for regulating the port and harbour of Waterford, and have accordingly pleaded it. In the argument at the bar, however, they insisted also upon the benefit of another statute, namely, the Merchant Shipping Act, section 354, because that the steamer was a passenger ship. This latter statute they had not pleaded, and grave reasons existed, even arising out of the statute itself, making it necessary to be pleaded, if intended to be relied upon. The court, then, acting upon the well-known principle of proceeding *secundum allegata et probata*, must decline to afford to the defendants whatever advantage the latter statute might have given them in the case. The consideration of the Court is thus restricted to the Waterford Harbour Act altogether, the statute pleaded by the defendants; and from its enactments alone is the conclusion of compulsory or not compulsory to be drawn. The 87th section of this statute enacts that every vessel coming into the port and harbour of Waterford from the sea, or going out from the same to the sea, shall pay pilotage. That these words "pay pilotage" mean "employ and pay a pilot" there can be no doubt, as it may be assumed that no one would pay for service, when he must do so, without having the benefit of that service. But, whether or no, the next section but one, the 89th, leaves the point beyond all doubt; for in it, being an exception to the operation of the 87th section, the very words "a pilot to take charge" are used, and the two sections must be construed together. Then comes the 90th section, in which it is enacted that the master of every vessel who is required by that Act to employ a pilot, should he refuse so to do when the pilot offers himself, shall pay the usual pilotage over and above any other penalty. Now do these three sections, taken together, impose any compulsory duty or a necessity upon the owner or master to take a pilot on board? The Court is of opinion that these sections do make it compulsory. In the case of *Carruthers v. Sidebottom* (4 Mau. & Sel. 77) referred to in the arguments at both sides, words not so strong were held compulsory; but here are the words "shall" and "required," which are compulsory *per se*. Still more, here is the obligation to pay pilotage over and above any other penalty for refusal to take a pilot, which in itself must be considered a compulsion independently of the grammatical force and effect of the words "other penalty." In the case of *The Maria*, (1 Wm. Rob. 95) referred to repeatedly, and not without cause, during the argument, the judge of the Court of Admiralty of England, when the same question was raised under very similar provisions of a local English statute, held that all these elements constituted compulsion. In that case, where, as here, the statute obliged a recusant master to pay the pilotage, the learned judge asks, Is not that compulsion on the owners? Suppose the statute had mentioned ten times the amount of the pilotage, where would be the difference? It would only be in the degree of compulsion, not in the compulsion itself. Now that case has been followed up by subsequent similar decisions, and has not been controverted. In the present case, then, in which the language of the local statute relied upon is more precise, the Court has no hesitation

in holding that the pilot so taken on board, in obedience to the statute pleaded, was taken by compulsion. That important point being therefore established, how are the owners of this steamer to be affected by his acts? The Merchant Shipping Act, which, upon this matter, is the general law of the United Kingdom, in section 388 enacts that "no owner or master of any ship, shall be answerable to any person whatever, for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." The Court, therefore, having already determined that the loss of the Hope and cargo was occasioned solely by the fault of the pilot, must hold the owners of the steamer which did the wrong not answerable for that damage, and dismiss the petition, but, following the rule in such cases, without costs.

Proctor for the Petitioner—Mr. Hamarton.

Proctor for the Defendants—The Queen's Proctor.

Exchequer Chamber.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[*Coram* MONAHAN, C.J., PIGOT, C.B., BALL, KEOGH, AND CHRISTIAN, JJ., AND FITZGERALD AND DEASY, BB.]

POOLE v. GRIFFITH AND OTHERS—May 29, 30; June 1, 2, 1863.

Ejectment—Presumptions—Proof of Possession—Statute of Limitations—Admissibility of Book of Distributions.

The plaintiff in an action of ejectment produced an attested copy of a patent from King Charles II. an attested copy of an extract from the Down Survey, a copy of a lease dated 19th September, 1701, purporting to be executed by the lessees only, and demising for the term of 91 years, and a lease dated 8th May, 1793, demising in the terms of the lease of 1701, with covenant for perpetual renewal. No question having been asked by either side at the trial, to be left to the jury, Held, that there was evidence of possession and enjoyment, entitling the plaintiff, in whom the interest of the lessee in the lease of 1793 had vested, to a direction.

Held, also, as against occupiers who had taken separate defences to the same ejectment, it being admitted that all rent receivable under the lease of 1793, and a fee-farm grant which had been substituted for it, had been regularly paid up to the bringing of the ejectment, that there was evidence of possession in 1793, and some evidence of possession subsequent (Pigot, C.B., dissentiente).

Held, also, that the want of such evidence of possession as the payment of rent afforded would not enable the occupiers to avail themselves of the Statute of Limitations, unless they showed a possession in themselves or in some one else than the plaintiff, following Smith v. Lloyd (9 Ex. Rep. 562); (Pigot, C.B., dissentiente.)

The Book of Distributions is admissible in evidence when offered to show the contents of profitable and unprofitable land, and not to make title, although it be impossible to point out the precise authority under which it was made.

Semble, that the reasonings of Lord Chancellor Napier in Knox v. Earl of Mayo (7 Ir. Chan. R. 563), in favour of its admissibility are unavailing.

ERROR FROM THE QUEEN'S BENCH.

THIS was an ejectment on the title, brought to recover all that, the mountain and lands of Scart, containing by a survey one thousand three hundred and forty-two acres, one rood, and twenty perches, or thereabouts, the cultivated portions of which were stated to be in the possession and occupation of the defendant, Michael O'Brien, and several others named as defendants in the summons and plaint, with all common of pasture thereunto belonging and appertaining, situate in the parish of Modeligo, and barony of Decies-without-Drum, in the county of Waterford; and the plaintiff claimed title to same from the 1st day of October, 1861.

The statutable defence was filed by Christopher Darby Griffith for the whole of the lands and premises sought to be recovered.

A similar defence was also filed by Thomson Hankey, Arthur Hankey, William Jenkins, Craig Colston and John Morris Colston, who claimed some trust estate derived under the defendant, Christopher Darby Griffith.

And similar defences were also filed by Michael O'Brien and several other defendants named in the summons and plaint, each of whom took defence for the portion of land in his own possession and occupation.

The case came on for trial before the Lord Chief Baron, and a special jury of the County of Waterford at the Summer Assizes in Waterford, July 15th, 1862.

The plaintiff's counsel gave in evidence a notice, dated the 2nd of July, 1862, to admit the several documents therein referred to.

Pursuant to such notice, the documents therein referred to were admitted by the consent of the several defendants, and such consent was proved.

The plaintiff's counsel then produced an attested copy of a patent from King Charles the II., dated the 20th of July, 1668, in the twenty-first year of his reign, granting to Robert Beard and others 896a. and 3r. profitable land, of Graigebeg and Graigemore, and 1084a. 2r. unprofitable land, in the same, and by which the said profitable land was sub-divided amongst the several patentees, granting to Robert Beard, in Graigemore and Graigebeg 256a. 3r. 24p. profitable land, plantation measure, retrenched by Thomas Brightwell, with a proportionate part of the unprofitable land belonging to the said towns and lands, according to the number of profitable acres adjudged to him by the therein-mentioned certificate, and granting certain other parts of the said profitable land, with a proportionate part of the unprofitable land, to each of the other patentees.

Plaintiff's counsel then offered in evidence an attested copy of an extract from the book of distribu-

tions, to which the defendant's counsel objected on the ground that the book of distributions was not evidence as between the parties in the suit; but the Lord Chief Baron received the evidence subject to the objection, and it was then agreed between the counsel for the plaintiff and defendants, that all questions as to the admissibility of the evidence, and any other questions that might arise during the progress of the trial, should be taken at the desire of either party by appeal to any appellate court, in order to avoid the expense and delay of a bill of exceptions.

The next document produced by plaintiff's counsel was an attested copy of an extract from the Down survey, A.D. 1657.

The next documents produced and proved by the plaintiff's counsel were attested copies of the will and codicil of John Greene, the will bearing date the twelfth of December, one thousand eight hundred, and the codicil bearing date the eighth of January, one thousand eight hundred and one, whereby, after reciting his seisin and estate of and in the said lands of Graigebeg and Graigemore, he devised the same to Beverly Hearne and Christopher John English, their heirs and assigns, subject to the rent payable thereout and also subject, as in the said will mentioned, upon trust, to the use of his eldest son, Rodolphus Greene, for life, with remainder to his first and other sons successively, in tail male, and in default thereof to his second son, John Greene, with similar limitations to his first and other sons, and in default thereof to his three daughters, Grace Greene, Mary Greene, and Ellen Greene, and the several and respective heirs male of their bodies lawfully issuing, share and share alike, as tenants in common.

The next document produced and proved by the plaintiff's counsel was the copy of a lease dated the nineteenth of September, one thousand seven hundred and one, in the third year of the reign of William III., between Catherine Beard, John Beard, a minor, and Michael Wicks, of the one part, and Robert Cook, therein described as of Cappoquin, in the kingdom of Ireland, gentleman, of the other part, demising to the said Robert Cook, his executors, administrators, and assigns, "all that the share, lot, and portion of and belonging to the said Catherine Beard, John Beard, and Michael Wicks, lying and being in Graigemore and Graigebeg, containing two hundred fifty and

acres three roods, and twenty-four perches of profitable land, plantation measure, and retrenched by Thos. Brightwell, and also other lands, not the subject of this ejectment, situate in the County of Waterford, and lately in the tenure and occupation of Mr. Richard Robert Cook, his assigns or undertenants, and containing in all two hundred and ninety-four acres, one rood, and two feet houses, mills, and commons, mountains and mountains lands, liberties, and privileges thereunto belonging, or in anywise to hold all and singular the said demised premises and lands, with the share and proportion of the townsmountain, and all and singular the houses, mills, cabins, woods, commons, commodities, privileges, and advantages thereunto belonging, or in anywise appertaining, from the first day of May before the date thereof, for the period of

ninety-one years next ensuing, at the rate of thirty-four pounds, for the first seven years of the said term, and the rent of forty pounds for the residue."

The foregoing blanks which exist in the original lease and copy, were occasioned by damp and age.

The next document produced and proved by the plaintiff's counsel was an agreement dated the twelfth of January, one thousand seven hundred and ninety three, between Catherine Griffith and John Greene, for a lease of the premises comprised in the lease next mentioned. This was objected to by the defendant's counsel, especially as it appeared that a lease was executed.

The Lord Chief Baron received the evidence subject to the objection.

The next document produced and proved by the plaintiff's counsel, was a lease bearing date the eighth day of May, one thousand seven hundred and ninety-three, between Catherine Griffith of the one part and John Greene, of the other part, whereby the said Catherine Griffith, in consideration of five hundred pounds, demised to said John Greene, his heirs and assigns, "all that and those parts of the towns and lands of Graigemoore and Graigebeg, commonly called or known by the names of Graigevurra, Upper Derry and Lower Derry, containing by a survey made thereof four hundred and eighty-five acres and two perches, statute measure, be the same more or less, together with the mountain and common theretofore therewith held and enjoyed, together with other lands therein mentioned, being the other lands comprised in the said lease of nineteenth September, one thousand seven hundred and one, and all which said lands are by the said lease stated to have been, by indenture bearing date 19th Sep. 1701, demised to Robert Cook, formerly of Cappoquin, in the County of Waterford and Kingdom of Ireland, gentleman, deceased, for the term of ninety-one years, which lease expired on the 1st day of May one thousand seven hundred and ninety two, all which said premises are stated to be meared and bounded as described by the maps to the said lease of one thousand seven hundred and ninety-three annexed. To hold for the lives of Rodolphus Greene, John Greene, and George Greene, three sons of the lessee, and the survivor of them, with a covenant for the perpetual renewal of the said lease at the yearly rent of £400 of the then currency.

The next document proved by the plaintiff's counsel was a consent order, dated the 11th July, 1862, admitting the several facts stated therein, viz., the death of John Greene, the lessee in lease of 1793, and of all his sons and daughters without issue, except one daughter, whose only son was the plaintiff.

The next documents put in and proved on behalf of the plaintiff were an attested copy of a commission of lunacy, in the matter of John Greene, a lunatic, dated the seventh of May, one thousand eight hundred and twenty-eight, and an attested copy of an inquisition under that commission, dated the 13th of May, one thousand eight hundred and twenty-eight, finding the said John Greene a lunatic antecedently to September, one thousand eight hundred and eleven. It is not considered necessary to set out or further allude to these documents.

The next document produced and proved on behalf of the plaintiff was a fee-farm grant of the said lands executed under the provisions of the Renewable Leasehold

Conversion Act, dated 13th April, one thousand eight hundred and fifty, and made between the said Christopher Darby Griffith of the first part, George Henry Houghton, of the second part, and the said John Greene of the third part, whereby, after reciting the said lease of the eighth of May, one thousand seven hundred and ninety-three, and that the lessor's estate therein was then vested in the said Christopher D. Griffith, and the lessee's interest in the said John Greene, a person of unsound mind, and a ward of the Court of Chancery in Ireland, and further reciting certain proceedings in the said lunacy matter, whereby it was directed that the said lease of lives renewable for ever should be converted into a grant in fee-farm to be executed by the said Christopher Darby Griffith, to the said George Henry Houghton, in trust for the said lunatic, the said Christopher Darby Griffith did thereby grant in fee-farm to the said George Henry Houghton, his heirs and assigns, all that and those parts of the town and lands of Graigemoore and Graigebeg, commonly called by the names of Graigevurra, Upper Derry and Lower Derry, containing by a survey made thereof four hundred and eighty-five acres and two perches, statute measure, be the same more or less, together with the mountain and common therewith held and enjoyed before the making of the said recited indenture of the eighth of May, one thousand seven hundred and ninety-three, and the said deed, after granting certain other lands, proceeds as follows:—"All which said several towns, lands and premises, are respectively meared and bounded as described by the three several maps to the said original lease annexed, true copies whereof are also herewith annexed. To hold to the said George Henry Houghton, his heirs and assigns for ever, at the yearly rent of three hundred and sixty nine pounds four shillings and seven pence, present currency, payable as therein mentioned."

The next document produced and proved on behalf of the plaintiff was a conveyance dated the fifteenth of June, one thousand eight hundred and fifty-nine, by which the said George Henry Houghton conveyed to the plaintiff all the lands comprised in the said fee-farm grant.

The next document produced and proved on behalf of the plaintiff was a consent order, dated the 25th of June, one thousand eight hundred and sixty-two, admitting the copy of the said lease of the nineteenth of September, one thousand seven hundred and one, as if the original was proved.

The following is a correct copy of the report of the Lord Chief Baron, as to the further evidence given on behalf of the plaintiff, and what took place until counsel on his behalf closed his case:—

Witness for plaintiff, Arthur Roberts—I know the lands of Toor. I surveyed Scart Mountain, Toor, Newtown, Poolroe, Graigbeg, Parkmore, Scart, Knockgaronn, Graigavurragh, Derry Upper, Derry Lower, Staigbroad, Carrigown, another Scart, Graigemoore, Church Quarter, and another part of Knockgarown.

This map is a correct representation. I compared the lands with the Down survey. I made an enlargement on the Down survey.

Question. Does the map you made correspond with the Down survey "No. 58, No. 58m?"

Answer. It corresponds. This is a very small

scale. The large map corresponds with the Down survey; in some places it does not.

[The witness here laid the map on the enlargement of the Down survey.]

The low lands correspond very well—very fairly; the mountain does not. The map, as shown now, is smaller than the mountain as shown on the Down survey.

Question. Does the reclaimed portion of the lands correspond?

Answer. The boundaries correspond pretty well. I have marked on my map the dotted line on the down survey what appears to separate Graigemore and Graigebeg from the coarse mountain; that dotted line is marked by a green line on my map.

Question. Is there a portion of that which is now arable land, which was formerly mountain within the green line?

Answer. It is. I have compared my map with the map of 1793.

[The fee-farm grant of 1850 is here handed to the witness.]

I have seen this map (annexed to the grant) before.

Question. State the difference between that map and the Down survey.

Answer. This map takes in a portion of land which is on the Down survey on the mountain side of the dotted line—take it as arable. I have marked that on my own map. I have marked the dotted line as green, and I marked outside that the boundaries in yellow.

[The witness describes this on another map, which is marked A.]

This contains all the denominations comprised in the Down survey, and comprises the denominations I have measured.

[The witness's enlarged tracing of the Down survey is marked B.]

[The map on the lease of 1793 and the map on the fee-farm grant are here shown to witness.]

I have only seen the last of these two maps within the last ten minutes. Map A is an actual map of the lands as they are now.

Question. Can you show what denominations in your map correspond with Upper Derry, Lower Derry, and Graigavurragh in the map of 1850?

Answer. Lower Derry agrees very well, indeed; Upper Derry also agrees with it. The townland of Graigavurragh contains now 203a.; in this map of 1850 it contained only 170a. Or. 12p; Scart mountain contains by this map of 1850, 1340a. 1r. 20p.; Scart mountain now contains—what is called Scart mountain, contains 1209a. 2r. 5p. In the fee-farm grant the 1340a. 1r. 20p. include all of the Scart mountain, all of the present townland of Toor, 67a. 2r. 23p.; 23a. 2r. 20p. of the townland of Newtown, and 33a. of the townland of Graigavurragh.

[The witness added here "Those parts of that I have given last I presume were taken in from the original Scart mountain." The learned judge considered this not legal evidence in the event of the case going to the jury.]

I believe this (a tracing) is a copy of the map on the lease of 1850.

[This tracing is now produced instead of another map or tracing, which had been marked C., and which was expunged, and this tracing is marked C., to be used for the purpose of convenient reference, but not as in itself evidence, as the original map on the fee-farm grant is in proof.]

Mr. Roberts is to show that this corresponds with the map of 1793.

Cross-examined. This map of 1793 was never shown me before.

The acreage of Scart mountain on it. I can see some of it. I can see 13. I can't say there are marks of blotting out.

Question. Do you see the traces of "in common"?

Answer. I do not. There is some appearance of a word having been there before. [After looking at it.]

[It was here admitted that rent was paid under the lease of 1793, and the fee-farm grant up to the present time.]

The plaintiff, reading the foregoing documents, including the maps, the Down survey, A. B. and C. (the map of reference) closed his case.

Mr. Walsh, for the plaintiff, professed to go into no case, in anticipation of a case founded on possession.

Serjeant Sullivan for the defendants, apprised him that the plaintiff should go into his whole case now, and that he, Serjeant Sullivan, would object to his entering into evidence hereafter.

Mr. Serjeant Sullivan, the leading counsel for the defendants, Christopher Darby Griffith, Thomson Hankey, Arthur Hankey, William Jenkins Craig Colston, and John Morris Colston applied to the Lord Chief Baron either to direct a verdict for the defendants, or to nonsuit the plaintiff, on the ground that no evidence of the possession, or use, or enjoyment of the mountain sought to be recovered was shown or proved and that the only title shown in the plaintiff to the mountain in question was to the mountain which was held and enjoyed with the lands of Graigemore and Graigebeg before the eighth of May, one thousand seven hundred and ninety three, and that no evidence whatever had been given of any possession or enjoyment by those under whom the plaintiff derived of any part of the mountain sought to be recovered in this ejectment with the lands of Graigemore or Graigebeg, nor the slightest evidence of any act of ownership or dominion from which such possession or enjoyment could be inferred, and that no possession or enjoyment ever went with any of the documents put in evidence.

And further, that the will of John Greene disclosed an outstanding legal estate in the trustees to whom the estate had been devised by that will, and that as the interest in the lease of one thousand seven hundred and ninety-three was subsisting when the fee-farm grant was executed, the fee-simple estate thereby created became subject to the uses declared by the said will, and that therefore the legal estate was outstanding.

Counsel for the plaintiff declined to give any evidence of possession further than that which already appeared in proof upon the documents proved, and the evidence of Mr. Roberts.

The Lord Chief Baron refused to non suit the plaintiff, but did not pronounce any opinion upon the effect of the evidence.

Serjeant Sullivan said he would abide by the requisitions he had made, and would not go into any evidence.

Mr. Roberts was then re-produced on the part of the plaintiff, to give evidence in reference to the maps, upon the comparison which it was stated he would make as to the map of one thousand seven hundred and ninety-three. He said, "I have compared the map upon the fee-farm grant with the map of 1793. Without reference to the obliterated letters, the maps in all other respects correspond."

This closed the plaintiff's case, and neither party asked the Lord Chief Baron to leave any question to the jury; but Mr. Walsh, for the plaintiff, called upon his Lordship for a direction to the jury to find for the plaintiff for an undivided share of the lands in the summons and plaint mentioned, in the proportion which two hundred and fifty-six acres three roods and twenty-four perches bear to eight hundred and eighty acres and twenty-seven perches; and his Lordship so directed the jury, but reserved to the said five defendants the right to move the Court to have the verdict set aside, and either a non-suit entered, or a verdict entered for the said defendants.

A similar right was reserved for the defendants, Michael O'Brien, Edmond O'Brien, John Fraher, Michael Carroll, Patrick Keniry, Bartholomew Straffan, William Flynn, Terrence O'Brien, Johanna Flynn, John Keily, Laurence Keily, Patrick Connors and Patrick Burke, who had taken separate defences, and who appeared by Mr. Thomas Harris, Q.C., and on whose behalf similar points and objections were made throughout the case to those made on behalf of the said above-named five defendants.

The jury found for the plaintiff in conformity with his Lordship's directions.

On Wednesday, the fifth of November, one thousand eight hundred and sixty-two, the Court of Queen's Bench gave a conditional order that the verdict had for the plaintiff be set aside, and a non-suit, or verdict for the defendants therein named, entered; or that a new trial be had upon the ground of misdirection of the learned judge, and also on the ground of the reception of illegal evidence, unless cause be shewn in the usual time.

And on the same day a similar conditional order on behalf of the defendants, for whom Mr. Harris so appeared

On the tenth of November, one thousand eight hundred and sixty-two, the plaintiff served the usual notices that he would show cause against the said conditional orders being made absolute.

The case was argued on the fifteenth and sixteenth days of January, one thousand eight hundred and sixty-three, before the Lord Chief Justice of the Court of Queen's Bench and Judges O'Brien and Hayes, and by the direction of the Court it was further argued by one counsel at each side, on the twenty-fourth of January, one thousand eight hundred and sixty-three.

On the thirty-first of January, one thousand eight hundred and sixty-three, the Court pronounced judgment,

allowing the cause shown on behalf of the plaintiff against the said conditional order of the fifth day of November, one thousand eight hundred and sixty-two, obtained on behalf of Christopher Darby Griffith and the said other four defendants, for whom Mr. Serjeant Sullivan appeared, thereby confirming the verdict given in favour of the plaintiff by the jury. And on the same day the majority of the Court pronounced judgment, disallowing the cause shown on behalf of the plaintiff against the said conditional order of the fifth day of November, one thousand eight hundred and sixty-two, obtained on behalf of the several defendants, for whom Mr. Harris, Q.C., appeared. The present appeal was brought from the said order of the 31st January, one thousand eight hundred and sixty-three.

The said Christopher Darby Griffith and the other four defendants submitted that the said order of the Queen's Bench of the thirty-first January, one thousand eight hundred and sixty-three was erroneous.

The following were the points relied upon on behalf of the said defendants and appellants, Christopher Darby Griffith, Thomson Hankey, Arthur Hankey, Wm Jenkins Craig Colston, and John Morris Colston:

1. That the Lord Chief Baron at the trial should either have directed a verdict for the defendants, or non-suited the plaintiff on the ground that no evidence of the possession, or use or enjoyment of the mountain sought to be recovered was shown or proved, and that no evidence whatever had been given of any possession or enjoyment by those under whom the plaintiff derived, of any part of the mountain sought to be recovered in this ejectment with the lands of Graigmore and Graigbeg, nor any evidence of any act of ownership or dominion from which such possession or enjoyment could be inferred, and that no possession or enjoyment of the lands sought to be recovered was shown to have ever gone with any of the documents put in evidence, or to have been had by the plaintiff, or any one under whom he claimed, and that the Court of Queen's Bench should have, pursuant to the leave reserved, either entered a non suit or a verdict for the said defendants.

2. That as the plaintiff failed in showing any title against the defendants for whom Mr. Harris, Q.C., appeared, who were declared entitled to, and obtained a verdict against the plaintiff, thereby establishing that he was not at the time entitled to recover the possession of the portion of the lands for which they respectively took defence, the verdict insisted on by the plaintiff, and had for him, could not stand against the said Christopher Darby Griffith, and the said Thomson Hankey, Arthur Hankey, William Jenkins Craig Colston, and John Morris Colston.

3. That the will of John Greene disclosed an outstanding legal estate in the trustees to whom the estates had been devised by that will, and that as the interest in the lease of the eighth of May, one thousand seven hundred and ninety-three was subsisting when the fee-farm grant was executed, the fee simple estate thereby created became subject to the uses declared by the said will, and that therefore the legal estate was outstanding.

4. That the extract from the Book of Distributions was not admissible in evidence.

5. That the agreement of twelfth January, one thousand seven hundred and ninety-three was also inadmissible in evidence.

6. That at all events there should have been a new trial.

The following were the points relied upon, on behalf of the plaintiff and respondent, on the appeal brought by the said defendants and appellants, Christopher Darby Griffith, Thomson Hankey, Arthur Hankey, William Jenkins Craig Colston and John Morris Colston, against the order of the Queen's Bench, entering up a verdict for said plaintiff:—

1. That the plaintiff proved on the trial of the said ejectment his title to the lands derived from the fee, and shewed a possessory title thereto which entitled him to recover in the action.

2. That the title shown by the plaintiff drew with it the rights of possession, and must be presumed to have been accompanied by possession, the defendants not having given any evidence to countervail it.

3. That even if it was necessary for the plaintiff to prove possession or acts of ownership, the evidence and the documents proved, especially when accompanied by the admitted payment of rent, afforded sufficient proof of possession and enjoyment.

4. That the evidence clearly identified the lands claimed under the lease of one thousand seven hundred and ninety-three, and fee-farm grant, as those previously enjoyed under the expired lease of one thousand seven hundred and one, and proved a conclusive title to them.

5. That the evidence at least made a *prima facie* case against the defendants, and cast upon the defendants the burden of proving some right against the plaintiff.

6. That the defendants were estopped by the documents proved, and the evidence, from denying the plaintiff's right to recover the lands for which the verdict was obtained.

7. That notwithstanding that the defendants for whom Mr. Harris appeared obtained a verdict by the judgment of the majority of the Court of Queen's Bench (and against which decision and judgment the plaintiff had appealed), the plaintiff was entitled to maintain the verdict and judgment obtained by him against the principal defendants.

8. That the plaintiff was entitled to maintain his verdict and judgment against the defendants, in respect of the lands which were not covered by the defences taken by those defendants for whom Mr. Harris appeared.

9. That under the will of John Greene no legal estate was left outstanding in the trustees named therein.

10. That assuming a legal estate was vested in the trustees by the said will, the same was divested or extinguished by the execution and operation of the fee farm grant of one thousand eight hundred and fifty.

11. That the extract from the Book of Distributions was legal evidence and admissible.

12. That the agreement of twelfth January, one thousand seven hundred and ninety-three, was also inadmissible in evidence.

13. That the direction of the learned judge to the

jury to find a verdict for the plaintiff against the defendants, was right, and that the order of the Court of Queen's Bench allowing the cause shewn against the conditional order obtained by the defendants, was also right in point of law.

14. That there were no grounds for granting a new trial.

J. E. Walsh, Q.C., and Tandy, for the plaintiff and respondent, T. W. Poole.—Our first proposition is, that we have made out the portion to which we are entitled, assuming that these deeds are admissible. The question is a sum in arithmetic, and the proportion is what the jury have found. *Lord Kildare v. Fisher* (1 Strange, 71,) was decided in 1716, not many years after the deed of 1701, and shows what must have been meant by "mountain" and by "arable land" in that deed and the deed of 1793. [*Pigot, C.B.*—There could be no doubt of the meaning of "mountain" to anyone who ever looked at the Down Survey; *m* occurs everywhere, and means unprofitable land.] Act of Explanation, 17 & 18 Chas. II. c. 2, s. 5. The word "six" must be supplied after the words "two hundred fifty and" in the lease of 1701, because it is so in the patent. Our second proposition is, that these deeds were good evidence and the best evidence. We should have done wrong to call the tenants to prove that one fed ten cows, and another cultivated half an acre of the mountain. [*Monahan, C.J.*—We cannot be speculating on the effect of unsatisfactory evidence which was not given.] *Doe dem. Egremont v. Pulman* (3 Q.B. 622,) is a stronger case than the present, for we have the lease of 1793 purporting to be made on the expiration of the lease of 1701, and rent paid ever since. Corporeal possession of the land all through is impossible to prove. It is never necessary to prove every intermediate link in an old title. There are presumptions to be made. We have title from the patent down. *Clarkson v. Woodhouse* (5 Term Rep., 413, note; 3 Dowl. 189); *Rogers v. Allen* (1 Campbell, 309); *Bavey v. Bebbington* (4 Term. Rep. 514); *Stead v. Heaton* (4 T. R., 669); *Holloway v. Rakes* (2 T. R. 55); 1 Taylor on Evidence, s. 597; *Humphrey v. Martin* (Car. & Marsh, 32). A *prima facie* case is a case for a direction. [*Christian, J.*—You have a title to something, but whether it be to that part of the mountain of Scart in the possession of these tenants is the question.] The Court of Queen's Bench held that the Statute of Limitations applied in favour of Mr. Harris's clients, but not in favour of Mr. Griffith, he being concluded by the deed of 1850. We have two answers to the argument of the Statute of Limitations. 1. That under the will made in 1801, tenants for life existed up to the 11th of July, 1858, when for the first time our title accrued. Time will only run from that, and the Court will not look astutely to see what was the state of things before the will was made. The language of the 3rd section of 3 & 4 Wm. 4, c. 27, is, therefore, applicable, "and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of

such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession." It is not said here that any person got into possession of the rents. We have proved tenancies for life prior to the new statute, and therefore if any statute applied, it would be the old Statute of Limitations. *Eyre v. Walsh* (10 Ir. C. L. Rep. 346) was twice tried, first before Baron Fitzgerald, and afterwards before Chief Baron Pigot. [*Christian, J.*—The turn the case took was this: there was a decision in the Court of Queen's Bench in England; the plaintiff succeeded in showing he was out of the new Act, and it was said he was within the old statute, because he was barred by the old one before the new one was passed, and then the question of adverse possession was for the jury. *Monahan, C. J.*—It was the mortgage which took the case of *Eyre v. Walsh* out of the new Act.] So, here, the will took us out of the new Act. Successive tenants for life have existed since 1801. [*Christian, J.*—By what statute did the Court below consider you bound?] By the statute of Wm. 4. 2. The defendants must show possession in themselves, or in some one else. We have proved title, and the law will annex possession unless the defendants show adverse possession. Having shown a good title against Griffith, are persons who have given no evidence of title entitled to say that is not *prima facie* evidence until they have shown a better title?—*M'Donnell v. McKinty* (10 Ir. Law Rep. 514); *Smith v. Lloyd* (9 Exchequer R., 562); *Tottenham v. Byrne* (12 Ir. C. L. R., 385). [*Pigot, C. B.*—That does not appear to me to prove that proof of title is proof of possession.] In *Smith v. Lloyd*, Baron Parke says, "There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute." Chief Baron Pollock says, "Suppose a person being the owner of two sets of chambers, one of which is immediately above the other, demises the upper set only, he would have a perfect right to enter the lower set, although he had never been near them for fifty years." The *onus* of proof is on the defendants. [*Pigot, C. B.*—Must not you show first title, and then some possession under that title within twenty years? You are now contending that evidence of title which with possession would be good is itself evidence of possession.] We have the payment of rent. [*Pigot, C. B.*—I understand you to contend that without that, the evidence of title is itself evidence of possession. *Christian, J.*—If I understand those two cases cited, where it is a blank as regards possession, after title is proved possession is presumed. *Monahan, C. J.*—I was of opinion that if nobody was in possession of this mountain, it was a question if the title would not draw with it possession. *Pigot, C. B.*—In those cases possession anterior to the title was proved.] Not in *Smith v. Lloyd*. Then as to the admissibility of the Book of Distributions—*Archbishop of Dublin v. Lord Trimleston* (12 Ir. Eq. R., 251); *Knox v. Mayo* (7 Ir. Chan. R. 563, and 9 Ir. Chan. R. 192). Lord Chancellor Brady was wrong in saying, in the former of these cases, that the Book of Distributions was a

mere abstract. 14 & 15 Chas. 2, c. 2, instruction 6; 17 & 18 Chas. 2, c. 2, ss. 5 & 13. Those who got the profitable land are directed to get the unprofitable land along with it. We cannot fix on the precise section under which this patent was made, but the authority of Domesday Book might be as well asked for. It must be taken that this book was made under these statutes. *Spaight v. Twiss* (13 Ir. C. L. R. 516), decided in the Court of Exchequer, is in favour of the admissibility of the book. It never was appealed from. [*Deasy, B.*—I remember the case, but do not remember that we decided that. *Pigot, C. B.*—I read the report, and do not think we decided that. *Fitzgerald, B.*—I have not the remotest recollection: I do recollect a case in which the question was raised. *Monahan, C. J.*—The question is now for the first time raised in the Court of Appeal, there being two contrary decisions of two Chancellors, and perhaps a decision in the Court of Exchequer. There is against the admissibility one decision of one Chancellor, and one case in Howard's Reports, if it be genuine.] In *The Duke of Beaufort v. Smith* (4 Exchequer Rep. 450) a survey made in the time of Oliver Cromwell was attempted to be given in evidence, and was rejected. [*Monahan, C. J.*—I thought everything done by the Crown *de facto* was evidence.] Oliver Cromwell was not the Crown, but Baron Parke says (p. 470) if it had been done by a rightful sovereign it would have been admissible. As to the remaining point regarding the agreement of Jan. 1793, it is said that it is to be rejected because it was followed by the lease. But if an act of ownership it is evidence. [This point was then abandoned by the opposite side, Chief Justice Monahan observing that there was no doubt it was evidence, though it would not be evidence to control the lease.]

During the argument a point of practice was raised by Mr. Hemphill, Q.C., as to whether juniors should be heard in this Court upon special cases, and it was urged they had taken the place of bills of exceptions. *Montgomery v. Middleton* was the only case, and Chief Justice Monahan observed that in that case the junior counsel was recently called to the Bar, and did not choose to argue it. The Court said that they would abide by the rule in *Harding v. Carry* until the judges should make some general order.

Harris, Q.C., and *Palles*, for the occupiers, who had taken separate defences.—1. As against us, no evidence has been given to connect us with the lease of 1701 or that of 1703. 2. Supposing these leases properly received against Mr. Griffith, no evidence has been given to connect them with the profitable portions in our possession. 3. These leases are not producible in evidence against us, notwithstanding the cases cited. 4. The Statute of Limitations does apply. 5. The Book of Distributions is inadmissible. There is no evidence to connect us with the lease of 1793. [*Monahan, C. J.*—The question is, if these documents are not evidence against all the world.] The plaintiff must show an absolute title. The fee-farm grant, which is the root of the plaintiff's title, grants Graigavurragh, Upper Derry, and Lower Derry, "together with the mountain and common therewith held and enjoyed before the time of the making of the said indenture of lease." To show what was the

mountain enjoyed before the making of the lease of 1793, the lease and the map attached to it are produced. The object is altogether different from that in the three cases cited—*Doe dem. Egremont v. Pulman*; *Clarkson v. Woodhouse*; and *Rogers v. Allen*. In *Doe v. Pulman* it was argued that acts of ownership by the landlord during a long term are difficult to be proved, and the counterpart of the lease was not received in evidence to show what were the contents of the lands, or their boundaries as here. In *Clarkson v. Woodhouse*, which is the foundation of *Doe v. Pulman*, Lord Mansfield says, "This case differs from that of *Lord Pomfret v. Smith*, where Lord Pomfret offered a lease by himself or his predecessor, containing the premises in dispute, described as lying within the limits of Lord Pomfrets' estate, the question being on the boundaries." This shows that these leases would not have been received as evidence of boundaries.—*Lord Pomfret v. Smith* (7 Bro. P. C., 169). [*Fitzgerald, B.*—The plaintiff proved that Scart mountain corresponded with the unprofitable land, and then he proved a lease was made in 1793, which contained a map, and he proved that the land in that lease corresponded with the Down Survey. *Monahan, C. J.*—It is plain what the ejectment is brought for—the mountain of Scart, to a portion of which the plaintiff is entitled, and it was proved that you are in possession of a portion.] He ought to show a right to the portion of which we are in possession. [*Monahan, C. J.*—That is impossible, because he is not entitled to any portion of the mountain in severalty, but his evidence is, that he is entitled to something between one-third and one-fourth of the entire mountain. No one suggested there was a difficulty as to where the mountain is. The only question is, has he proved an actual possession to rebut the title under the Statute of Limitations, and as he commenced in 1858, whether he was not bound to have gone further back.] *Lord Pomfret v. Smith* is precisely this case. [*Christian, J.*—As I understand, these leases were given as proofs of acts of ownership. The question is, if the documents which are proof against Mr. Griffith are evidence to prove the same thing against you; simply as acts of ownership which are evidence against all the world.] The only ground which the plaintiff has to bring this ejectment is the fee-farm grant of land, together with unprofitable land, which was held before 1793, and to show what that was he produced a lease with a map. [*Pigot, C.B.*—There was not an identity shown between the part you held and the share of the mountain, but then that was a question for the jury, and you did not ask to have it left to the jury.] To support an inference from such an instrument, four things are necessary—first, antiquity; secondly, that it should have come from the proper custody; thirdly, that it should be free from suspicion; fourthly, that it should be supported by proof of possession or enjoyment corresponding with it.—*Starkie on Evidence*, p. 93. The fourth requisite is not complied with in respect to the lease of 1793. If the tenants of the plaintiff were proved to have taken turf, it might be different. [*Monahan, C. J.*—The peculiarity here is, that neither plaintiff nor defendant choose to give any evidence of possession, and thus the question is on whose part the *onus*

lies to do so.] Was there ever a mountain recovered where the plaintiff sat down after proving a paper title? [*Monahan, C. J.*—There was no question as to the quantity at the trial.] No presumption can be founded against a defendant in ejectment.—*Richards v. Richards* (15 East. 294, note). Possession gives him a title. [*Fitzgerald, B.*—Is the patent evidence of seisin and of possession?] Yes. [*Fitzgerald, B.*—Then the presumption is, that that continued to the dating of the lease of 1793, and the presumption of the fee in your clients from possession is subsequent to that lease, and inconsistent with it. It might be different if your presumed fee dated earlier back than the making of that lease.] The Court is dealing with presumptions, and there is nothing impossible in supposing the fee in one person, and possession in another. The difficulty is to see where these presumptions are to stop. The lands are not proved to be within the leases unless the statements in the leases are themselves made evidence. [*Christian, J.*—The words "two hundred and fifty — acres" do not override the general words going before, i.e., "Graigebeg and Graigemore." This did not pass by the lease of 1793 unless it was enjoyed before as described. What passes must fulfil the last description. The plaintiff should give substantive evidence that it was held and enjoyed. As to the Statute of Limitations, *Nepean v. Doe d. Knight* (2 M. & W. 894, and 2 Smith's L. C. 476). [*Pigot, C.B.*—I always understood that the statute of Wm. 4 diminished the amount of the defendant's evidence, but did not diminish the amount of the plaintiff's evidence.] In *Nepean v. Doe* it was held necessary for the plaintiff to go into evidence to take himself out of the statute. [*Monahan, C. J.*—There an adverse possession was in fact proved. *Pigot, C.B.*—That case decided that an adverse possession was not necessary. *Eyre v. Walsh* is accurately abstracted in 2 Smith's L. C. 583. It is said that the plaintiff's title did not commence till the death of the lunatic in 1858, but the statute commenced to run in 1793, because no act of ownership has been shown since. But the will of John Greene of 1800 did not give the mountain of Scart at all; it must be taken not to have comprised the lands in question, and the plaintiff took them, if he did take them, as heir-at-law, and not as remainderman, and therefore cannot rely on his estate coming into possession only on the death of Greene, the lunatic. [*Ball, J.*—Is it not clear that the testator meant to devise whatever he got by the lease of 1793?] He has not specifically derived it. [*Pigot, C.B.*—Would it not be a question for the jury if the profitable and unprofitable land did not go by the same name?] Then as to *M'Donnell v. M'Ginty*, there was evidence given of when the plaintiff got into possession; that ought to have been done here. It is not necessary for us to prove that we have been in possession for twenty years. *Smith v. Lloyd* is an authority to the same effect as *M'Donnell v. M'Ginty*, and no further, and that is not that the defendant in ejectment is to prove possession.—*Roe v. Harvey* (4 Burrow, 2487); *De Beauvoir v. Owen* (5 Exch. 166); *Cole on Ejectment*, p. 6, p. 212. As to the Book of Distributions, Howard's Exchequer has always been quoted as a book of authority, though

the author was not a barrister. The surveys were mixed, and on that ground the Books of Distributions were rejected. They were prepared partly from the surveys, and partly from field books brought in by the soldiers. [*Pigot, C.B.*—The Book of Distributions was made partly from charts outside the Down Survey, and partly from the Down Survey. The only part of the Book available in this case is that which identifies *m* as mountain, and it would be taken from the Down Survey.] In *Knox v. Mayo* Lord Chancellor Napier confounded the books made up under the sixth instruction and those mentioned in the 46th sec. of 14 & 15 Chas. 2, cap. 2. After the argument in the Court of Appeal he says, "We are all very clearly of opinion, without going into the question made upon the Book of Distribution," &c. Lord Justice Blackburne says he would be reluctant to act on his recollection when he found it conflict with the opinion of Lord Chancellor Brady. Baron Greene says, "It would require great caution and deliberation on my part to authorize me in saying whether the Book of Distributions can or cannot, in any case, or for any purpose, be received in evidence on questions between parties claiming under patents granting forfeited lands."—9 Ir. Chan. Rep. 201.

Serjeant Sullivan and *E. Johnstone* for the defendant and appellant, Mr. Griffith.—The plaintiff must recover under the fee-farm grant, or not at all. That does not recite the unprofitable land, but recites that the interest of the lessor in the lease of 1793 had become vested in Griffith. The recital cannot, of course, control the operative part, if that be clear, but by the words of the operative part all that passed was the lands of Graigemore and Graigebeg, together with the mountain and common therewith held and enjoyed before the making of the lease of 1793. The map attached to the fee-farm grant contains the whole of Scart mountain, but the plaintiff does not seek to recover the whole of the mountain. The lease of 1701 grants "All That the share, &c., lying and being in Graigemore and Graigebeg, &c., to hold, &c., with the share and proportion of the Town's Mountain." Lands cannot pass as appurtenant to land.—Comyn's Dig., vol. 4, p. 416, title Grant (E. 9). The share of the Town's Mountain never passed by the purview of this lease, but is attempted to be given by the *habendum*. This will explain why no evidence of user was given by the plaintiff. A deed operating by way of conveyance cannot pass by the *habendum* what is not in the premises.—Sheppard's Touchstone, p. 76. The share of the Town's Mountain is first mentioned in the *habendum* as something over and above what had already been granted, and this is the key to the garbled language of the fee-farm grant. It is contended that what was demised by the lease of 1701 passed by the lease of 1793; therefore if the share of the Town's Mountain is shown not to have passed by the former lease, it could not pass by the latter. Even if it did pass, there is no evidence of enjoyment from the patent down. If the plaintiff showed any act within living memory, he might carry back the presumption. [*Monahan, C.J.*—The period to which the enjoyment is referred by the fee-farm grant is prior to 1793. If the true construction of the lease of 1701 be, that it granted

whatever the patent granted, and if what the patent granted was a certain number of acres in the profitable, and a proportion of the unprofitable land, then the question is, is there not proof that the tenants under the lease of 1701 were in possession of whatever passed by it up to the termination of it?] It is conjecture, at best, to say that it was the share which was granted by the patent. [*Monahan, C.J.*—Is not that a question for the jury?] It is consistent with the patent that the party looked to the profitable land, and took no care of the other, unless you can say the share was the identical undivided share of the mountain which the patent gave. The language does not fix the identity. [*Christian, J.*—There is a remarkable similarity in the language. I read the *habendum* in the lease of 1701 as only giving a name to what had already passed under the other words. The words following show that there is not something new meant. If you press this by the rules of syntax you may be right, but if you construe it by common sense you are not.] "Held" and "enjoyed" are not the same. [*Ball, J.*—Do you say the plaintiff is to prove both?] No; proof of enjoyment would include both. [*Christian, J.*—Is not making a lease evidence of enjoyment? it would be evidence that this mountain had been enjoyed with the 256 acres prior to 1793.] *Doddington's case* (2 Rep. 33, a); *Roe d. Conolly v. Vernon and Vyze* (5 East, 51); *Doe dem. Harris v. Greathed* (8 East, 103); *Walsh v. Trevanion* (15 Q. B. 733). As to the Book of Distributions there is an unreported decision in the Court of Exchequer refusing to disturb a verdict in a trial had before O'Brien, J. [*Monahan, C.J.*—It appears that this Book of Distributions was made after the patent because the patent gave 880 acres, and the Book of Distributions gives 896. If it is to regulate the proportion, the verdict is wrong.] The argument in *Attorney-General v. The Primate* (1 Jebb & Symes, 292) shows how the 17 Chas. 1, c. 33, the Act for reducing the Rebels in Ireland came to be passed.—Carte's Life of Ormond, p. 301. Then follows the Act of Settlement or rather Royal Declaration, 14 & 15 Chas. 2, cap. 2, and in the 6th & 7th sections there is no mention of the Book of Distributions. The first mention of it is in the 6th instruction, and what is meant there cannot be this Book of Distributions. [*Monahan, C.J.*—The 46th instruction speaks of fair books.] Then this is not a fair book, and cannot be what is meant in that instruction. Then comes the 13th section of the Act of Explanation. [*Monahan, C.J.*—I think it is clear that no one could tell under what section this Book was framed, and so when Lord Chancellor Napier came to re-consider his judgment he did not say what he had said before. But the question is the Book being there so long, and having been acted on, is it evidence?] [*Pigot, C.B.*—I think it does follow the 13th section of the Act of Explanation.] It is plain that the two judges who sat to assist Lord Chancellor Napier avoided the question of the Book. The Book of Distributions is not binding on the subjects. [*Pigot, C.B.*—It has been binding for a long time in connection with the Down Survey.]

J. E. Walsh, Q.C., in reply.—[*Pigot, C.B.*—I have come to the conclusion that this plaintiff stands precisely in the same position as if he had got a new

lease in 1858.] As to the Book of Distributions. [*Fitzgerald, B.*—I have known in my own experience, and have heard it stated by men of the greatest eminence at the Bar, that the Book of Distributions has been received. As a fact, a considerable part of the Down Survey has been lost, and the civil survey no longer exists. *Christian, J.*—It has appeared to me that any attempt to make the Book of Distributions fit into the sections of the Act of Settlement or Act of Explanation, must fail. I can conceive how in some cases it was rejected as evidence, but now as my brother Fitzgerald has remarked, after being referred to by practitioners so long, and from what is said in Howard's book, it may well be that this lapse of time has ripened that document into an evidentiary validity.] *Vicar of Kellington v. Trinity College* (1 Wilson, 170); 1 Taylor on Evidence, sec. 599.

Cur. adv. vult.

The Court required the following questions to be re-argued:—

1. Having regard to the lease of 1793, and the map attached thereto, did the mountain in question pass under the will of John Greene, or did it descend to his heir-at-law?

2. Having regard to the recitals and statements in the fee-farm grant, and the fact that at the time of the execution thereof the legal estate under the lease of 1793 was vested in the lunatic, did Houghton, the grantee, and the plaintiff, his assignee, acquire in 1858, on the death of the surviving *cestui que vie*, a new right of entry derived from the grantor in the fee-farm grant, so as to deprive the occupiers of any defences arising from the Statute of Limitations?

Jan. 15, 1864.—*J. E. Walsh, Q.C.*, for the plaintiff.

Harris, Q.C., for the occupiers.

Serjeant Sullivan for the defendant, Griffith.

The following authorities were cited.—*Doe dem. Tyrrell v. Lyford* (4 Maule & Selw. 550); *West v. Lawday* (14 Irish Chan. Rep. 209, and on appeal, 14 Ir. Chan. Rep. 340); *Slingsby v. Grainger* (7 H. of L. 282); Renewable Leasehold Conversion Act, s. 17; Trustee Act, 1850, s. 43.

Cur. adv. vult.

Jan. 23.—*MONAHAN, C. J.*—This was an ejectment brought to recover the mountain and lands of Scart, containing by survey 1342a. 1r. 20p. the cultivated portions of which were described as being in the possession of Michael O'Brien and others named, and the title of the plaintiff, T. W. Poole, was alleged to have accrued in Oct. 1, 1861. To this ejectment the principal defendant, Griffith, and some others described as his trustees, took defence for the entire of the premises. The other defendants took defence each for a small portion, and which portion is stated in the defences to be in their own possession. The ordinary rule was made to oblige them to consolidate their defences, each defendant having the right to make his separate defence. The plaintiff first gave in evidence an extract from the Book of Distributions. The admissibility of that extract was objected to, but

no use was made by the judge of any portion of that evidence. But that extract contains a statement of the premises, and it would appear from it that grants were made of 896a. 3r. of profitable land of Graigebeg and Graigemora, and it would appear the unprofitable land was 1084a. 2r. The next document produced on the part of the plaintiff was an extract from the Down Survey. No objection was made to it. That was a survey or map appearing to have been made in 1657 by Francois Cooper, and was preserved in the Quit-rent Office in Dublin. The only portion of it of any value is what describes Graigebeg and Graigemora, No. 58 and 58 m; and 58 m is described as coarse heath mountain, and it would appear that was a portion of Graigebeg and Graigemora. So the only use of the Book of Distributions, supposing it to be a summary of the Down Survey, is to show the lands were 896a. and 1,084a. profitable and unprofitable respectively, because the references are the same. The next document was the patent of Chas. II. of 1668 made to four several persons, R. Beard, R. Robins, J. Stephenson, E. Winston, and W. Winston, her son. It gives to R. Beard 256a. 3r. 24p. profitable land, with a proportionable part of the unprofitable lands according to the profitable adjudged to him. It gives other denominations of the county immaterial to refer to. There is a grant in precisely similar terms to R. Robins. A similar grant is made to the other two parties. So taking the whole it amounts to this, that 880 acres and 27 perches are disposed of, with the proportionable part of the unprofitable lands belonging thereto. The next document is of date the 19th September, 1701; a lease made between Katherine Beard, widow of John Beard, deceased, John Beard, son and heir apparent of the said John Beard, deceased, and M. Wicks, of the one part, and Robert Cooke, of Cappoquin, of the other part. The lease is damaged, but the thing demised is all that the share, lot, and portion of the said Katherine Beard, &c., lying and being in Graigemora and Graigebeg, containing two hundred fifty and acres (if we are at liberty to fill up that blank) three roods and twenty-four perches. The grant is containing so many acres profitable land, with the woods, commons, mountains, To hold all and singular with the share and proportion of the towns-mountain, from the 1st May, for the term of 91 years, at the yearly rent thereafter mentioned. This lease of 1701 expired in 1792. That was received without objection. The next was an agreement of 12th January, 1793, made between Catherine Griffith and John Greene, of the City of Dublin, stating that Catherine Griffith had demised, &c. All that and those parts of towns and lands of Graigemora and Graigebeg, commonly called or known by the names of Graigevurra, Upper Derry and Lower Derry, together with the mountain and common heretofore, therewith held and enjoyed all which were heretofore by indenture of 19th Sep. 1701, demised to Robert Cooke, formerly of Cappoquin, for 91 years, and which lease recently expired, &c., To have and to hold to the said J. Greene, his heirs, &c., as the same were heretofore demised to the said Robert Cooke, for lives of Rodolphus Greene, John Greene, and George Greene, the three sons of John Greene, and the survivor of them, and a cove-

nant for renewal follows, and a proviso that a proper lease should be executed, though this really operated so as to convey the legal estate, and that a map be added, &c. By the Chief Baron's report, it appeared that an objection was taken to the admissibility of this agreement, which was most properly abandoned, for this was as admissible as the other evidence; it was an act of ownership over the property. The next was the lease of the 8th May, 1793, between Catherine Griffith of the one part, and John Greene, of the other part. It is identical in the description of the profitable lands, with the previous agreement for the lease, adding, "all which premises are meared and bounded as described by the maps hereunto annexed." Then come the ordinary covenants. Then the will of John Greene, of 1800, recites, "whereas I am seised in fee of, &c., and I am also seised of and entitled to the lands of Upper and Lower Derry, Graigavurra, by virtue of a lease for three lives;" it then devises the said lands upon certain trusts, to the use of his eldest son for life, remainder to his first and other sons in quasi tail, then to his own younger sons, then to the three sisters as tenants in common in tail, but not with any cross-remainders between them. This is not material. We are not prepared to hold that the mountain passed by this will at all. None of us will say it did, and many members of the Court think it did not. But we will dispose of the case as if this clause of the will did not operate. The next evidence is some proceedings in the Court of Chancery, dated 1828, by which it appeared that the younger John Greene had been a lunatic. Then a fee farm grant dated April, 1850, made between Christopher D. Griffith, of the one part, George H. Houghton, of the second part, and the said John Greene, of the third part, recites the lease of 1793, recites that all the estate of the lessee had become vested in his son, John Greene. Master Henn was the committee. The Master did not probably choose to enter into a covenant to pay the rent of £400 a year, and, therefore, the arrangement was that the renewal or whatever it was was made to a stranger, who had no interest as trustee. The lunatic died in 1858, without issue, and the two brothers and the three sisters died, but one sister left one son, the present plaintiff, who, upon the title created or enlarged by the fee-farm grant, has brought this ejectment. There was a small portion of parol evidence; evidence of a surveyor. It amounted to this. He looks at the map of the lease of 1793, and the Down survey, and he satisfies everybody that what is demised by the lease of 1793, by the name of Upper Derry, Lower Derry, and Graigavurra, is comprised in the Down survey. Placing one over the other, the mountain of Scart in the lease of 1793 is in common to the owners of Upper Derry, Lower Derry, and Graigavurra, and the other owners, as to whom we have no evidence of who they were. Having regard to the lease of 1793, and the agreement and the map, we have no doubt but that the legal operation of the lease of 1793, and the fee-farm grant which is in fact a copy of the lease, is a demise of the lands of Graigemore and Graigebeg, and also of the share of the mountain in the patent. That being the plaintiff's case, at the close of it the defendant's coun-

sel, Serjeant Sullivan, says, "The plaintiff must go into his whole case, and cannot again go into a case of possession." They took a night to consider, and Mr. Walsh abided by his decision. Serjeant Sullivan applied for a nonsuit on this ground, that no evidence of possession or use, or enjoyment of the mountain was given, and that the only portion proved to have been passed was the part enjoyed prior to the lease of 1793, and that no possession or enjoyment ever went with any of the documents. Another ground was that the will of John Greene disclosed an outstanding estate. Each party called for a direction, Mr. Walsh, abandoned his claim to the whole of the mountain, but claimed a proportion of the unprofitable to the profitable. Mr. Harris, counsel for the small owners of the portions, made the same objections, but the argument necessarily was very different. The Chief Baron directed a verdict for the plaintiff, neither party having asked that any question should be left to the jury. The Court of Queen's Bench decided afterwards that Mr. Griffith had no case at all, but that Mr. Harris's clients had a case, and that no case sufficient to bar the Statute of Limitations had been made; but that as Mr. Griffith had made this fee-farm grant in 1850, that no question as to that arose with regard to him. The question is, was there any evidence of enjoyment? Serjeant Sullivan says there was not; the Queen's Bench say there was. So think the Court. What was it? That in 1701 the profitable land was demised with the unprofitable land, precisely in the terms of the lease of 1793. We think that the principle decided in the case of *Doe d. Egremont v. Pulman* (3 Q.B. 622) applies. That was an ejectment. The lessor of the plaintiff claimed under the will of Charles, Earl of Egremont. In order to show the land belonged to Earl Charles, and had been part of the estate of Sir W. Wyndham, no evidence was given of any holding by or under Sir W. Wyndham, except the counter-part of a lease. The objection was that being executed by only one party, it was not properly received in evidence; but it was properly received to show a demise was made pursuant to that, and enjoyment under it, because there is nothing clearer than this, that a lease of what a man has not is mere waste paper. We have no doubt but that this lease of 1701 was as good evidence as the counterpart in the case of *Egremont v. Pulman*. The lease of 1793 recites the lease of 1701, and upon that coupled with the fee-farm grant we think that C. D. Griffith has no case. The question is, have Mr. Harris's clients any case. If this case goes further, it may be well to observe that many members of the Court do not think that the question of the Statute of Limitations is raised at all, or is in the objections I have gone through. Serjeant Sullivan has nothing to do with it. It is a very serious question if any such point arises. We are not going upon that, but the judgment of myself and the majority of the Court will go on this, that the point was open to the party. It appears by the ejectment and by the defence that certain portions of these lands at the time of the ejectment in 1861 were in possession of these cottiers. It is tried, and we do not see they had anything to do with C. D. Griffith on the record. We must assume, therefore, they are parties we know nothing of. Mr.

Harris says that the plaintiff should show he had been in possession within twenty years to be entitled to turn out those who are admitted to be in the actual possession. That case was met by Mr. Walsh, and on a portion of that we directed a further argument. One answer would be a very good answer if it existed in fact, that the portion of the mountain passed by the will of J. Greene, and that successive life estates were thereby created. The title would not have arisen till 1858, and if the lunatic was not out of possession, that would be no bar to the new title. In answer to that we are not prepared to decide the mountain passed by the will; therefore we cannot hold that this answer is well founded. Another answer was given by Mr. Walsh. He says the fee-farm grant of 1850 made by Mr. Griffith was not made in pursuance of the terms of the Renewable Leasehold Conversion Act, and therefore he says, it not having been so made, its operation must be this, to convey a new legal estate, which would not merge in the lease of 1793. There is no doubt that is well founded, provided such was the operation of this conveyance; but several members of the Court are not prepared to decide that this did not operate under the fee-farm statute. It is a very serious question if this operates under the fee farm statute. I proceed to consider this case on the supposition that this fee-farm grant had the operation it would have had if made to an owner under the Renewable Leasehold Conversion Act. Its operation would have been then to enlarge the estate of 1793, and everybody would be in the position of claiming under the lease of 1793. I proceed to consider the case as if that lease was still in existence. The question is, whether there was evidence at the trial sufficient to call upon the defendants to go into evidence to answer the case the plaintiff made. What is the case he made? In the first instance that the premises were the property of the lessor in the lease of 1701; a case shewing the execution of the lease of 1793. It is admitted by the parties in the case that all the rents received under the lease and the fee-farm grant were regularly paid up to the bringing of the ejectment. If we are right as to evidence of possession under that lease, we are also of opinion that the production of that lease, coupled with the fact of payment of rent under it is some evidence, to say the least of it, of possession under that lease of 1793. We do not say a lease of 1850, without possession thereunder shown, would be evidence of possession; but we are of opinion that the execution of the lease of 1793, and payment under it of rent is evidence of possession at the time, i.e., 1793, and is some evidence of possession subsequent, but whether or not that the want of it would not deprive the plaintiff of his remedy, unless the defendants themselves showed a possession different from the person in whom the estate vested. In *Smith v. Lloyd* (9 Ex. Rep. 572); Parke, B., says, "We have not the slightest doubt that the title of the grantees of the mines, is not barred in this case under the 3 Wil. IV., c. 27, ss. 2 & 3, for we are clearly of opinion that that statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring

the case within the statute. We entirely concur in the judgment of Blackburne, C. J., in *M'Donnell v. M'Ginty*, and the principle upon which it is founded." Then he goes on to show the only difficulty was in the pleadings. We are of opinion that a possession in the defendants, or somebody else than the plaintiff should be shown, the plaintiff having shown an original possession in him. In that view of the case all, except the Chief Baron, think the plaintiff is entitled to retain his verdict, i.e., to have a verdict entered for him against Mr. Harris's clients, and to retain the verdict he has against Mr. Griffith. The only question I have not noticed is the admissibility of the extract from the Book of Distributions. I do not see why it was given, or that any use was made of it. Its only object was to embarrass and confuse. However, it having been given, and an objection taken, the opinion of the Court is that it was properly received. Where a document is offered, if receivable for any purpose, it must be received. In *Archbishop of Dublin v. Trimleston*, the Chancellor decided that it should not be received in evidence. The Chancellor says, "This is stated in 2 Howard, p. 115, to have been decided in the case of *The King v. Daly* in the Exchequer, on the 12th of December, 1747." This came to be considered before Lord Chancellor Napier in *Knox v. Earl of Mayo* (7 Ir. Chan. R. 563). He goes on to show the document was properly receivable in evidence. There has been an argument here which we were not able to follow. [His Lordship then referred to the observations of Greene, B., in *Knox v. Mayo* (9 Ir. Chan. R. 201).] We are of opinion that though we are unable to point out the exact authority by which made that for the purpose of showing the contents of profitable and unprofitable lands, and not to make title or any such thing, that this document was properly admitted, and no improper use being made of it, on the whole we think the judgment of the Queen's Bench should be upheld, as far as concerns Mr. Griffith, and reversed as regards Mr. Harris's clients. In either case each party will pay their own costs. The costs in this Court, so far as Mr. Griffith is concerned, must be paid.

PILOT, C.B.—I concur in the opinion of the other members of the Court, that the judgment in Mr. Griffith's case ought to be sustained, and the other be reversed, but I do not agree in the reasons on which I come to that conclusion. The plaintiff gave no evidence of possession of the premises, for which the second class of defendants have taken defence, nor of the mountain of Scart, nor of the receipt of rent. I will assume that in applying 3 & 4 Wm. IV. c. 27, s. 3, the principle of *M'Donnell v. M'Kinty* (10 Ir. L.R. 514); *Smith v. Lloyd* (9 Ex. 562), and *Tottenham v. Byrne* (12 I. C. L. R. 376), should be applied to this case. Still it appears to me that the plaintiff in ejectment must show that period has not passed when the ejectment was brought; otherwise he does not show his action was brought within twenty years. It is said there was a presumption the Scart mountain was given to the lessee in 1793, and a further presumption of possession continuing. I am not aware that the objection is successfully encountered in this way, Cole on Ejectment, Buller's Nisi Prius, 101a: "Therefore, if the lessor of the plaintiff be not able to prove

himself or his ancestors, to have been in possession within twenty years before the action brought, he shall be non-suited." I have never known this rule controverted. To hold under these circumstances that the plaintiff without any further proof of possession of the premises, or of Scart mountain, or of receipt of rent, is entitled to succeed, because the defendants have not shown the origin of their possession would be to shift the burden of proof in this case. They are entitled to hold what they have till a better title can be laid. The 3 & 4 W. 4, c. 27, was passed rather to limit than to enlarge the powers given. The second and third sections of that statute do not shift the burden or lessen the proof. I see nothing in this way to prevent a person from putting out one who has an exclusive possession, by showing a patent, proving payment of quit rent, and closing his case without a proof of any intervenient act of possession down to the time for the last three hundred years. To hold that presumptions must be thus made, and thus to cast on the party in possession the burden of proof, would be to reverse the relative positions of plaintiff and defendant in ejectment, to reverse the principle that the plaintiff must succeed, not on the weakness of the defendant's title, but the strength of his own. In *Smith v. Lloyd* certain allegations were not made, and in *Tottenham v. Byrne* the plaintiff gave evidence to show that the acts were done within twenty years; there was conflicting evidence, but a continued user was proved. I am, however of opinion, on another ground that the plaintiff is entitled to succeed, and I concur in the rule made by the Court. Upon the evidence I think Scart mountain was shown to be in the lease of 1793, and if Griffith brought an ejectment against his co-tenants, Griffith would be entitled to recover. The grant was made, not as to the trustee of a lunatic, but as to a person named to be a trustee for the special purpose of becoming a grantee. It appears to me that he was not in that capacity an owner within sec. 17 of the Renewable Leasehold Conversion Act, which enacts that the trustee, &c., "shall for the purposes of this Act be substituted in the place of such owner, and do such other acts which such owner should and might have executed, made, and done under this Act." I think he only becomes trustee, and it would be a confusion of terms to say he is one when he only becomes one for the purpose. Upon the face of the thing it appears he never became trustee until the deed was executed. This being the operation of the 17th section, it is unnecessary to determine whether there would be a merger in the lease of 1793. I am disposed to think that Houghton becoming the trustee for Greene, would still take the legal estate for all those interested, and I should hold the legal estate was not transferred to the lunatic, J. Greene with all its incidents, and there is a new estate entitling the plaintiff to maintain his ejectment. That point has not been argued, and I ought not to base my judgment on it. With respect to the Book of Distributions, where the evidence could not be possibly of influence with the jury, its being inadmissible should not vitiate the verdict. I am rather disposed to think the evidence was properly admitted.

Judgment of the Court of Queen's Bench affirmed as regarded Griffith, and reversed as regarded the occupiers.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

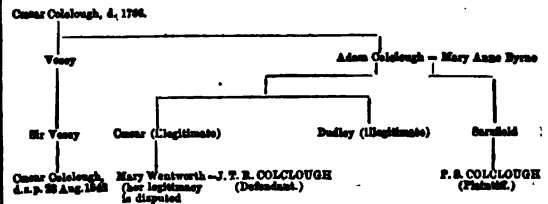
COLCLOUGH v. COLCLOUGH.—April 23.

Practice—16 & 17 Vict. c. 113, s. 106.

Where pursuant to the 106th section of the Common Law Procedure Act (1853), the defendant had entered a rule, "that the plaintiff proceed to trial at the assizes next after the expiration of twenty days from the service thereof," and where the plaintiff afterwards did not go to trial within the time specified, the Court on motion extended the time limited in said rule, on being satisfied that there was no laches on the part of the plaintiff.

Sergeant Sullivan (with him John O'Hagan) moved that the time limited by the order of the 7th July, 1863, made in this cause, may be extended, and that the plaintiff may be at liberty to go to trial at the next summer assizes for 1864, for the county of Wexford, on the terms of the plaintiff paying to the defendants the costs occasioned by the withdrawal of the records. The order of the 7th of July, 1863, which it was sought to extend, was, "That the plaintiff do proceed to trial at the assizes after the expiration of twenty days from the service of this rule."

This was an action of ejectment, brought to recover the Tintern Abbey estates; the title of the plaintiff it was alleged, accrued on the 23rd of August, 1842, by reason of the death of Cæsar Colclough, without issue, and by reason of the plaintiff's being thereupon heir at-law of deceased; the following pedigree is extracted from the plaintiff's affidavit, and under which he claims title:—



The action was commenced on the 27th June, 1862. The defendant had been in possession of the estates since 1857, and from the fact that Cæsar Colclough, of Tintern, who was last in possession, died on the 22nd of August, 1842, the Court would see that, if precluded in this proceeding, the plaintiff would be forever barred.

It appeared from the affidavits that Mr. Patk. Sarsfield Colclough the plaintiff, was discharged an insolvent in 1857, and no assignee was appointed till 1862. From these dates it would appear that there had been no unnecessary delay in instituting the present suit, for the moment the creditors' assignee was appointed the plaintiff issued, viz., on the 27th of June, 1862. The creditors' assignee, Mr. Felix Fitzpatrick, and the official assignees of the Insolvent Court—Messrs. Michael Murphy and Chas. Henry James, were also named as co-plaintiffs in the proceedings, the names of the last two parties having been used without their knowledge or consent. An application was made to the Court by the offi-

cial assignees to compel the parties taking such proceedings, to give security for costs, and several orders and proceedings were had, both in this Court and in the Court of Appeal in Chancery, the result of which was, that security to the amount of £850 had been brought in and lodged in Court, as an indemnity to the official assignees, for any costs to which, as such plaintiffs in said ejectment suit, they might become liable, and not until the 30th January last, was the said indemnity lodged; owing to the several proceedings the plaintiff was unable to go to trial within three terms from the filing of the last plea, and the defendant, on the 7th July, 1863, obtained a rule that the plaintiff do proceed to trial at the assizes next after the expiration of twenty days from the service of said rule, which would be the spring assizes, 1864. The case accordingly went down for trial at that assizes. The plaintiff, in his affidavit, avers that he means to try the question at issue, that every diligence was used to obtain the production in evidence of certain documents, and in particular, of a correspondence which passed between the Byrne and Colclough family, of the most material importance to plaintiff's case, as fixing the date of the marriage of plaintiff's grandfather, Adam Colclough, with Miss Mary Anne Byrne, subsequent to the birth of Caesar and Dudley, and prior to the birth of plaintiff's father, and as the result of his inquiries, he was led to believe that the same were in the possession of Miss Georgina Mary Byrne of Cabinteely, and under that belief the plaintiff caused said Miss Byrne to be served with a *subpoena duces tecum*, requiring her to produce said documents in the trial of these causes; she accordingly attended the assizes, but she declined previously to communicate with him on the subject, and it was only on the evening before the trial, Miss Byrne stated to the plaintiff's attorney, that she brought no correspondence with her, and that she had none; an application was then made to the judge (Mr. Justice O'Brien) to postpone the trial, and was refused, whereupon the plaintiff withdrew the record; it now became necessary to enlarge the rule by extending the time for proceeding to trial.

Brewster, Q.C., John E. Walsh, Q.C., and Ryan, opposed the motion.—Miss Byrne was brought from London to produce a correspondence which it was alleged took place between members of the Byrne and Colclough families. Such correspondence never existed, and this was an application the object of which was to delay and harass the defendant. Mr. Justice O'Brien had already refused to postpone the trial, whereupon the plaintiff withdrew the record. Miss Byrne had made an affidavit, which is in the following terms: "I say that on Monday, the 29th day of February last, I was served in London, at my residence, with a subpoena in this cause on behalf of the plaintiff, whereby I was required to attend at the last assizes for the county of Wexford to produce certain letters or correspondence alleged to have been written by some members of the Colclough family to my ancestor, John Byrne, Esq., of Cabinteely. I say that upon such occasion I informed Mr. Stuart, by whom I was so served with such subpoena, as I had previously apprised Mr. Felix Fitzpatrick, one of the plaintiffs, that I had not such letters or correspondence or any of them, and never heard of or saw such letters, and that

I knew nothing whatever of them, and I also then said to him that I would, if necessary, make an affidavit in London to that effect. I say that notwithstanding such my statement, the plaintiffs insisted on my obeying such subpoena, and I accordingly proceeded to Wexford, but I was not examined as a witness. I say to the best of my belief that long previously to the time when I was so served with such subpoena, and in the spring of the year 1862, Mr. Felix Fitzpatrick, one of the plaintiffs, called on me at my residence aforesaid, and made similar inquiries from me in relation to such alleged correspondence and letters, when I informed the said Felix Fitzpatrick in person to the same effect as I have above stated, viz. that I never saw or heard of same, and knew nothing about them. I say that in the early part of the year 1864, Miss Colclough, whom I understood to be a daughter of the plaintiff, Patrick S. Colclough, also called on me to make a similar inquiry, on which occasion I did not see the said Miss Colclough, but I communicated to her through my friend Mrs. Burke, who resides with me, the same reply that I had previously given to said Felix Fitzpatrick."

Saturday, 7th May.—FITZGERALD, B.—This was an action of ejectment, for certain lands in the county of Wexford, which was commenced in June, 1862; the action was brought by Patrick Sarsfield Colclough, an insolvent, and Felix Fitzpatrick his creditors' assignee, in which action the names of Charles Henry James and Michael Murphy, the official assignees, were used without their knowledge or consent; application was then made to this Court by said official assignees to compel the parties taking such proceedings to give security for costs, and several orders of date, respectively, 4th July, 1862, 20th February, 1863, 16th June, 1863, and 29th July, 1863, were made both in this Court, the Court of Bankruptcy and Insolvency, and the Court of Appeal in Chancery, the result of which was, that on the 30th January, 1864, the sum of £850 has been brought in and lodged in this Court, as an indemnity to the said official assignees, for any costs to which, as such plaintiffs, in said ejectment suit, they might have become liable to. On the 7th July, 1863, on motion by the defendant, it was ordered by this Court, that the plaintiff do proceed to trial at the assizes, next, after the expiration of twenty days, from the service of this rule, which would be the spring assizes for 1864, and in default thereof, that the defendants be dismissed with their costs; the object of the present motion is, that the time limited by that order may be extended, and that the plaintiffs may be at liberty to go to trial at the next summer assizes for 1864. By the 106th section of the Common Law Procedure Act of 1853. "The plaintiff shall proceed to trial within three terms, from that in which, or the vacation of which, the defence or other subsequent pleading is filed, and in default thereof, the defendant may enter a rule that the plaintiff do proceed to trial at the assizes, or sittings next after the expiration of twenty days, from the service of such rule, and that in default, the defendant shall be dismissed with his costs of the suit; and if the plaintiff neglects to proceed to trial in pursuance thereof, the defendant, on filing an affidavit of the service of such rule, and that the plaintiff has failed

to proceed to trial, in pursuance thereof, may enter a peremptory order, for the payment of his costs of the suit, which order shall be in lieu, and shall have the effect of a judgment, as in the case of a non-suit, and the defendant on producing such order, shall have the pleadings in the cause removed into the office of the master of the Court, for the purpose of having execution thereon, and shall have execution accordingly, *provided* however that the Court or a judge shall have power to extend the time for proceeding to trial with or without terms." The effect of refusing this application would be that the defendant may enter a peremptory order for the payment of his costs of suit, which order shall have the effect of a judgment, as in case of non-suit, which in fact corresponds with what the law was in England, under the 14th Geo. 2, c. 17, whereby it was enacted, that "when the plaintiff in any action or suit, hath neglected or shall neglect to bring such issue to be tried according to the course and practice of said Courts, it shall and may be lawful for the judge or judges of the said Courts, respectively at any time after such neglect, upon motion made in open Court (due notice being given thereof) to give the like judgment for the defendant in every such action, as in cases of nonsuit, unless the said judge or judges shall upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff shall neglect to try such issues, within the time so allowed, then and in every such case the judge shall proceed to give such judgment as aforesaid." The second section of the last mentioned Act enacts "That all judgments given by virtue of the Act shall be of the like force and effect as judgments upon nonsuit." I do not find any difference in the practice in both countries. In *Jackson v. Carrington* (4 Ex. 41) where a plaintiff was under a peremptory undertaking to try at a particular sitting, and when the cause came on to be tried, he applied to the judge and obtained leave to postpone it, and it was thereupon postponed, the defendant is not entitled to make absolute the rule for judgment, as in case of a non-suit; Rolfe, B., observing, that though the cause was not tried, that did not occur through the neglect of the plaintiff. There does not appear to be any wilful default in the plaintiff in not proceeding to trial at the Spring Assizes of 1864. What are the facts? The case came on for trial last Spring Assizes for Wexford, the plaintiff applied to the learned judge to postpone the trial, which his Lordship declined to do, whereupon the plaintiff withdrew the record. The plaintiff alleged that a most important part of the case would be established by a correspondence between the Byrne and Colclough families, which he up to the time of the last Wexford Assizes, believed to be in the possession of Miss Byrne who resided in London. The plaintiff asserted that Miss Byrne declined previously to communicate with him on the subject, and it was only when she came to Wexford in March last upon a *subpoena duces tecum* that he learned she had not the correspondence in question, a circumstance that took both the attorney and counsel of the plaintiff by surprise, and induced them to withdraw the record. The Court was pressed with the fact, that there had been a large expenditure in the case, that a considerable sum was lodged as

security for costs, and that Miss Byrne who made an affidavit in this question, did not distinctly deny that she had not the correspondence in question. Moreover, the plaintiff made an affidavit stating that there was a question to be tried between the parties, and that it was his intention to try it. In *Hutchinson v. Hutchinson* (9 Price, 389) "an order for judgment as in case of nonsuit for not proceeding to trial after a peremptory undertaking, being absolute in the first instance, may be set aside on a motion for that purpose where good cause can be shewn." The cause for not proceeding to trial there, was the absence of a material witness who was unable to attend from serious illness. In *Dowell v. Hussey* (6 L. C. L. 230) pursuant to sec. 106 of the Common Law Procedure Act, the defendant had entered a rule that the plaintiff proceed to trial at the assizes next after the expiration of twenty days from the service of such rule; and the plaintiff not complying with such rule defendant entered the peremptory order for non-suit and his costs, on an application to set aside or vary those rules, without any grounds stated for such rescission, save the *laches* of the clerk of the attorney. There it was held that nothing but a fatality can prevent the strict operation of the rules; and that the defendant having acted regularly was entitled to their protection, and the motion was refused with costs. In that case, however, the element of *laches* existed which does not exist in the present case. Mr. Justice Crampton there observes that there never was a plainer case for the refusal of a motion which was grounded on the *laches* of an attorney, no surprise or fatality suggested, and yet they were called on to set aside two regular orders of the Court; and even so, that learned judge adds, "that if the Statute of Limitations were in the way, possibly the Court might interfere." Now the plaintiff here would be barred by the Statute of Limitations if the Court, refused to enlarge the time, and the loss would be irreparable. I cannot, having regard to the amount of money advanced on the part of the plaintiff, refuse giving them one more opportunity. I am not, however, insensible of the hardship which the defendant has to endure. There is one other case I shall notice, *Master v. Muner*, (1 Bingham, 70), where the plaintiff in a special jury title cause being under a peremptory undertaking to try at the next assizes, the absence of eleven special jury men was held a sufficient reason for his declining to proceed, (though a *tales* had been prayed, and some of the *tales* men sworn), and the Court on a fresh peremptory undertaking to try at the next assizes discharged a rule *nisi* for judgment as in case of a nonsuit. I am of opinion that this motion should be granted, the plaintiff paying the costs of the motion.

PIGOT, C. B.—I entirely concur in the judgment of my brother Fitzgerald.

HUGHES, B.—I entirely dissent from the decision of my learned brothers, and my views are founded upon the manner in which the plaintiff's case has been conducted. I refrain from entering into the reasons which lead me to differ from the judgment just announced; I will therefore merely express my entire dissent from it.

REYNOLDS v. LEMON—May 23.

Practice—Discovery—Administering interrogatories before defence filed—19 & 20 Vict., c. 103, secs. 56, 57; 24 & 25 Vict., c. 43.

The defendant in an action under the Bills of Exchange Act (24 & 25 Vict., c. 43) having obtained leave to plead thereto grounded on his affidavit that he had a good defence to the action, applied under the 56th section of the Common Law Procedure Act of 1856 for liberty to administer interrogatories to the plaintiff before defence filed. Held, per Fitzgerald and Deasy, BB., that the motion must be refused, on the ground that there appeared no special reason for discovery, but they declined to give any opinion on the point that interrogatories could be administered before defence filed.

Per Pigot, C.B.—The defendant is entitled to exhibit interrogatories before defence filed—a case of extreme urgency having been made out.

THIS was an application made to the Court, under the 56th and 57th sections of the Common Law Procedure Act of 1856, that prior to the defendant being obliged to file his defence to this action, the defendant be at liberty to administer to the plaintiff the several interrogatories hereinafter set forth. The summons and plaint was brought under the Summary Procedure on Bills of Exchange, Ireland, Act, 1861, by the plaintiff, who styled himself an attorney and cement manufacturer, and is as follows, "Apr. 9, 1861, Graham Lemon, the defendant, is summoned to answer the complaint of Wm. Collet Reynolds, who complains that the defendant by and under the style and title of Graham Lemon & Co. on the 30th day of October, 1863, by his bill of exchange, now overdue, directed to certain persons under the style and title of E. S. Ruthven & Co., required the said E. S. Ruthven & Co. to pay to the order of the defendant the sum of £2000 four months after date thereof, and the said defendants by and under the style and title aforesaid endorsed the same to the plaintiff, and said bill was duly presented for payment and was dishonoured, whereof the defendant had due notice, but did not pay the same; and the plaintiff incurred expenses in and about the noting of said bill to the amount of one shilling and sixpence, the particulars of which are endorsed hereon."

ENDORSEMENT OF PARTICULARS.

3rd March, 1864, amount of Bill due			
this day ...	...	£2000	0 0
Noting ...	...	0	1 6
Interest on said bill of £2000 from date			
of Bill becoming due	...	13	8 6
Total		£2013	10 0

On the 21st of May leave was given to appear and defend the action. The affidavit upon which said leave was given was made by defendants, and is as follows: "I say that some time about the month of March, 1863, one Edward Southwell Ruthven introduced himself to me, and having learned from me that I was willing to dispose of my interest in my property in Stephen's-green, he men-

tioned to me that he had a partner in London named, Benjamin Parker who was a capitalist, and that he would be willing to introduce him to me for the purpose of treating with me for the purchase of my interest in my said property; and I further say, that the said Ruthven afterwards introduced the said Parker to me, who, subsequently, about the month of September, 1863, agreed with me by a memorandum in writing for the purchase of my said property for a sum of upwards of £20,000, £5000 of which said sum was to have been paid to me in cash on the signing of the conveyance; and I say, that although said agreement was signed by the said Parker, he has never since in any manner carried out same or paid any portion of the said purchase money, and I have no doubt, from the facts hereinafter disclosed, that same was only colourable and entered into for the sole purpose of leading me to believe that in dealing with said Parker, I was dealing with a capitalist. I further say, that having applied to said Ruthven to get his said partner, Parker, to pay me £1000 on account of said £20,000, the said Ruthven communicated to me an offer on the part of the said Parker to discount my acceptances at 5 per cent. and 1½ per cent. commission, which offer I declined on the grounds, that I had never before on any occasion, as was the fact, accepted a bill, and said Ruthven then suggested that he would accept same for me, and I could be the drawer; and said Ruthven thereupon put his name as acceptor on the bill now sued on in this action amongst others, and which bill I gave to said Parker together with others amounting in all to £7000 on the 3rd day of November last, to be discounted by him on his promise to give me the cash therefor on the next day; and I beg to refer to a letter of the said Parker to me, dated the 3rd day of November, 1863, and on which I have endorsed my name at the time of swearing this my affidavit. I further say that for several days afterwards the said Parker put me off without giving me any settlement for said bills, and he, subsequently, paid me by cash and securities on foot of this and others of said bills amounting in all to £1950 and no more. And I positively say that no portion of the said £1950 save and except the sum of £400, being the amount of the plaintiff's acceptances, was afterwards paid to me on foot of the bill sued on in this action. I further say, that savesaid sum of £400 now referred to, the said Parker or any other person never paid to me any sum of money whatever on foot of said bill sued on in this action, and that to this moment I never received any further or other value or consideration for same or for my said endorsement to him therefor. I further say, that my suspicion having become aroused as to the honesty of the said Parker, I placed the transaction in the hands of Messrs. Thomas & Holloma, English solicitors for the Union Bank of Ireland, who employed some English detectives and others to make enquiries in relation to the said Parker's character, the result of which was that I discovered that the said Parker was no capitalist at all, and that he was a person of very bad and dishonest character, that he had been on a former occasion indicted and convicted of swindling, and that charges of a similar character had more than once been preferred against him. I

further say, that I used my best endeavours by every means in my power for the purpose of recovering back my said bills, but that I could not induce the said Parker to return me any of same, but that after much trouble and enquiry I traced out one of said bills for £1000 into the hands of a third party named Eldred, who gave me up said bill on being paid the sum of £163, which he alleged he had advanced thereon to said Parker, and one Bishop, who, Parker had informed me, was a partner of his. I further say, that said Parker frequently informed me that one M. Leon Wolfsohn together with the aforesaid Bishop and persons named A. Kauffman and said Reynolds, the plaintiff in this action, were partners of said Parker; and from subsequent information which I have received, I have now no doubt on my mind, and I do verily believe, that he the said Wolfsohn and Bishop, Kauffman and said Reynolds are confederates of and are in league with said Parker and Ruthven and that all and each of the said parties are and have from the commencement of my said transactions with them been leagued together in a conspiracy to cheat and defraud me out of said bills; and I say that said Kauffman's name appears on the said bill sued on in this action, as being the person who actually endorsed the same to the plaintiff. I further say, that I verily believe and I charge and aver it to be the truth and fact that said Parker particularly obtained from me said bill sued on in this action, and that he never intended to discount same, neither had he the capital or means of doing so; and I say, that I now believe that the said acceptance of the said Reynolds for £400, which was delivered to me by said Parker as part of the consideration of said bill, and which I endorsed away on receiving same, was so given to me solely for the purpose of inducing me to believe that said Parker was the capitalist he held himself out to be, and I now believe that said bill for £400 was only honoured at maturity with the view of inducing the belief that the present plaintiff was a *bona fide* holder for value of the bill sued on in this action, and entitled now to recover from me the full amount thereof under pretence of being a holder for value thereof. I further say, that the said plaintiff in this action, who calls himself an attorney and cement manufacturer, has taken preliminary proceedings in bankruptcy against me on foot of said bill by causing me to be served with a trader debtor summons to appear before the Court of Bankruptcy, and to depose whether or not I had a defence on the merits to said claim of the plaintiff on foot of said bill of £2000 sued on in this action; and I say that from the information I have received, recently, concerning the plaintiff in this action and concerning his dealings with said Kauffman and Parker and the complicity with each other in the perpetration of said fraud on me, and, likewise, from evidence now in my possession, I do verily believe and I have no doubt, but that I shall be able to connect the said plaintiffs, Kauffman and Parker, as being leagued together as confederates in the attempt to defraud me out of the amount of the said bill, on account of which I never received any value or consideration save the said acceptance of said Reynolds for £400, being said portion of said sum of £1950 hereinbefore referred to, which acceptance was endorsed to

me by said Parker, and I say that it is my intention to defend said proceedings in bankruptcy at the suit of the said plaintiff on the grounds herein-before mentioned. I further say, that notwithstanding I had used my best exertions to trace out what had become of my said bills, and prevent same being put into circulation, I wholly failed to ascertain into whose hands the bill sued on in this action was, until on or about the day of March, inst. I further say, that another action has been brought against me by a person named Dresser on foot of another bill for £1000, same being one of the bills forming part of said £7000, so delivered by me to said Parker, and I say that, upon a disclosure of the facts and circumstances as above detailed, I obtained from the Court of Queen's Bench leave to appear and defend said action, and I am now defending same. I further say, that I have a just, honest, valid, and legal defence to this action on the merits, and that my application to defend the action is *bona fide* and not made for the purpose of delay." On the 19th of May an application was made to compel the plaintiff, who resides in England, to give security for costs, and thereupon an order was made that the plaintiff be at liberty to lodge in the Bank of Ireland to the credit of the cause the sum of £170, being the amount measured as such security; and the time for pleading was extended to the 21st of May.

On the 21st of May, the following affidavit, upon which the present motion was grounded, was filed. "Graham Lemon of Stephen's-green, in the county of the city of Dublin, the defendant in this action, and John Julian of Lower Sackville-street, in the said city, attorney for the said defendant in this action, jointly and severally make oath and say; and the said defendant, Graham Lemon for himself, first maketh oath and saith as follows—I say that in order to avoid unnecessary prolixity and repetition, I beg to refer to an affidavit, made and filed by me in this cause in the proper office of this honourable Court, on the 21st day of April, 1864, for the purpose of obtaining leave to appear and defend this action; and also to a certain other affidavit likewise made and filed by me in that cause on the 27th day of April, 1864; and I say, that said affidavits, to the best of my knowledge and belief, truly set forth the circumstances, under which I drew and endorsed the said bill of exchange, sued on in this action. I say that I have as I am advised and verily believe a just, honest, valid and legal defence to this action on the merits. I further say, that I have been advised by my counsel, and which advice I verily believe to be true, that I cannot possibly file my defences to this action until after I shall have received from the plaintiff his answers to the several interrogatories herein-after set forth in the schedule annexed to this affidavit; and that with the view of having the proper defences pleaded in this action, and which will be necessary for my defence, it is essentially and absolutely necessary, that before preparing or filing such defence, I shall be furnished with the said answers to such interrogatories, and I say that I believe that the answers which I may receive to such interrogatories will materially aid and assist me in my defence. I further say, that on the 21st day of April, 1864, I obtained an order in this honourable Court, permitting me to appear and

defend this action; and I say on the very same day on which I so obtained such order, I caused plaintiff's attorney to be served with a notice, requiring him to give me security for the costs of this action, and which security was perfected by the plaintiff on the 19th day of May, 1864, by lodging in Court to the credit of this cause, a sum of £170; and notice of which lodgment I am informed, and believe, was only given to my said attorney, about the hour of half past 5 o'clock, on the said last-mentioned day. I further say, that on the 1st day of April, 1864, I was also served by the plaintiff, with a trader-debtor summons, requiring me to appear in the Court of Bankruptcy, on the 20th of April, 1864, and to which trader-summons I beg to refer. I further say, that I was sworn and examined on oath, in the said Court, on said day, in the presence of counsel for myself, and for the plaintiff, and in his presence, and after being so examined on oath, touching the nature of my defence to this action, an order was pronounced by the said Court, allowing me to make an affidavit of merits in said Court, as to the said claim of the plaintiff on said Bill of Exchange, and to which order I beg leave to refer; and I say that from the earliest moment at which I learned that the plaintiff in this action, and down to the present time, I have by myself, and with the aid of other parties, used my very best endeavours to ascertain and acquire all possible information calculated to connect and connecting the plaintiff in this action, with the said other parties referred to in my said other affidavits, and with the frauds so practised on me by all the said parties, and I have through such sources acquired valuable and important evidence which I expect will materially aid me in successfully resisting the claim of the plaintiff in this action; but for the purpose of enabling my legal advisers to frame the proper and necessary defences for me in this action, I have been advised by them, and which advice I verily believe to be true, that before they can so prepare such defences, it is absolutely necessary for me to have the answers of the plaintiff to the several interrogatories so proposed to be administered by me to the said plaintiff. And, I, the said John Julian, for myself, make oath and say, that I have read over the foregoing statements of the defendant, and so far as the matters therein mentioned are within my knowledge, I verily believe that such statements are true and correct; and we, the said Graham Lemon and John Julian, jointly and severally make oath and say, that we believe that the said defendant will derive material benefit in this cause from the discovery which he seeks; and that there is a good defence to this action, on the merits; and that the discovery so sought is not made for the purpose of delay, and that such information is sought and required by the defendant, for the purpose of enabling his counsel afterwards to frame the proper and necessary defences required for the defence to this action." In a subsequent affidavit, the defendant swore that he would have to bring eight witnesses, one from London, and that he had a *bona fide* defence to this action.

The following are the interrogatories referred to in the above affidavit. 1. When first did you acquire the possession of the bill of exchange, sued on in this action? 2 By whom was same ac-

ually passed or delivered to you? 3 Was there any consideration for such endorsement to you; if so, state particularly what the consideration was, and when it, or any part thereof passed; and if there was a money consideration, when, and in what sum or sums same was paid, and whether gold, notes, or by cheque; and if in notes upon what bank, and the amounts respectively; and if by cheque or cheques, on any bank, state the nature and full particulars including the date thereof, and by whom drawn, and in what bank, and to whom same were payable? 4 What is your calling and business, and had you ever, at any time, any dealing or dealings with Benjamin Parker, of No 50 Osborne Terrace, Clapham-road, London, county of Surrey, and No. 5 Barge-yard, London, either in the buying or selling of goods or otherwise, and if so, state the nature of such dealings, and the date of the last thereof respectively. 5 Do you know one Adolphe Kauffman, or do you know what trade or business he follows, or had you ever any dealing or dealings with him, if you had, state the nature thereof, and the date of the last thereof, respectively? 6 Do you know one Robert Bishop, or one M. L. Wolfsohn, or do you know what trade or business they follow, or had you ever any dealing or dealings with either of them, if you had, state the nature thereof, particularly, and the date of the last thereof, respectively? 7 Did you at any time, and if so, when, get or receive any written security, assurance guarantee, or other indemnity, for the purpose of inducing you to take said bill, sued on, or in any wise indemnifying you for so taking said bill, or any instrument, or writing of any sort in connexion therewith, respectively, and if you did, state fully and accurately the nature thereof, and the circumstances under which you so obtained same? 8 When first did you learn or know that the defendant in this action alleged that he had been defrauded out of the said bill now sued on by you? 9 If you did learn of such allegation, pending the currency of the said bill, state particularly, what steps, if any, you took with the view of finding out the truth of such obligations, and state the result thereof? 10 Were you aware, and if so, when first, and from whom did you learn the fact, that the defendant was in London in the month of November last, and that he had several or any interviews with said Benjamin Parker? 11 Were you in London during the said month of November, last, and if you were, were you at any time or times, and if so, when and how often in the company of the said Benjamin Parker, or Adolphe Kauffman, or Robert Bishop, or M. L. Wolfsohn, or did you hold any communications with him, them, or any of them, either in writing or by word of mouth, and if you had stated particularly, when and how often with each of them, stating particularly by name, which of said person or persons you so refer to in your said answer to this interrogatory? 12 Did you accept a bill for £400, purporting to be the draft of W. T. Finewell, on you, dated the 3rd December, 1863, and payable three months after date, and if so, state particularly, and in detail, the nature of the transaction which induced you to accept same; the consideration you got for so doing, and the name of the persons who induced you to accept same, and the name of the persons to whom you actually delivered same state; also the time and place,

when and where, you so accepted same? 13 Was one Adolphe Kauffman in your debt at the time you allege you first received said bill, and if so, state in what amount, and the nature of such debt? 14 Did you know one E. S. Ruthven, and if so, had you ever directly or indirectly any dealings with him; if so, state the nature thereof; and whether you ever at any time, and if so, when particularly, spoke to him, or received any communications from him, touching your claim on the bill sued on in this action, or in any wise respecting said bill? 15 Did you ever, and if so, when, first know or learn that the defendant holds a large quantity of cement manufactured by you, or that he so received same from said E. S. Ruthven, or that same is now held by defendant, under a lien for advances made by defendant, to the said E. S. Ruthven, thereon? 16 Can you state whether you have taken any; and if so, what legal proceedings against any other; and if so, what person or persons, by name, save the defendant, in respect of the bill sued on by you in this action, and in respect of any guarantee or other security, which you may hold in any wise touching or concerning said bill.

Sergeant Armstrong was in support of the motion.—This is a motion for liberty to exhibit interrogatories to the plaintiff, before the defendant files his defence to the action. The application is under the 56th section of the Common Law Procedure Act of 1856. That section is as follows—"In all causes in any of the superior Courts by order of the Court or a judge the plaintiff may with the writ of summons and plaint, and the defendant may, with the appearance and defence, or either of them, by leave of the Court or a judge, may, at any other time, deliver to the opposite party or his attorney, (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter) interrogatories in writing upon any matter as to which discovery may be sought; and require such party, or in the case of a body corporate, any of the officers of such body corporate, within ten days to answer the questions in writing, by affidavit to be sworn and filed in the ordinary way; and any party or officer omitting without just cause, sufficiently to answer all questions as to which a discovery may be sought, within the above time, or such extended time as the Court or a judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly." The 51st section of the English Common Law Procedure Act of 1854, is identical with the Irish, and several decisions have been made shewing that the Court may allow a defendant to deliver interrogatories before plea pleaded.—*Martin v. Henning* (10 Ex. 478). The marginal note there states that, "Under the 51st sec. of the Common Law Procedure Act (1854) 17 & 18 Vic. c. 125, which empowers the Court to allow a party to deliver (before declaration by the plaintiff, and before plea by the defendant) written interrogatories to his adversary to be answered by him, the Court will not exercise that power, by allowing a defendant to deliver interrogatories before plea, except under special circumstances, as for instance when the defendant makes out a case of urgent necessity." It is quite true that the Court there made no rule on the

motion, but Pollock, C. B., says, that the reason for so refusing the application was that a case of extreme urgency was not made out, which according to the principles laid down in *Finney v. Beesley* (17 Q.B. 86) is necessary. The bearing of *Martin v. Henning* then is this, that, if a proper case was made out, the interrogatories would be allowed; and if the Court here think that the defendant's affidavit shews sufficient groundwork for exhibiting interrogatories before plea pleaded, following that case, they will here permit the defendant to exhibit interrogatories. Our defence is, that our bills got in among a set of people whose doings in connection with these bills we seek to unravel, and unless we be permitted to seek for information by interrogation, our defence can not be as full as it would be by giving it full scope under the 56th section of the Act of Parliament; and to refuse this motion would be in fact rendering the 56th section nugatory. *Jones v. Pratt* (6 Ex. 697) was a case where the Court refused to allow the plaintiff to administer interrogatories to the defendant before declaration; but it does appear that the reason for the Court declining to allow the interrogatories was on the ground that the cause of action arose more than six years before the action commenced, as in *Smith v. Fox* (6 Hare, 386).

Clarke, Q.C. (with whom were *Exham, Q.C.* and *Wheeler*) opposed the motion.—This application must be refused with costs, this is a mere fishing for information. Mr. Lemon has obtained leave from a judge to appear and defend this action which is under the Bill of Exchange Act, and in order to obtain that leave he must have sworn that he has a good defence. The case of *Martin v. Henning* relied upon on the other side is an authority dead against the application, and Pollock, C. B., giving judgment there says, that it is perfectly clear that the 51st section points to the time of the declaration as the proper period for the delivering of the written interrogations by the plaintiff, and to the time of the plea as the period when they are delivered by the defendant; the proper time for filing interrogatories is after defence. Interrogatories of a mere fishing character will not be allowed. In *Stern v. Sevastopulo* (14 Com. Bench N.S., 737) which was an action for slander, the Court refused to allow the following interrogatories to be administered to the defendant, "Did you speak and publish the words laid in the declaration, or any, and which of them, or any or what other words conveying the same or similar imputations against the plaintiff? 2nd. When, where and to whom, did you speak and publish the words laid in the declaration?" Erle, C. J., observing (p. 742) that such interrogatories as are of a fishing nature are not to be allowed. If those interrogatories are permitted, the Bills of Exchange Act will be a nullity. The defendant swears he has a defence on the merits, and when he comes to file his defence he must fish to see what defence he will file. *Jones v. Pratt* was where the Court refused to administer interrogatories before the declaration. But even admitting that the Court will allow fishing interrogatories, and that further they will do what has never been done before under the Common Law Procedure Act—namely, allow interrogatories before defence filed, and further that they will allow the defendant, after swearing as he did under

the Bills of Exchange Act, that he had a good defence, now to get up a defence which he had not—admitting all these, still, on another ground, those interrogatories must be refused, viz., on the ground that the answers thereto are calculated, if in the affirmative, to criminate the plaintiff. On this point, see *MMahon v. Ellis* (10 L. C. L. 120) which was an action for the disturbance of the plaintiff in the office of weigh-master for the town of Clones under the 4th Anne, c. 14, Irish; the defendant pleaded that the plaintiff had not taken the oath required by the Act, nor had taken the oath nor subscribed the declaration required by the Roman Catholic Relief Act; and he also obtained from the Court an order under the Common Law Procedure Amendment Act, 1856, that the plaintiffs should answer certain interrogatories. The interrogatories exhibited by the defendant were, as to whether the plaintiff had taken the oaths, and subscribed the declaration in question; and also whether he was a member of the Roman Catholic religion; the plaintiff filed an affidavit, submitting that he was not bound to answer the interrogatories upon the ground that they were exhibited with a view to obtain a discovery as to how he intended to make out his title to the office, and upon a motion to attach the plaintiff for refusing to answer, it was further insisted on his behalf that the answers to the interrogatories might tend to expose him to criminal proceedings for having acted in the office without having taken the qualifying oaths. The Court of Common Pleas there held that, irrespective of the question whether the discovery sought for would have been under any circumstances obtainable, it was a valid reason for declining to answer, as the plaintiff apprehended that his answers might tend to criminate him, and it was held that the plaintiff was entitled to decline to answer the interrogatory as to whether he was a Roman Catholic, as this question was a link in the chain of inquiry. Fishing interrogatories will not be permitted to be put; vide *Moore v. Roberts* (26 L. J. N.S. C. P. 246); *Zarific v. Thornton* (26 L. J. N.S. Ex. 214); *Tupling v. Ward* (30 L. J. N.S. Ex. 222). *Shackell v. Macauley* (2 Sim. & St. 79); *Macauley v. Shackell* (1 Bligh, N.S., 96), where Lord Eldon entered his protest against parties being asked questions tending to criminate them; neither would a Court of Equity compel a discovery in a case involving moral turpitude. See Story's Equity Jurisprudence, paragraph 1494.

Sidney, Q. C., in reply.—That the answers if in the affirmative would render the party interrogated liable to a criminal prosecution, was held in *Bartlett v. Lewis* (12 C. B. N.S. 249), to be no ground for refusing to allow interrogatories to be put. As to the other objection that the application was fishing for materials, it was held in *Bayley v. Griffiths* (31 L. J. Ex. 477), that a party was bound to answer interrogatories although his answers might disclose his case. Bramwell, B., there says, "I very much doubt whether you cannot search a man's conscience as to his own case," and Erle observed (p. 739), "that, as a general rule, a party may interrogate his adversary as to anything that will support his own case subject to some limitations. In *Zehinski v. Maltby* (10 C.B. N.S., 838), it is laid down generally that any interrogatories are to be allowed which are relevant to the

matter in issue, and which the party interrogated would be bound to answer if in the witness box; but it is pressed on the other side that the defendant ought not to be allowed to exhibit interrogatories, because he has already sworn he has a good defence on the merits. How can his having a good defence prejudice his right to have interrogatories exhibited? As to the objection that the defence should be filed before we can get at liberty to administer interrogatories in addition to the cases cited by Serjeant Armstrong, vide, *Foreshaw v. Lewis* (10 Ex. 712) where it was held that an application for the discovery of documents may be made before plea pleaded—vide also *White v. Watts* (12 C. B. N. S., 267).

June 3rd, 1864.—*Pigot*, C.B.—This motion is resisted on several grounds; it is resisted on the ground that the plaintiff is precluded from administering interrogatories before defence filed. In my opinion that objection cannot be sustained, the words of the 56th section of the Act of Parliament are that the defendant may, with the appearance or defence, or at any other time, deliver to the opposite party interrogatories by the leave of the Court; this section corresponds with the 51st section of the English Procedure Act of 1853. I think this application ought to be granted, grounded as it is on the affidavits that have been made, such affidavits as the 57th section of the Procedure Act of 1856 require; that section is in the following terms:—"The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or in the case of a body corporate of their attorney or agent, stating that the deponent or deponents believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defence on the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay." I think that the defendant is entitled to exhibit his interrogatories before defence filed; the language of the 56th & 57th sections of the Common Law Procedure Act of 1856, is extremely plain and simple; however it seems that no language can be used that can not be made the subject of criticism and contention. In *Martin v. Hemming* (10 Ex. 478) it is said that the Court declined to allow a defendant to deliver interrogatories, before plea pleaded; the Court in that case refused the application, but it was on the grounds that a case had not been made out of extreme urgency, which is necessary. In *Foreshaw v. Lewis* (10 Ex. 712), the marginal note says that an application under the 50th section of the English Common Law Procedure Act of 1854, for the discovery of documents may be made before plea pleaded. *Croombes v. Morrison* (3 Ellis & B. 984) was a case where liberty was refused to exhibit interrogatories before declaration, but it was refused on the ground that the affidavit upon which the motion was grounded disclosed nothing which was explanatory of the action, the only affidavit being one by the plaintiff and his attorney, that they believed that the plaintiff would derive material benefit from the discovery which he sought, and

that there was a good cause of action on the merits; and the application was resisted on the ground that it was essential for the plaintiff to shew what his case was; and Lord Campbell there says, that the party who seeks for liberty to administer interrogatories, must shew the nature of his case: but if the application be before declaring, he must do more in order to satisfy the Court, that the interrogatories are pertinent, than is required if he have declared. This case then shews that the Court will allow interrogatories even before declaration in England; and the reason of the interrogatories being refused in *Coombe v. Morrison* was, that it was obviously necessary to know what the case was; the law gives the Court the discretion to administer interrogatories or not, and I think the rule to be observed in such cases, is well stated by Lord Campbell in the case of *Whateley v. Crowther* (5 Ell. & Bl. 713.) His lordship there says, that a party may administer interrogatories for the purpose of obtaining a discovery, if the interrogatories are such, that the answers may be reasonably expected to discover matter which will advance the case of the interrogating party, though the answers may also disclose what the case of the interrogated party is. "We have a discretion in these cases, but it is to be exercised for the purpose, only, of seeing that the process of the Court is not abused; when the discovery is legitimate, it should not be refused." *Jones v. Pratt* (6 H. & Nor. 697) was relied on by the plaintiff; there the Court declined to administer interrogatories to the defendant before declaration filed; but why did they do so? on the ground that the cause of action arose more than six years before the action was commenced, and that as there was no cause of action within six years, a Court of Equity, would not grant a discovery, following *Smith v. Fox* (6 Hare, 386.) It was argued in the course of this case, that the defendant ought not to be allowed to exhibit interrogatories, because he has already sworn, when obtaining leave to defend this action, that he has a good defence on the merits; the affidavit of the defendant sworn on the 21st of May, 1864, states that the defendant has acquired valuable and important evidence, which would aid him in resisting the claim of the plaintiff. I do not think that the affidavit made by the defendant, that he has a good defence to this action, could preclude him from coming in and obtaining leave to file interrogatories, before defence filed. Upon the whole, I am of opinion, that the defendant ought to be allowed to administer interrogatories before plea pleaded; and I am of that opinion, because I think the application is made *bona fide*, and I think that justice requires us to aid him in discovering facts that will be of assistance to him in framing his defence, and because I conceive we have full power to do so under the 56th section of the Procedure Act of 1856, at any stage of the case after the filing of the summons and plaint, the defendant having made out a case of extreme urgency.

FITZGERALD, B.—I intend to offer no opinion on the point, that the application can be made by the defendant, before defence filed; in the present case, I see no difficulty, and as no special reason is given for a discovery, I think the present application ought to be refused.

DEAST, B.—I agree with Baron Fitzgerald: when the application was made for liberty to take defence to this action under the Bills of Exchange Act, it does not appear that any difficulty presented itself in the defendant's way; now he asks us to allow him to exhibit interrogatories, and that application is made on this ground, not that he has discovered any new evidence, but it is suggested, and only suggested, that there may be some other defence. I adopt the expression of Lord Campbell, that we should be more particular in allowing interrogatories to be framed before defence than after. I am of opinion, that the Court ought not to allow those interrogatories to issue.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-Law.]

THE QUEEN v. REA—Jan. 14, 15, 30.

Jury—St. 3 & 4 Wm. IV. c. 91—Distringas—Precept—Challenge to the array—Service of summons on jurors six days before assizes.

The provisions of section 109 of the Common Law Procedure Act, 1856, do not apply in the case of a criminal information tried by a special jury, struck under the old system; and, therefore the fact of such a jury having been summoned by virtue of writs of venire and distringas, and not by virtue of the precept of the judges' of assize, does not form a ground of challenge to the array.

The provisions of section 18 of the st. 3 & 4 Wm. IV. cap. 91 are directory only, and not mandatory; and therefore the fact of none of the jurors having been summoned by the sheriff six days before the assizes does not form a ground of challenge to the array.

THIS was a motion for a new trial, on the ground that Mr. Justice Hayes before whom the case was tried at the Summer Assizes for 1863, for the county of Antrim, ought to have overruled a demurrer put in to a challenge to the array handed in by the defendant. The case was one of a criminal information, tried by a special jury, struck under the old system. A report of the pleadings and proceedings up to the trial will be found in *Rea v. Nagle* (ante page 81) and in *The Queen v. Rea* (8 Irish Jurist, N. S. 382). The challenge appears in the *postea* which is in the following terms:—Afterwards on the day and at the place last within contained, before the Hon. Edmund Hayes, one of the justices of our said lady the Queen, of the Bench, and the Hon. Francis Alexander Fitzgerald, one of the Barons of the Exchequer of our said lady the Queen, justices of our said lady the Queen, assigned to hold the Assizes in and for the county of Antrim, within mentioned, according to the form of the statute in such case made and provided, came as well the within named James Nagle, Esq., who for our said lady the Queen in this behalf, prosecuteth, as the within named John Rea, in his own proper person; and the jurors of the jury within

mentioned, being called, come, and the said John Rea thereupon in his own proper person, hands in a challenge to the array in the words and figures following: "John Rea, at the suit of the Queen: And now at this day, to wit, on the twenty-fifth day of July, one thousand eight hundred and sixty three, come, as well as my said lady the Queen, by her said coroner and attorney, as the said John Rea in his own proper person, and the jurors of the jury empanelled also come; and hereupon the said John Rea challengeth the array of the said panel upon the following grounds, that is to say:—Because he saith that the said jurors so empanelled as aforesaid, were summoned to serve upon said jury for the trial of the issues in this cause by virtue and in pursuance of a writ of *venire facias*, and a writ of *distringas juratores*, and not otherwise, or according to the form of the statutable enactments in that case made and provided; and because the said jury were not summoned under any precept issued by the judges of assize to the sheriff of the said county, pursuant to the provisions in that behalf of the Common Law Procedure Amendment Act (Ireland, 1853); and because the said jurors were not duly summoned pursuant to the provisions of the statute in that behalf made and provided, six days before the commencement of the present assizes for the said county of Antrim; and because the said jurors or any of them were not duly summoned, pursuant to the provisions of the statute in that behalf made and provided, six days before the commencement of the present pending assizes for the said county; and because the sheriff of the said county, did not within the time and in the manner prescribed by the statute passed in the session of Parliament, held in the third and fourth years of the reign of his late Majesty, King William the Fourth, and entitled "An Act for consolidating and amending the laws relating jurors and juries in Ireland," make out the special jurors' list for said county, and of which list so illegally formed the jurors so empanelled as aforesaid were selected; and because the jurors so empanelled as aforesaid were not taken or selected from a special jurors' list, made pursuant to the statute in that case made and provided; and because there is not, nor has there been, during the present year, any special jurors' list made or in existence for said county, pursuant to or according to the provisions of the statute in that case made and provided; and because there have been omitted from the special jurors' list of the said county, for the present current year, the names of divers, to wit, two hundred persons qualified and liable to serve on special juries for said county, and named as jurors in the jurors' book, for the current year of said county; and because the jurors' book for the current year of said county has not been made, pursuant to, and in the manner prescribed by the last-mentioned statute; and because no general list was made out by the justices at special sessions for said county of Antrim, or any of them, containing the name or names of any person or persons qualified to serve as jurors for said county, for the present year; and because there was no general list whatever made out, containing the names of the persons, or of any person or persons qualified to serve as jurors for the present current year, for said county, by the justices of said county, or any of them; and because issue is not yet joined

in this cause; and because the said jurors so empanelled were struck before issue was joined in this cause; and because issue was not joined in this cause, previous to the 24th day of July, instant, and the said jury were struck, and summoned previous to said day; and this the said John Rea is ready to verify; wherefore he prayeth judgment, and that the said panel may be quashed—JOHN REA." And therefore, the said James Nagle comes and saith that the said challenge of the said John Rea is not sufficient in law to quash the array of the panel aforesaid; and that there is no necessity for him, the said James Nagle, nor is he obliged by the law of the land, to answer the said challenge in manner and form as it is above alleged, and this the said James Nagle is ready to verify. Whereupon for our said lady the Queen, he prays judgment, and that the array of the said panel may be affirmed. And this said John Rea here says, that he hath above alleged sufficient matter in law, in the said challenge, by him above made to the array of the panel aforesaid, to quash the array of the said panel, which he the said John Rea is ready to verify—which said matter, the said James Nagle does not deny, nor in any manner answer thereto; whereof the said John Rea, as before, prayeth judgment, and that the array of the said panel may be quashed. Whereupon all and singular, the said premises being seen and understood, it is ordered, considered, and adjudged by the justices aforesaid, that the said demurrer be allowed, and that the challenge to the array of him, the said John Rea, be overruled and disallowed. The *postea* then set out the swearing of the jurors and their findings for the Crown upon the several issues. With reference to one of the grounds of challenge, above stated, it is necessary to say, that the usual formal replications had been put in to the defences filed by the traverser (vid. ante, p. 81); and that on the morning of the trial, before the case was gone into, the traverser handed in a demurrer to those replications, which however, the judge refused to allow to be received.

Brewster, Q.C., (with him *Joy, Q.C.*, *Harrison, Q.C.*, and *Bruce*) for the Crown.—The first cause of challenge is substantially that the jurors were summoned under the Jury Act, 3 & 4 Wm., c. 91, and not under the provisions of the Common Law Procedure Act, 1853. Upon that we submit in the first place, that the Common Law Procedure Act does not apply at all in criminal cases. Under the third section of that Act, and schedule A, sections 10 and 12 of the Jury Act are repealed, but, only so far as they "relate to personal actions, or actions of ejectment in the superior courts of law." Section 109 says, that "no jury process shall be necessary or used in any action." A criminal information is not an action within the meaning of the Act. The next part of the section enacts, that "the precept issued by the judge of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on at the assizes." There is no averment in the challenge that a precept did not issue. It must therefore be taken that there was a sufficient summons. [*Fitzgerald, J.*—The averment on the record that the jurors were summoned by virtue of a writ of *venire facias*, and a writ of *distringas juratores* and not

otherwise, is inconsistent with there having been a precept.] In point of fact there were both, but, we say, that at all events the Common Law Procedure Act does not apply in criminal cases. There is no repeal of the old jury process as to criminal issues. No matter how the jury was empanelled, the judge's precept would have been an authority to the sheriff to return a jury.—*O'Neill v. The Queen* (4 Ir. C. L. Rep. 221). If there is any case in which a jury might be summoned by *venire* the challenge was bad. This is a challenge to the array: we say that the ground alleged was not matter of challenge at all. A challenge to the array must be for some improper act or thing done by the sheriff; not for something antecedent to his being put in motion, and to which he has nothing to say.—*The Queen v. O'Connell* (11 Cl. & Fin., 342.) The third and fourth causes of challenge are substantially the same, except that in the fourth the words "or any of them" occur. Upon these two grounds the real question is whether the 18th section of the Jury Act is mandatory or directory. Under that section each juror is to be summoned six days at least before the day on which he is to attend. The section is directory only. The first statute on the subject of juries is the 42nd Edw. III, c. 11. It has been held that though that statute directs that "the sheriffs array the panels in assizes, four days at least before the sessions of the justices," yet, if the panel was arrayed two days before the assizes, that would be sufficient "because where the statute is in the affirmative that does not take away the common law."—Br. Abr. *Parlement et Statutes*, pl. 70. *Edwardes v. Harding* (Vern. & Scr. 99), citing *Lessee Mege v. Costello*, is an authority that non summoning of jurors is no cause of challenge of the array. *Gillespie v. Cumming* (1 Cr. & Dix. C. C. 294) will be cited on the other side; it was a *Nisi Prius* case, and the question was not argued there: the case came on afterwards before the Court of Exchequer on a question of costs, when the point as to the summons did not arise.—See 2 Ir. L. R. 28. *The Dundalk Railway Company v. Gray* (1 Cr. & Dix. C. C. 332) which will be cited on the other side is not an authority for anything. In *Ronayne v. Elliott* (Ir. C. O. 215), the question was not argued. *Lord Kingston v. Dwyer* (Ir. C. C. 517), was a fictitious case, got up to get rid of a difficulty in another case.—*Brown v. Fitzgerald* (Ir. C. C. 483); *Nowlan v. The King* (1 Ir. Huds. & Br. 164). The statute never was intended to be compulsory or mandatory.—*The King v. Edmonds* (4 B. and Ald. 471) is a powerful negative authority in our favour. Other cases upon the question, whether a statute is directory or mandatory, and in our favour, are, *Lessee the Governors of Sir Patrick Dunne's Hospital v. Dowling* (Batty 296); *Quin v. Aldwell* (Batty 339); *Gardiner v. Blisinton* (1 Ir. Ch. R. 64). But at all events the cases of *Hayes v. The Queen* and *Fogarty v. The Queen* (10 Ir. L. Rep. 53), form a direct and solemn authority that the 18th section of the 3 & 4 Wm. IV. c. 91, is not mandatory, and does not apply in criminal cases. The fifth cause of challenge is an assumption without warrant; for there is no allegation on the record that this was a special jury. There is no averment that there was any special jurors' book or list, and the Court cannot

presume either. It is perfectly possible that there was no special jurors' book, and yet there might be a good special jury—st. 4 & 5 Wm. IV. c. 8, s. 2. We also insist that s. 24 of st. 3 & 4 Wm. IV., c. 91, is purely directory. The ground of challenge is bad also on the ground that it does not specify any names.—*Regina v. Conrahy* (1 Cr. & Dix. C. C. 56). The judgments in *O'Connell v. The Queen of Tindal C. J.* (11 Cl. & Fin. 248), and of Lord Denman (11 Cl. & Fin., 354) are very important on this part of the case. The other grounds of the challenge are plainly bad. The thirteenth if anything, is ground of error not of challenge. Then as to the nature and form of the entire challenge; it puts in some things which are essentially bad: we could not take issue on some of the grounds only; the challenge cannot be taken distributively. If part of it is bad the whole must fall. No difficulty can arise from holding that section 18 is directory only. If there is any misfeasance on the part of the sheriff, the Court has jurisdiction to set aside the entire of the proceedings.

Serjeant Armstrong and *Mr. Mahon* for the defendant.—Is it true to say that a challenge to the array will lie only for unindifferency on the part of the sheriff? It is true that the sheriff has nothing to do with the formation of the jurors' book. That is the duty of the clerk of the peace, and the sheriff's duty begins only when the jurors' book is given to him; but it would be strange if a challenge to the array did not lie, no matter how corrupt might be the formation of the books. From the judgments of Lords Denman, Cottenham, and Campbell in *O'Connell v. The Queen*, it appears that it was the opinion of those lords that the right of challenge to the array was not confined merely to cases of unindifferency in the sheriff. Lord Denman thought the true principle of the challenge to be "the security of the parties that a jury shall be fairly taken." Then the jury ought to have been summoned by virtue of the judge's precept; sec. 109 of the Common Law Procedure Act, 1853, extends to criminal cases. The statement is the challenge that there was not a precept is admitted by the demurrer. There is nothing in the Common Law Procedure Act to do away with the necessity of the precept, even where there is a special jury struck under the old system. [*Fitzgerald, J.* referred on this point to *Aldborough v. Bland* (7 Ir. C. L. Rep., 571). Then with respect to none of the jurors having been summoned six days before the assizes, it is admitted that there is no English authority upon the point. In *Gillespie v. Cumming* (1 Cr. and Dix., C. C. 294), a challenge was taken upon this point. It is true that issue was taken, but the array was quashed, and the observations of Pennefather, B. in the same case afterwards in the Court of Exchequer (see 2 Ir. Law Rep., 28), are very important. The fact of the Court having the power to fine the sheriff does not prevent the party from challenging, *Waters v. Hughes* (2 Ir. Law Rep., 362); *Dundalk Western Railway Company v. Gray* (1 Cr. & Dix., 332); *Brown v. Fitzgerald* (Ir. Circuit Cases, 483). The whole object is to secure a fair and impartial jury; to that everything ought to yield; and Bushe, C.J., took that view in *The Dundalk Western Railway Company v. Gray*. It is settled that a juror cannot be fined for

mentioned, being called, come, and the said John Rea thereupon in his own proper person, hands in a challenge to the array in the words and figures following: "John Rea, at the suit of the Queen: And now at this day, to wit, on the twenty-fifth day of July, one thousand eight hundred and sixty-three, come, as well as our said lady the Queen, by her said coroner and attorney, as the said John Rea in his own proper person, and the jurors of the jury empanelled also come; and hereupon the said John Rea challengeth the array of the said panel upon the following grounds, that is to say:—Because he saith that the said jurors so empanelled as aforesaid, were summoned to serve upon said jury for the trial of the issues in this cause by virtue and in pursuance of a writ of *venire facias*, and a writ of *distringas juratores*, and not otherwise, or according to the form of the statutable enactments in that case made and provided; and because the said jury were not summoned under any precept issued by the judges of assize to the sheriff of the said county, pursuant to the provisions in that behalf of the Common Law Procedure Amendment Act (Ireland, 1853); and because the said jurors were not duly summoned pursuant to the provisions of the statute in that behalf made and provided, six days before the commencement of the present assizes for the said county of Antrim; and because the said jurors or any of them were not duly summoned, pursuant to the provisions of the statute in that behalf made and provided, six days before the commencement of the present pending assizes for the said county; and because the sheriff of the said county, did not within the time and in the manner prescribed by the statute passed in the session of Parliament, held in the third and fourth years of the reign of his late Majesty, King William the Fourth, and entitled "An Act for consolidating and amending the laws relating jurors and juries in Ireland," make out the special jurors' list for said county, and of which list so illegally formed the jurors so empanelled as aforesaid were selected; and because the jurors so empanelled as aforesaid were not taken or selected from a special jurors' list, made pursuant to the statute in that case made and provided; and because there is not, nor has there been, during the present year, any special jurors' list made or in existence for said county, pursuant to or according to the provisions of the statute in that case made and provided; and because there have been omitted from the special jurors' list of the said county, for the present current year, the names of divers, to wit, two hundred persons qualified and liable to serve on special juries for said county, and named as jurors in the jurors' book, for the current year of said county; and because the jurors' book for the current year of said county has not been made, pursuant to, and in the manner prescribed by the last-mentioned statute; and because no general list was made out by the justices at special sessions for said county of Antrim, or any of them, containing the name or names of any person or persons qualified to serve as jurors for said county, for the present year; and because there was no general list whatever made out, containing the names of the persons, or of any person or persons qualified to serve as jurors for the present current year, for said county, by the justices of said county, or any of them; and because issue is not yet joined

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Serjeant Armstrong and *M. Mahon* for the defendant.—Is it true to say that a challenge to the array will lie only for unindifferency on the part of the sheriff? It is true that the sheriff has nothing to do with the formation of the jurors' book. That is the duty of the clerk of the peace, and the sheriff's duty begins only when the jurors' book is given to him; but it would be strange if a challenge to the array did not lie, no matter how corrupt might be the formation of the books. From the judgments of Lords Denman, Cottenham, and Campbell in *O'Connell v. The Queen*, it appears that it was the opinion of those lords that the right of challenge to the array was not confined merely to cases of unindifferency in the sheriff. Lord Denman thought the true principle of the challenge to be "the security of the parties that a jury shall be fairly taken." Then the jury ought to have been summoned by virtue of the judge's precept; sec. 109 of the Common Law Procedure Act, 1853, extends to criminal cases. The statement in the challenge that there was not a precept is admitted by the demurrer. There is nothing in the Common Law Procedure Act to do away with the necessity of the precept, even where there is a special jury struck under the old system. [*Fitzgerald, J.* referred on this point to *Aldborough v. Bland* (7 Ir. C. L. Rep., 571). Then with respect to none of the jurors having been summoned six days before the assizes, it is admitted that there is no English authority upon the point. In *Gillespie v. Cumming* (1 Cr. and Dix., C. C. 294), a challenge was taken upon this point. It is true that issue was taken, but the array was quashed, and the observations of Pennesfather, B. in the same case afterwards in the Court of Exchequer (see 2 Ir. Law Rep., 28), are very important. The fact of the Court having the power to fine the sheriff does not prevent the party from challenging, *Waters v. Hughes* (2 Ir. Law Rep., 362); *Dundalk Western Railway Company v. Gray* (1 Cr. & Dix., 332); *Brown v. Fitzgerald* (Ir. Circuit Cases, 483). The whole object is to secure a fair and impartial jury; to that everything ought to yield; and Bushe, C.J., took that view in *The Dundalk Western Railway Company v. Gray*. It is settled that a juror cannot be fined for

mentioned, being called, come, and the said John Rea thereupon in his own proper person, hands in a challenge to the array in the words and figures following: "John Rea, at the suit of the Queen: And now at this day, to wit, on the twenty-fifth day of July, one thousand eight hundred and sixty-three, come, as well as our said lady the Queen, by her said coroner and attorney, as the said John Rea in his own proper person, and the jurors of the jury empanelled also come; and hereupon the said John Rea challengeth the array of the said panel upon the following grounds, that is to say:—Because he saith that the said jurors so empanelled as aforesaid, were summoned to serve upon said jury for the trial of the issues in this cause by virtue and in pursuance of a writ of *venire facias*, and a writ of *distringas juratores*, and not otherwise, or according to the form of the statutable enactments in that case made and provided; and because the said jury were not summoned under any precept issued by the judges of assize to the sheriff of the said county, pursuant to the provisions in that behalf of the Common Law Procedure Amendment Act (Ireland, 1853); and because the said jurors were not duly summoned pursuant to the provisions of the statute in that behalf made and provided, six days before the commencement of the present assizes for the said county of Antrim; and because the said jurors or any of them were not duly summoned, pursuant to the provisions of the statute in that behalf made and provided, six days before the commencement of the present pending assizes for the said county; and because the sheriff of the said county, did not within the time and in the manner prescribed by the statute passed in the session of Parliament, held in the third and fourth years of the reign of his late Majesty, King William the Fourth, and entitled "An Act for consolidating and amending the laws relating jurors and juries in Ireland," make out the special jurors' list for said county, and of which list so illegally formed the jurors so empanelled as aforesaid were selected; and because the jurors so empanelled as aforesaid were not taken or selected from a special jurors' list, made pursuant to the statute in that case made and provided; and because there is not, nor has there been, during the present year, any special jurors' list made or in existence for said county, pursuant to or according to the provisions of the statute in that case made and provided; and because there have been omitted from the special jurors' list of the said county, for the present current year, the names of divers, to wit, two hundred persons qualified and liable to serve on special juries for said county, and named as jurors in the jurors' book, for the current year of said county; and because the jurors' book for the current year of said county has not been made, pursuant to, and in the manner prescribed by the last-mentioned statute; and because no general list was made out by the justices at special sessions for said county of Antrim, or any of them, containing the name or names of any person or persons qualified to serve as jurors for said county, for the present year; and because there was no general list whatever made out, containing the names of the persons, or of any person or persons qualified to serve as jurors for the present current year, for said county, by the justices of said county, or any of them; and because issue is not yet joined

in this cause; and because the said jurors so empanelled were struck before issue was joined in this cause; and because issue was not joined in this cause, previous to the 24th day of July, instant, and the said jury were struck, and summoned previous to said day; and this the said John Rea is ready to verify; wherefore he prayeth judgment, and that the said panel may be quashed—*JOHN REA.*" And therefore, the said James Nagle comes and saith that the said challenge of the said John Rea is not sufficient in law to quash the array of the panel aforesaid; and that there is no necessity for him, the said James Nagle, nor is he obliged by the law of the land, to answer the said challenge in manner and form as it is above alleged, and this the said James Nagle is ready to verify. Whereupon for our said lady the Queen, he prays judgment, and that the array of the said panel may be affirmed. And the said John Rea here says, that he hath above alleged sufficient matter in law, in the said challenge, by him above made to the array of the panel aforesaid, to quash the array of the said panel, which he the said John Rea is ready to verify—which said matter, the said James Nagle does not deny, nor in any manner answer thereto; whereof the said John Rea, as before, prayeth judgment, and that the array of the said panel may be quashed. Whereupon all and singular, the said premises being seen and understood, it is ordered, considered, and adjudged by the justices aforesaid, that the said demurrer be allowed, and that the challenge to the array of him, the said John Rea, be overruled and disallowed. The *postea* then set out the swearing of the jurors and their findings for the Crown upon the several issues. With reference to one of the grounds of challenge, above stated, it is necessary to say, that the usual formal replications had been put in to the defences filed by the traverser (*vid. ante*, p. 81); and that on the morning of the trial, before the case was gone into, the traverser handed in a demurrer to those replications, which however, the judge refused to allow to be received.

Brewster, Q.C., (with him *Joy, Q.C.*, *Harrison, Q.C.*, and *Bruce*) for the Crown.—The first cause of challenge is substantially that the jurors were summoned under the Jury Act, 3 & 4 Wm., c. 91, and not under the provisions of the Common Law Procedure Act, 1853. Upon that we submit in the first place, that the Common Law Procedure Act does not apply at all in criminal cases. Under the third section of that Act, and schedule A, sections 10 and 12 of the Jury Act are repealed, but, only so far as they "relate to personal actions, or actions of ejectment in the superior courts of law." Section 109 says, that "no jury process shall be necessary or used in any action." A criminal information is not an action within the meaning of the Act. The next part of the section enacts, that "the precept issued by the judge of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on at the assizes." There is no averment in the challenge that a precept did not issue. It must therefore be taken that there was a sufficient summons. [*Fitzgerald, J.*—The averment on the record that the jurors were summoned by virtue of a writ of *venire facias*, and a writ of *distringas juratores* and not

otherwise, is inconsistent with there having been a precept.] In point of fact there were both, but, we say, that at all events the Common Law Procedure Act does not apply in criminal cases. There is no repeal of the old jury process as to criminal issues. No matter how the jury was empanelled, the judge's precept would have been an authority to the sheriff to return a jury.—*O'Neill v. The Queen* (4 Ir. C. L. Rep. 221). If there is any case in which a jury might be summoned by *venire* the challenge was bad. This is a challenge to the array: we say that the ground alleged was not matter of challenge at all. A challenge to the array must be for some improper act or thing done by the sheriff; not for something antecedent to his being put in motion, and to which he has nothing to say.—*The Queen v. O'Connell* (11 Cl. & Fin., 342.) The third and fourth causes of challenge are substantially the same, except that in the fourth the words "or any of them" occur. Upon these two grounds the real question is whether the 18th section of the Jury Act is mandatory or directory. Under that section each juror is to be summoned six days at least before the day on which he is to attend. The section is directory only. The first statute on the subject of juries is the 42nd Edw. III. c. 11. It has been held that though that statute directs that "the sheriffs array the panels in assizes, four days at least before the sessions of the justices," yet, if the panel was arrayed two days before the assizes, that would be sufficient "because where the statute is in the affirmative that does not take away the common law."—Br. Abr. *Parlement et Statutes*, pl. 70. *Edwardes v. Hardinge* (Vern. & Scr. 99), citing *Lessee Metge v. Costello*, is an authority that non summoning of jurors is no cause of challenge of the array. *Gillespie v. Cumming* (1 Cr. & Dix. C. C. 294) will be cited on the other side; it was a Nisi Prius case, and the question was not argued there: the case came on afterwards before the Court of Exchequer on a question of costs, when the point as to the summons did not arise.—See 2 Ir. L. R. 28. *The Dundalk Railway Company v. Gray* (1 Cr. & Dix. C. C. 332) which will be cited on the other side is not an authority for anything. In *Ronayne v. Elliott* (Ir. C. C. 215), the question was not argued. *Lord Kingston v. Dwyer* (Ir. C. C. 517), was a fictitious case, got up to get rid of a difficulty in another case.—*Brown v. Fitzgerald* (Ir. C. C. 483); *Nowlan v. The King* (1 Huds. & Br. 164). The statute never was intended to be compulsory or mandatory.—*The King v. Edwards* (4 B. and Ald. 471) is a powerful negative authority in our favour. Other cases upon the question, whether a statute is directory or mandatory, and in our favour, are, *Lessee the Governors of Sir Patrick Dunne's Hospital v. Dowling* (Batty 296); *Quin v. Aldwell* (Batty 339); *Gardiner v. Blesinton* (1 Ir. Ch. R. 64). But at all events the cases of *Hayes v. The Queen* and *Fogarty v. The Queen* (10 Ir. L. Rep. 83), form a direct and solemn authority that the 18th section of the 3 & 4 Wm. IV. c. 91, is not mandatory, and does not apply in criminal cases. The fifth cause of challenge is an assumption without warrant; for there is no allegation on the record that this was a special jury. There is no averment that there was any special jurors' book or list, and the Court cannot

presume either. It is perfectly possible that there was no special jurors' book, and yet there might be a good special jury—st. 4 & 5 Wm. IV. c. 8, s. 2. We also insist that s. 24 of st. 3 & 4 Wm. IV., c. 91, is purely directory. The ground of challenge is bad also on the ground that it does not specify any names.—*Regina v. Conrahy* (1 Cr. & Dix. C. C. 56). The judgments in *O'Connell v. The Queen* of Tindal C. J. (11 Cl. & Fin. 248), and of Lord Denman (11 Cl. & Fin., 354) are very important on this part of the case. The other grounds of the challenge are plainly bad. The thirteenth if anything, is ground of error not of challenge. Then as to the nature and form of the entire challenge; it puts in some things which are essentially bad: we could not take issue on some of the grounds only; the challenge cannot be taken distributively. If part of it is bad the whole must fall. No difficulty can arise from holding that section 18 is directory only. If there is any misfeasance on the part of the sheriff, the Court has jurisdiction to set aside the entire of the proceedings.

Serjeant Armstrong and *Mr. Mahon* for the defendant.—Is it true to say that a challenge to the array will lie only for unindifferency on the part of the sheriff? It is true that the sheriff has nothing to do with the formation of the jurors' book. That is the duty of the clerk of the peace, and the sheriff's duty begins only when the jurors' book is given to him; but it would be strange if a challenge to the array did not lie, no matter how corrupt might be the formation of the books. From the judgments of Lords Denman, Cottenham, and Campbell in *O'Connell v. The Queen*, it appears that it was the opinion of those lords that the right of challenge to the array was not confined merely to cases of unindifferency in the sheriff. Lord Denman thought the true principle of the challenge to be "the security of the parties that a jury shall be fairly taken." Then the jury ought to have been summoned by virtue of the judge's precept; sec. 109 of the Common Law Procedure Act, 1853, extends to criminal cases. The statement in the challenge that there was not a precept is admitted by the demurrer. There is nothing in the Common Law Procedure Act to do away with the necessity of the precept, even where there is a special jury struck under the old system. [*Fitzgerald, J.* referred on this point to *Aldborough v. Bland* (7 Ir. C. L. Rep., 571). Then with respect to none of the jurors having been summoned six days before the assizes, it is admitted that there is no English authority upon the point. In *Gillespie v. Cumming* (1 Cr. and Dix., C. C. 294), a challenge was taken upon this point. It is true that issue was taken, but the array was quashed, and the observations of Pennesfather, B. in the same case afterwards in the Court of Exchequer (see 2 Ir. Law Rep., 28), are very important. The fact of the Court having the power to fine the sheriff does not prevent the party from challenging, *Waters v. Hughes* (2 Ir. Law Rep., 362); *Dundalk Western Railway Company v. Gray* (1 Cr. & Dix., 332); *Brown v. Fitzgerald* (Ir. Circuit Cases, 483). The whole object is to secure a fair and impartial jury; to that end nothing ought to yield; and Bushe, C.J., took that view in *The Dundalk Western Railway Company v. Gray*. It is settled that a juror cannot be fined for

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in this cause; and because the said jurors so empanelled were struck before issue was joined in this cause; and because issue was not joined in this cause, previous to the 24th day of July, instant, and the said jury were struck, and summoned previous to said day; and this the said John Rea is ready to verify; wherefore he prayeth judgment, and that the said panel may be quashed—*JOHN REA.*" And therefore, the said James Nagle comes and saith that the said challenge of the said John Rea is not sufficient in law to quash the array of the panel aforesaid; and that there is no necessity for him, the said James Nagle, nor is he obliged by the law of the land, to answer the said challenge in manner and form as it is above alleged, and this the said James Nagle is ready to verify. Whereupon for our said lady the Queen, he prays judgment, and that the array of the said panel may be affirmed. And this said John Rea here says, that he hath above alleged sufficient matter in law, in the said challenge, by him above made to the array of the panel aforesaid, to quash the array of the said panel, which he the said John Rea is ready to verify—which said matter, the said James Nagle does not deny, nor in any manner answer thereto; whereof the said John Rea, as before, prayeth judgment, and that the array of the said panel may be quashed. Whereupon all and singular, the said premises being seen and understood, it is ordered, considered, and adjudged by the justices aforesaid, that the said demurrer be allowed, and that the challenge to the array of him, the said John Rea, be overruled and disallowed. The *postea* then set out the swearing of the jurors and their findings for the Crown upon the several issues. With reference to one of the grounds of challenge, above stated, it is necessary to say, that the usual formal replications had been put in to the defences filed by the traverser (*vid. ante*, p. 81); and that on the morning of the trial, before the case was gone into, the traverser handed in a demurrer to those replications, which however, the judge refused to allow to be received.

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otherwise, is inconsistent with there having been a precept.] In point of fact there were both, but, we say, that at all events the Common Law Procedure Act does not apply in criminal cases. There is no repeal of the old jury process as to criminal issues. No matter how the jury was empanelled, the judge's precept would have been an authority to the sheriff to return a jury.—*O'Neill v. The Queen* (4 Ir. C. L. Rep. 221). If there is any case in which a jury might be summoned by *venire* the challenge was bad. This is a challenge to the array: we say that the ground alleged was not matter of challenge at all. A challenge to the array must be for some improper act or thing done by the sheriff; not for something antecedent to his being put in motion, and to which he has nothing to say.—*The Queen v. O'Connell* (11 Cl. & Fin., 342.) The third and fourth causes of challenge are substantially the same, except that in the fourth the words "or any of them" occur. Upon these two grounds the real question is whether the 18th section of the Jury Act is mandatory or directory. Under that section each juror is to be summoned six days at least before the day on which he is to attend. The section is directory only. The first statute on the subject of juries is the 42nd Edw. III, c. 11. It has been held that though that statute directs that "the sheriffs array the panels in assizes, four days at least before the sessions of the justices," yet, if the panel was arrayed two days before the assizes, that would be sufficient "because where the statute is in the affirmative that does not take away the common law."—Br. Abr. *Parlement et Statutes*, pl. 70. *Edwardes v. Hardinge* (Vern. & Scr. 99), citing *Lessee Maize v. Costello*, is an authority that non summoning of jurors is no cause of challenge of the array. *Gillespie v. Cumming* (1 Cr. & Dix. C. O. 294) will be cited on the other side; it was a Nisi Prius case, and the question was not argued there: the case came on afterwards before the Court of Exchequer on a question of costs, when the point as to the summons did not arise.—See 2 Ir. L. R. 28. *The Dundalk Railway Company v. Gray* (1 Cr. & Dix. C. O. 332) which will be cited on the other side is not an authority for anything. In *Ronayne v. Elliott* (Ir. C. O. 215), the question was not argued. *Lord Kingston v. Dwyer* (Ir. C. O. 517), was a fictitious case, got up to get rid of a difficulty in another case.—*Brown v. Fitzgerald* (Ir. C. O. 483); *Nowlan v. The King* (1 Huds. & Br. 164). The statute never was intended to be compulsory or mandatory.—*The King v. Edwards* (4 B. and Ald. 471) is a powerful negative authority in our favour. Other cases upon the question, whether a statute is directory or mandatory, and in our favour, are, *Lessee the Governors of Sir Patrick Dunne's Hospital v. Dowling* (Batty 296); *Quin v. Alduall* (Batty 339); *Gardiner v. Blenheim* (1 Ir. Ch. R. 64). But at all events the cases of *Hayes v. The Queen* and *Fogarty v. The Queen* (10 Ir. L. Rep. 53), form a direct and solemn authority that the 18th section of the 3 & 4 Wm. IV. c. 91, is not mandatory, and does not apply in criminal cases. The fifth cause of challenge is an assumption without warrant; for there is no allegation on the record that this was a special jury. There is no averment that there was any special jurors' book or list, and the Court cannot

presume either. It is perfectly possible that there was no special jurors' book, and yet there might be a good special jury—st. 4 & 5 Wm. IV. c. 8, s. 2. We also insist that s. 24 of st. 3 & 4 Wm. IV., c. 91, is purely directory. The ground of challenge is bad also on the ground that it does not specify any names.—*Regina v. Conrahy* (1 Cr. & Dix. C. O. 56). The judgments in *O'Connell v. The Queen* of Tindal C. J. (11 Cl. & Fin. 248), and of Lord Denman (11 Cl. & Fin., 354) are very important on this part of the case. The other grounds of the challenge are plainly bad. The thirteenth if anything, is ground of error not of challenge. Then as to the nature and form of the entire challenge; it puts in some things which are essentially bad: we could not take issue on some of the grounds only; the challenge cannot be taken distributively. If part of it is bad the whole must fall. No difficulty can arise from holding that section 18 is directory only. If there is any misfeasance on the part of the sheriff, the Court has jurisdiction to set aside the entire of the proceedings.

Serjeant Armstrong and *M. Mahon* for the defendant.—Is it true to say that a challenge to the array will lie only for unindifferency on the part of the sheriff? It is true that the sheriff has nothing to do with the formation of the jurors' book. That is the duty of the clerk of the peace, and the sheriff's duty begins only when the jurors' book is given to him; but it would be strange if a challenge to the array did not lie, no matter how corrupt might be the formation of the books. From the judgments of Lords Denman, Cottenham, and Campbell in *O'Connell v. The Queen*, it appears that it was the opinion of those lords that the right of challenge to the array was not confined merely to cases of unindifferency in the sheriff. Lord Denman thought the true principle of the challenge to be "the security of the parties that a jury shall be fairly taken." Then the jury ought to have been summoned by virtue of the judge's precept; sec. 109 of the Common Law Procedure Act, 1853, extends to criminal cases. The statement in the challenge that there was not a precept is admitted by the demurrer. There is nothing in the Common Law Procedure Act to do away with the necessity of the precept, even where there is a special jury struck under the old system. [*Fitzgerald, J.* referred on this point to *Aldborough v. Bland* (7 Ir. C. L. Rep., 571). Then with respect to none of the jurors having been summoned six days before the assizes, it is admitted that there is no English authority upon the point. In *Gillespie v. Cumming* (1 Cr. and Dix., C. O. 294), a challenge was taken upon this point. It is true that issue was taken, but the array was quashed, and the observations of Pennefather, B. in the same case afterwards in the Court of Exchequer (see 2 Ir. Law Rep., 28), are very important. The fact of the Court having the power to fine the sheriff does not prevent the party from challenging, *Waters v. Hughes* (2 Ir. Law Rep., 362); *Dundalk Western Railway Company v. Gray* (1 Cr. & Dix., 332); *Brown v. Fitzgerald* (Ir. Circuit Cases, 483). The whole object is to secure a fair and impartial jury; to that everything ought to yield; and Bushe, C.J., took that view in *The Dundalk Western Railway Company v. Gray*. It is settled that a juror cannot be fined for

non-attendance unless he has been summoned six days before the assizes. Upon the next ground of challenge, s. 24 of the 3 & 4 Wm. 4, c. 91, is important. It is said on the other side that there is no averment that there was a jurors' book. That is, the Court is asked to assume that all the officials charged with making out the lists neglected their duty. The presumption is that the duty was done. As to the names of the two hundred jurors, who we say were omitted, not being specified, what difference can that make? The affirmative of the issue lies on the traverser, and unless he is in a position to give a name and go on with it, he must fail. Then as to the jurors' book not being made out as prescribed in the statute, it must be presumed that there was a jurors' book; the demurrer is an admission both that there was a book, and that it was not made out according to the statute. The case of *Fogarty and Hayes v. The Queen*, cited on the other side, has no bearing here. The objection there was that all the jurors were not summoned six days before the assizes. Here it is that none of them were so summoned. *The King v. Nowlan* establishes nothing as to this case. The result of all the authorities is to show that the trial here was *coram non judice*—*Ro,ers v. Smith* (1 Ad. and Ell. 772); *Stainer v. James* (Cro. Eliz. 311); *Becknam v. Rye* (Cro. Eliz., 587); *Blodwell v. Brown* (4 Taunt. 470); *Rea v. Waring*, cited in *King v. Perry* (5 T. R. 453); 1st Chitty's Archb. 370; *Farmer v. Mountford* (8 M. & W. 266); *Crosbie v. Murphy* (8 Ir. C. L. R. 301); *Fonblanque v. Lee* (7 Ir. C. L. R. 550); *Re Fitzgerald's Estate* (11 Ir. Ch. R. 278); *Re Gripi's Estate* (7 Ir. Jur. N.S. 119). The tender of the demurrer to the replications was good at any time before the trial, there being no rule to rejoin.

Joy, Q.C., in reply, referred to Co. Litt. 156 (a); *Moore v. O'Reilly* (6 Ir. Jur. 60); *The Queen v. O'Connell* (Armstrong and Trevor, p. 37); Rolle's Abridgment, Trial, 642.

Cnr. adv. vult.

Jan. 30th.—LEFROY, C.J.—In this case a motion has been made for a *venire de novo* upon the ground of the erroneous decision of the learned judge who tried the case, in allowing a demurrer put in by the Crown to a challenge to the array taken by the defendant. We are all of opinion that the motion should be refused, and I will now state the reasons which have influenced my judgment at least, in coming to that decision. First, there is the principle that no challenge to the array can be taken, except upon the ground of unindifferency, or some other personal matter in the sheriff. There is the very highest authority for that statement, following up the ancient law which I must say was so fully and so correctly brought before the Court in the reply by Mr. Joy, that I will not go into it, especially as I have before me the authority of the eleven judges of England, as given by the Chief Justice in the House of Lords upon the case which was, strange to say, cited as an authority for sustaining the fourteen objections which have been taken to the array in this case. The case to which I allude is the case of *The Queen v. O'Connell*, and it is curious to see how the present objections on the record to this

array, are but a variation to a certain extent of the objections that were taken to the array in that case. Some small variations there are, but not an essential difference between the grounds that were taken in that case and in the present; and as I have the authority, such an authority as that, I should consider it a waste of time if I were to go farther, which, however, I am prepared to do if I thought it necessary, to show that the Act of Parliament, the Jury Act, upon which these objections purported to be founded, is not mandatory, but directory, and to shew the absurdity which would follow, if all the proceedings in a cause were to be set aside on account of there being a single departure from the number of details, the number of acts to be done by persons none of whom are the officers of the sheriff, the person who originates the proceedings not being the sheriff himself, but being the constable and the Clerk of the Peace, and their subordinates. The notion, therefore, that an error by a single one of these, the omission or introduction of a name that should not be introduced or omitted, is to set aside the whole array, is so monstrous that I should say the Act of Parliament, on the face of it, could not for a moment sustain such an idea as that not a case could be tried through the country if a single name was omitted from the jurors' book. Well, I shall now proceed to advert to the question that was put by the House of Lords to be considered by the judges, and to which an answer was given by the Chief Justice of England, whether there was any ground for reversing the judgment on any of the objections to the array in that case. I find the answer in page 246 of 11 Clarke and Finnelly, given by the Chief Justice of England, in which he goes into the law at length, and shows that no challenge can be taken to the array, but for unindifferency or other personal default in the sheriff, and the law is the same in England, although the persons there to make up the juries are different from those who are charged with that duty here. The same point had been decided in a case in 4 B. & Ald., which goes into the whole law. Upon these grounds we are clearly of opinion that there is nothing to sustain the objections taken to the ruling on the demurrer here, allowing the murrer, and refusing to allow the challenge to the array, and therefore that there should be no *venire de novo*.

O'BRIEN, J.—I concur in the ruling of the Court that the application should be refused, but with respect to one ground, which was properly relied on in the argument, I do so for reasons which differ in some respects from those stated by my Lord Chief Justice. I refer to the statement that the jurors, or any of them, were not duly summoned pursuant to the statute six days before the assizes. While concurring in the ruling of the Court refusing the *venire*, I do so, because I consider that we are bound by the judgment in this Court in the cases in 10 Ir. L. Rep. 53. In those two cases the prisoners had been capitally convicted and sentenced to death. Writs of error were issued, and it appeared on the record in each case that there had been a challenge to the array by the prisoners upon the ground, amongst others, that the entire of the jurors had not been summoned within six days before the assizes. The challenges

were demurred to by the Crown. The judge allowed the demurrers, and the allowance of them was one of the causes of error. The Court, consisting of Blackburne, C. J., Crompton, J., Perrin, J., and Moore, J., decided that the challenges were bad in law, and that the demurrers were properly allowed. It is to be observed that the challenge in the case before us goes farther, because it alleges that the jurors, or any of them, were not summoned. But it is clear that one reason assigned by the Court in that case, namely, that the provisions of the 18th section of the Jury Act were directory only, and not mandatory, is equally applicable here. That was a decision pronounced in this Court, after a laboured discussion, in a capital case, and of course not without due deliberation. Its propriety might have been questioned by writ of error, and I do not think we should be warranted in not acting upon it, unless we thought it erroneous or unsustainable. In the present case the challenge, the demurrer, and the allowance of the demurrer, appear on the record. It will be in the power of the defendant to bring a writ of error, and the House of Lords may reject the authority of that case, if they may think fit, but it would be contrary, in my opinion, to the settled course of practice, if we should do so, unless we be clearly satisfied that the former decision was wrong. Blackburne, C. J., in pages 62 and 63, states that his construction of the Act is, that the provisions of the section requiring the jurors to be summoned six days before the assizes were made with a view to the ease and convenience of the jurors, and that, assuming that the sheriff ought to have summoned the jury six days before the commission day, the omission could not afford a ground for questioning the panel. The judgment is as clear and explicit on this peculiar question as words could make it. I must add, however, that but for that decision I should consider it doubtful that the cause of challenge was not good. The question is, in my opinion, doubtful, but I cannot say that the Court was wrong in its decision in the case which I refer to. It is manifest that the question is doubtful. I do not mean to refer to all the authorities or all the arguments. One class of arguments was adopted by both sides. Extreme cases were adopted by counsel on both sides to shew the inconvenience and injury that would follow. I will allude to one case put on the part of the Crown: Suppose that only one juror was not served, would that vitiate the entire of the proceedings? On the other hand a case was put by the defendant's counsel: Suppose none of the jurors were summoned at the time, it is asked, would that be such a tribunal as the prisoner is entitled to have? Well, passing by the argument derived from the consequences resulting from either construction, the case on the Act itself renders it very difficult to adopt the construction contended for by the defendant's counsel. I allude to the 34th section, which, after the 18th section has directed the sheriff to summon the jurors ten days before the assizes, enacts, "that if any sheriff..... shall summon any juror in less than four days before the day on which he is to attend.....the Court of Assize.....may and is hereby required, on examination and proof of such offence, in a summary way to set such a fine upon every person so offending as the

Court shall think meet, according to the nature of the offence." It is difficult to see why the period of four days is introduced into that section different from the six days in the other section, but there it is. It may have been a mistake in passing the bill through Parliament, but there it is, and it is difficult to hold that the Legislature intended that the provisions of section 18 should be mandatory, while the only case in which a fine is to be imposed on the sheriff is in the event of his not summoning the jurors within four days. Well, suppose they were served within four days, and that the enactment was mandatory that they should be served six days before the assizes, the trial would be abortive, and yet in that case the power of fining would not rest on the sheriff. It is difficult to account for the introduction of that provision into the Act, but it is hard to suppose that the Legislature intended the enactment in the 18th section to be mandatory. Well, it was put certainly on the other side by Serjeant Armstrong, in his answer to this difficulty, that the liability of the sheriff at common law to be proceeded against for the non-discharge of his duty was not qualified by the 34th section, and that it was in the power of parties still to proceed against him for non-compliance with the 18th section. But we are dealing with the 18th section, and it is difficult to hold that they intended the provisions of the 18th section to be mandatory under the circumstances. Well, those being the provisions of the Act, there is more doubt thrown on the matter by the series of decisions at Nisi Prius. We have that of *Waters v. Hughes*, in which Woulfe, C. B., consulted with Pennefather and Richards, BB., and held that a demurrer to a challenge taken on this ground was bad in law; and we have *Browne v. Fitzgerald, Hartigan v. McCarthy* (Bl. D. and Osb. 86), and we have the opinion of Pennefather, B., in *Gillespie v. Cumming*, in which the question arose incidentally on an application to stay proceedings. However, we have then in the opposite direction the statement of Pennefather, B., in *Hartigan v. McCarthy*, that he did not, in *Gillespie v. Cumming*, intend to express any opinion as to the propriety of the challenge; and then we have also, in *Hartigan v. McCarthy* a strong expression of the opinion of the present Lord Chancellor that the supposition that the omission to serve any one juror would vitiate the panel, was new law to him. Well, all this shows that we should not be justified in departing from the decision of this Court in *Fogarty and Hayes v. The Queen*. Those were decisions at Nisi Prius, and were not capable of being reviewed on appeal. They are not to be regarded as possessing anything like the authority of the case to which I refer, which held that the provisions of the 18th section were directory only. There are one or two other objections. One is that the challenge would not lie at all, as a challenge can only be for undifferency in the sheriff. Serjeant Armstrong contended that though that was laid down in *The King v. Edmonds*, that it ought not to apply now, because the sheriff's duty only commences with the jurors' book, and also because some of the judges in *O'Connell's case*, Lord Deunau and Lord Campbell dissented from that doctrine. It is not necessary to go into that here, in the view which I take. The duty of summoning the jurors is, beyond

all doubt, thrown upon the sheriff; whether the words are mandatory or directory, it appears to me that non-compliance with the directions of the Act is a default. I have said I should not refer to the other grounds which were urged. One only will I touch upon, that this whole proceeding is void, because the jurors were summoned by writ of *venire*, and not by precept. It is enough to look at the sections of the Common Law Procedure Act to see that they do not apply to special juries struck under the old system. The directions there are wholly inapplicable to the case of special juries, which may not be struck at the time the judges issue their precept, and there is a distinct proviso at the end of s. 102, "that the Court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause." That follows the direction that was given as to what the precept issued by the judge of assize should do. That manifestly cannot refer to a special jury under the old system, and the case of *Aldbrough v. Bland* rules the point. It is unnecessary to go into the other grounds of the challenge. I was only anxious to state the particular ground on which I have come to my conclusion that the section was directory only, and not mandatory.

HAYES, J.—In this case a motion was made for a *venire de novo*. It is a case of a criminal information which was tried before me. When the case was called on, and a full jury appeared, the defendant handed in a challenge to the array, and to that challenge there was a demurrer. Instead of calling for argument, I thought it best to allow the demurrer. I was induced to adopt this course, because it occurred to me that if after argument I allowed the challenge, I should inflict a very serious injury on the prosecutor; whereas the correctness of the course of allowing the demurrer might be brought before the Court of Queen's Bench. I do not, therefore, regret the course I took, or the discussion which has been had, as I trust it puts into train for final settlement the question before us. The defendant has challenged the array on three grounds, and if any of them be ruled sufficient in law, judgment should be given for the defendant. It behoves us to consider this cause both in matter and manner. I will not occupy much time in discussing the form of the challenge; the pleader seems to have lost sight of some plain principles. The challenge ought to set forth the ground of challenge with convenient certainty and precision, so that the opposite party, if so advised, might take issue on it. The first cause of complaint against the array is, that the jurors were summoned by writ of *venire* and *distringas*, and the second cause is, that they were not summoned by precept. These, I think, ought to be overruled, by reason of vagueness and uncertainty. Then the fourth cause is, that all the jurors were not summoned six days before the assizes, but none of them are specified by name. So also the eighth cause alleges the omission of several persons from the special jurors' list, and not one of them has been specified. But let us apply ourselves to the matter of the first and second objections. The 109th section of the Common

Law Procedure Act enacts that no jury process shall be necessary, but the precept of the judges shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal. It is contended that by force of this the process by *venire* and *distringas* was abolished. I think not. It was only abolished "for any action," and by the 4th section of the Act the word "action" is to mean "any personal action," and a criminal information is not a personal action. The latter part of the 109th section might at first seem to be more extensive. The Legislature in the latter part of the clause, only meant to provide a substitute for this jury process which had been abolished, and this it does, not by enactment that all issues shall be tried as there directed, but merely that the judges' precept shall be not in the form theretofore in use, but shall have a wider area, and direct the return of jurors for all issues, civil and criminal. The effect of the 109th section is to charge the sheriff with the duty of selecting a panel of jurors sufficiently large for the purpose of the assizes. Section 112 enacts, "that the court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause." I think it very plain that where such an order is made, and a jury struck under it, the power of selecting the array of the panel is taken away from the sheriff, and given to the officer of the Court. After the jury is thus struck, how is the panel to be made for the trial of the cause? The Common Law Procedure Act prescribes no mode of doing this. It gives no directions as to furnishing a copy, nor does it impose any obligation on the sheriff to summon jurors other than those that he has himself previously selected and arrayed. I say it is only by the old system of jury process that it can be done. The course then will be continued in the ancient practice of proceeding to issue a writ of *venire*. That seems only to be awarded as a preliminary to the writ of *distringas* which issues as the sheriff's order and warrant to summon a jury. Such is the course which ought to be pursued when a jury is struck under the old system, and as that is the course adopted here, the defendant has failed to shew that the first is a good cause of challenge. The second is, that the jury is not summoned under the judge's precept. The observations I have made show that the sheriff's authority is derived, not from the precept, but from the *distringas*: that cause must also be overruled. The third cause is, that all the jurors on the panel were not summoned six days before the trial. The fourth varies the expression by saying "or any of them." Let us consider these two causes together as involving the consideration of the want of a summons six days before the trial. A good many cases were cited. In some of them the conduct of the sheriff was called in question; in others the default of the party. I do not think it impossible to reconcile them. The duty of the sheriff is derived from section 18 of the statute 3 & 4 Wm. 4. That enacts "that the summons of every man to serve on any jury, common or special; in any of the Courts aforesaid, shall be made by the proper officer six days at least before the

day on which the juror is to attend, by showing to the man to be summoned, or in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting, a note in writing under the hand of the sheriff, sub-sheriff, or other proper officer, containing the substance of such summons." I am of opinion that this enactment is merely directory, and that a six-day summons is not essential to the validity of the proceeding. The names of the jurors having been selected and duly empanelled by the sheriff during seven days, as prescribed by the 2 & 3 Wm. 4, and the Common Law Procedure Act, s. 110, the next great process is to secure the attendance of a competent number of them. This being the end to be attained, the statute sets forth the means, but it is plain that those means, though they ought not to be lost sight of, are not essential. If the sheriff can procure the attendance of jurors, though he did not give twenty-four hours' notice, no mischief can arise; and it would be imposing a great hardship on the officer if he was obliged to serve every one of them at the time stated. The existence of that obligation would be a strong inducement to select a jury from those residing in the immediate vicinity of his office. If a six days' service were to be essential, a jury panel summoned five days before, though all attended, would not be available for any useful purpose, and the sheriff could not be punished, he having given a four-day notice. So to hold a six-day summons necessary would do away with the 34th section. The result is, that the only reasonable mode of construing the 18th section is to hold that it is directory only, and not mandatory; and the case of *Fogarty and Hayes v. The Queen* is a decision on the point before us. The 5th and 7th causes bear on the conduct of the sheriff in making the special jurors' list. But how can this be made a ground of challenge, especially in a case in which the array is made not by the sheriff, but by the officer, and in which the party challenging has seen the list returned by the sheriff to the Clerk of the Crown, has seen the officer selecting the names? If he had any objection to it, he should have brought his complaint to the Court. No prejudice is shown to have resulted from this, and it must be called to mind that the 36th section imposes a fine of £100 if there is any default on the part of the sheriff. The 6th cause of challenge is obscurely framed. It is uncertain whether it is meant to convey an imputation on the Clerk of the Crown or the sheriff for having handed over some book, not the true one. Which ever be the meaning, I am of opinion that the observations I have just made afford a sufficient answer. The 9th, 10th, and 11th causes of challenge impugn the conduct of the officers, but no particulars are given as to the persons whose names are said to have been omitted. This is not a ground of challenge, and if authority was wanting, we have *The Queen v. Fitzpatrick*. The remaining causes of challenge, the twelfth, thirteenth, and fourteenth have been given up. The result of the whole is, that in my opinion the demurrer taken in the Court below was rightly allowed, and the motion should be refused.

FRIZGERALD, J.—I concur in the decision of the Court. In consequence of the very grave importance of the question, I mean to state shortly my grounds

on the 3rd and 4th grounds of challenge. The case, as it appears now on the record, is a criminal information, tried at Nisi Prius under the warrant of the Attorney-General, but still a criminal case. A good deal of discussion took place in the early part of the argument as to some matters of fact, and for a considerable time it was gravely urged by Mr. Brewster, that we could not take this to be a case by special jury, but an ordinary case by common jury summoned under the precept of the judge of assize. But I pointed out we ought to put the case on the facts as they were, and as they ought to be on the record, and that it appeared that it was a case tried at Nisi Prius, an order having been made for striking a special jury under the old practice, and that such was struck and returned with the panel annexed. We are also referred to this statement on the *postea*, "the jurors being called, come," and it was argued that this was equivalent to a statement that the whole twenty-four appeared, whereas the facts were that a full jury only appeared, and not twenty-four, and if necessary I should say that the *postea* ought to be amended according to the facts. There is another ground on which more may turn, and that is, the statement on the challenge itself. It commences with this statement; after stating the appearance of the prosecutor and the defendant, the challenge says that "the jurors of the jury also empanelled also come," and no doubt that is a statement not that the jury was afterwards arrayed to try the case, but that the whole twenty-four came, and however the *postea* may be corrected, it is difficult to get over this statement. The only one of the grounds on which I mean to make any observations is that which is comprised in the third and fourth, that none of the jurors were summoned six days before the trial. It is not that the whole were not summoned, but that none of them were summoned. There is no allegation on the challenge that this arose from fraud, or that it was a fraudulent act on the part either of the sheriff or of his officer, or in any way the result of design or fraud on the part of the prosecutor. It is simply an allegation that none of the persons were duly summoned six days before the assizes. Possibly that may be of importance. It is also apparent from that that it is consistent that every one of the twenty-four were summoned on the morning of the fifth day. Two answers were given on the part of the prosecution. First, that the provisions of the 18th section, if it applied to criminal cases at all, were directory; and secondly, that whether they were mandatory or directory, the omission to perform this duty was not ground of challenge at all. As to this second answer proposed to be given, it seems to be plain that if the statute applies to criminal cases, and the 18th section is mandatory, the omission is a ground of challenge. The old and modern cases all determine that the challenge to the array, which does not deal with personal conduct of the jurors, must deal with unindifferency or personal default in the sheriff; but I have no hesitation in saying that the omission to summon the jurors is a default. The duty to summon always rested in the sheriff's hands; it is not taken from him by the Jury Act; on the contrary it is left with him. Then the question remains, is the 18th section mandatory? In other words, are

the parties to the litigation entitled to say that the due summoning of the jury six days before the assizes is essential to a valid array. The question is one of very great constitutional importance, to be considered with great care, and on which, if not concluded by authority, I should entertain great doubt. If the statute is not mandatory, I must confess I can point out no adequate remedy. There are remedies in civil cases, but none in criminal. Take the case of a trial for a capital felony. An application for a new trial is not open to the accused, if he is convicted. And, in addition to the powerful arguments adduced by Serjeant Armstrong, in pointing out the grave inconveniences which would arise in holding the statute not to be mandatory, and that the omission of the sheriff to summon was not the ground of a challenge to the array, I may point out this, that in criminal cases the subject is without adequate remedy if there is no challenge to the array. There are, it is true, the gravest inconveniences on the other side, for if this is the subject of challenge for a prisoner, it is equally so on the other side. It is the default of the officer, and not of the party. It may be said that the exception to the array of the jury should lie as well in the mouth of the prosecutor as of the defendants, so that the ruling of the Court on one side or the other is fraught with grave inconvenience, and I should wish that this case or some case was submitted to the Court of last appeal to determine the law. It has been announced by my brother O'Brien, and by my brother Hayes, that we have the decision of this Court on this point in the case of *Fogarty and Hayes v. The Queen*. In many respects I think that is an unsatisfactory authority, but it is a solemn decision of the Court *in banco*, open to appeal by writ of error, and I know of no practical inconvenience greater than for this Court to overrule what has been so solemnly decided on a demurrer. I have said I thought it in many respects unsatisfactory, both from the form of the challenge which was taken in that case, and because it is not easy to ascertain on what ground the decision rests, and some of the grounds stated are, in my judgment wholly unsustainable. In the first place the Chief Justice is represented to have said, and it is evident that his judgment is a written one—"The whole substance of the charge amounts to this, an omission by the person or persons employed to summons the jury; but this omission does not inculpate the sheriff, and affords no ground for arguing that the panel was not duly arrayed." Now, in my judgment that observation, which, if well founded, would have gone to the whole case, cannot be sustained. The default there was the default of the sheriff; that is, the default of the sheriff through the summoning officer. Whose officer is he? The sheriff's. Upon whom does it rest, and has always been thrown to summon the jury? Upon the sheriff. And I am at a loss to see that the default of this officer is not as much the default of the sheriff as if he had undertaken to summon the jury himself. Again, the Chief Justice says, "In my apprehension, it is very plain, though perhaps it is not necessary to decide that question, that the 18th section had no reference to jurors required to serve in criminal courts; the section which relates to them is the 34th, which enacts—'If any sheriff, un-

der-sheriff, coroner or elisor, bailiff, or other officer, shall wilfully transgress in any of the cases aforesaid, or shall summon any juror less than four days before the day on which he is to attend, except in the cases hereinbefore excepted, the Court of Assize, Nisi Prius, &c., may, and is hereby required, on examination, &c., to set such a fine upon every person so offending as the Court shall think meet, according to the nature of the offence;' so that, comparing these provisions with the enactments of the 18th section, it would appear to me that the 18th section does not apply to jurors who are to serve in criminal cases." Again it seems to me that that ground is entirely unsustainable. I apprehend it is clear, on an accurate view of the Jury Act, that the 18th section embodies the whole jury system in reference both to civil and criminal cases, save where the judge at the assizes thinks fit to direct the sheriff to summon a jury forthwith, and I did not hear any ground urged to show why that 18th section is not applicable to criminal as well as to civil cases; but subject to this we find the Chief Justice announcing the decision of this Court on demurrer, that the 18th section was only directory—in other words, that the due observance of its provisions was not essential. That ground appears to me, therefore, if the judgment in *The Queen v. Fogarty* is correct, to establish that this alleged default in the summoning of the jury would not be the subject of objection to the jury, as they stood in the box, or of objection to the array. I, for one, would not concur in any judgment which would reverse here what was decided in that case. If the case is erroneous, and should be reversed, it must be done in some other tribunal, and possibly by the highest; but independently of it, I have endeavoured to form a judgment on the question. Forming the best judgment I could in a case beset with difficulties, which is fraught with danger however the Court decides, I have come to the conclusion that the 18th section is not mandatory, and I confess I was much pressed in the course of the argument by what I threw out—the difficulty of getting over the provisions of the 34th section, for how it could be held that the 18th section is mandatory, when under the 34th section, the sheriff is not punishable if he has summoned the jurors four days before the assizes, I do not understand. I have endeavoured to trace the law out, and I find that the 17 & 18 G. 3, c. 45, imposes the six days' clause. Sect. 4 of that statute enacts, "that the said jury so struck as aforesaid shall be the jury returned for the trial of said issue, and shall be summoned by the sheriff or other officer appointed to return the same at least six days before the assizes or sittings, at which such issue is to be tried." That was the provision of the law in reference to which we find an observation of Power, B., in *Vernon and Scriven*, 100. It is only a *dictum* of a judge—namely, that the provision was not in the sense I have put it, mandatory, that it was intended for the benefit of the jurors only, and its non-observance was not intended to render proceedings invalid. The case in *Vernon and Scriven* is important in this view, that when this had long been the law of the land, there is no decision or dictum shewing it was held that this was essential to the array of the jury, but on the contrary it is said that it was for the pre-

tection of the jurors themselves. Again by section 7 of the same statute it is provided, "That if the sheriff or sheriffs, or such other officer as shall be appointed to return such jury as aforesaid, shall omit or neglect to summon, or cause to be summoned, by a note in writing, every person so struck or returned as aforesaid, at least six days before the assizes or sittings whereat such issue is to be tried, he shall forfeit such fine not exceeding fifty pounds, and not less than ten pounds, as the judge before whom such issue is to be tried, shall think reasonable, for every such offence, and that the said judge shall estreat such fines." Well, the two sections there, one requiring that the jurors shall be summoned six days at least, and the other providing a penalty, according to the statement of Power, B., are only a direction for the protection of the jury; but how much stronger does it become under the Jury Act, which only imposes a fine upon him for neglecting to summon the jurors four days before the assize? Viewing it in that light, the view I take is that the 18th section is only directory. I observed also in the course of my observation that it was important in my mind that no allegation of fraud or contrivance was made, and that is important in reference to what occurred in the House of Lords, in the case of *O'Connell v. The Queen*, where much was rested in the challenge, on the ground that the abstraction of the thirty names was the act of design or fraud by some person with a view of depriving the accused of a fair trial, and that is further borne out by the observations of the judges in *The King v. Hunt* (4 B. & Ald. 430), which was a criminal information for a libel. There was a trial before Abbott, C. J., a jury was called, and ten attended; two tales men were sworn. The defendant was tried and convicted; then he moved for a new trial. The affidavits of two of the special jury men and of the defendant were read, shewing that two of the special jurors who had not attended had not been summoned, and one might infer that the non-attendance of the other fourteen arose from non-service also. Well, there all the arguments used here were urged; but in the course of delivering the judgment of the Court there it was said that the omission was not the consequence of contrivance or collusion on the part of any one, and Bailey, J., said "If we were to accede to this application, it would be equally competent to the Crown, in case of an acquittal, to have a new trial as of right, and, therefore, our granting a rule in this case would tend to deprive defendants of the protection which the law at present gives to them; and this would apply to all cases, criminal as well as civil. It would, surely, be a monstrous proposition to contend that after an important question has been determined at *Nisi Prius*, the losing party might have a new trial because the sheriff had omitted to summon one common jurymen out of the whole panel." On that ground it is an authority deserving of attention, though the reasoning of Bailey J., may not be satisfactory, for if this is not a trial at *Nisi Prius*, I am at a loss to see, even if there had been a fraudulent contrivance, how the Court could have aided the defendant by granting a new trial, and whether he would not have been left to an application to the Crown to remit the sentence. Upon these grounds I concur in the rule that the cause shown should be allowed.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SHANNON v. BARLOW—April 24.

Goods bargained and sold—Indefinite order—Right to rescind contract—Levy v. Green, (1 El. & El., 969).

*The defendant, a Roman Catholic clergyman in Sheffield, through P, who was the superintendent of the Glasnevin Cemetery, Dublin, for the uses of a cemetery about to be opened in Sheffield, gave the plaintiff (a stationer in Dublin) an order, which, according to the evidence of P, was in the following words, "One copy of each of the large books, and as few as possible of the smaller books and forms." According to the plaintiff's evidence, P. desired him to furnish "One book of the forms least in use, and a moderate quantity of the others, in proportion as they were used in Glasnevin Cemetery." The plaintiff forwarded to the defendant, through P, two of two of the large books and an excess in the "smaller books and forms," over the requirements of the Sheffield Cemetery, as ascertained by the evidence at the trial, together with a quantity of stationery, which had not been ordered at all, and included them all in the one invoice. Held, (following *Levy v. Green, (1 El. & El., 969)* that the defendant was justified in rejecting the whole.—*Christian, J., dissents.**

And per Christian, J., that the case was distinguishable from Levy v. Green as to the indefinite portion of the order, 1st, because it was indefinite; and 2ndly, because it appertained to a certain measure or standard which was in the possession of the defendant, but not in the knowledge of the plaintiff; and that as to the portion of the order which was alleged to be precise, there was not evidence to show that the books in question were not amongst those most in use. And, that as to the stationery, which was not ordered, no case had decided that where articles alterius generis were sent along with those ordered, the purchaser was at liberty to reject the whole of them. And that a verdict which, under these circumstances, specified the articles in the invoice, for which the jury thought the plaintiff entitled to recover, ought not to be disturbed.

THIS action for goods bargained, sold and delivered, &c. was tried before O'Brien, J., in the Consolidated *Nisi Prius* Court on 21st of November. The defence was an ordinary traverse.

First witness for plaintiff, Mr. Patrick Phelan deposed—I have been superintendent of the Glasnevin Cemetery for 11 years, I saw defendant in Sheffield in August, 1862; I had gone to see the Cemetery there and remained there for a week, assisting several times the arrangements at the Committee about the Cemetery. I went once with defendant to the ground, I had brought over the headings of the forms of several books used in our Cemetery, one of each sort; I shewed them to defendant. They had been printed by plaintiff. I suggested to defendant that he should get the same forms from the plaintiff as we had. Defendant directed me to do so and said he would wish

to get them done by an Irishman. On returning to Ireland, I went to plaintiff and told him there was a lot of forms and books wanted for the Sheffield Cemetery, and that defendant would wish him to do them, as he was an Irishman.

I saw defendant in Dublin about 10 days after in the end of August or beginning of September. I met him at Glasnevin with the Rev. Mr. Moore and told him that plaintiff was slow in getting the forms, &c. Defendant told me to press on plaintiff the getting them up as quick as he could, as the Cemetery would be opened the 29th of September.

I went that evening to plaintiff and told him what defendant told me, and to have the proofs of these forms ready, in order that defendant might see them before he left Dublin. Plaintiff came to me next morning and I went with him to defendant, and plaintiff shewed him the proofs at Phibsborough. Defendant examined them and appeared quite pleased: they were headed for the Sheffield Cemetery. I had told the plaintiff the Cemetery was to be opened on 29th of September, and that the books and forms, &c. were to be sent by Mr. Walker to Sheffield—defendant had told me to give them to Mr. Walker. I ordered from plaintiff one copy of each of the large books and "as few as possible" of the small forms. I told plaintiff to send up the books and forms to me: defendant did not tell me to examine the goods.

Plaintiff sent me up the books, forms, &c.; I examined some of them: they were according to order. Mr. Walker was present. I forwarded them with Mr. Fitzpatrick to Sheffield.—Defendant had said they were to go to Sheffield by Mr. Walker, but Mr. Walker could not take them and I sent them by Mr. Fitzpatrick.

Cross-examined.—I gave plaintiff no other order than for one copy of each of the large books and "as few as possible" of the smaller books, &c., of the forms. I had no authority from defendant to order more; I ordered no stationery; I had authority from defendant to send to Sheffield what he had authorized me to order.

Re-examined.—I sent the invoice with a note to defendant by Mr. Walker and got no reply. I had seen and walked through the Sheffield Cemetery.

A document was produced to witness, which was admitted by both parties to be a copy of the account or invoice which had been furnished by plaintiff to the defendant, containing the particulars of the articles sent by plaintiff to defendant, which were the subject of this action.

Witness continued.—I ordered from plaintiff one of each of the articles mentioned in the six items of that invoice, No. 2 to No. 7 inclusive. The articles mentioned in the fourteen other items of that invoice, No. 8 to No. 21 inclusive, are necessary in a cemetery and are used in Glasnevin.

The witness was then asked by plaintiff's counsel whether, from the experience he acquired at Glasnevin and having regard to the size of the Sheffield Cemetery, he could say what number of the articles mentioned in item No. 8 of the copy invoice should reasonably have been given to answer the order of "as few as possible."

Morris, Q.C. for defendant, objected to this ques-

tion. The judge allowed it to be put, subject to his objection, and witness answered, "four or five."

A similar question was put (subject to like objection) as to the articles mentioned in the other items of the copy invoice, No. 9 to No. 21 inclusive, and witness stated in reply, that the number of such several articles, which in his opinion should reasonably have been given to answer said order of "as few as possible" were as follows, viz: four or five of those mentioned in No. 9; one of those in No. 10; three of those in No. 11; three of those in No. 12; four or five of those in No. 13; three of those in No. 14; one of those in No. 15; one of those in No. 16; 200 of those in No. 17; from 50 to 100 of those in No. 18; 50 of those in No. 19; 100 of those in No. 20; and 50 of those in No. 21.

Examination continued.—To Juror.—When I got the goods and invoice from the plaintiff, I read the invoice, I thought there were too many of some of them, but I did not tell that to the plaintiff, but sent forward the goods to defendant.

To the judge.—Defendant had told me in Sheffield when I was there to order one of each of the large books and "as few as possible" of the smaller books and forms.

Second witness, Mr. C. P. Shannon, the plaintiff.—I am a printer and stationer, and have been in the habit of supplying goods to Glasnevin Cemetery. I know Mr. Phelan (last witness). In August, 1862, he gave me directions for supplying books and forms for defendant: I had not known defendant till then. Phelan told me there were quantities of books, forms, and stationery wanted for the opening of the Sheffield Cemetery, and that he was commissioned by defendant to order them from me. He directed me to get a sheet of each book and form that was in use at Glasnevin, and to bring them out to him in Glasnevin, when he would change the headings to suit the Sheffield Cemetery. Next morning I brought out all the forms to him at Glasnevin, and he altered them, and told me to prepare proofs of those altered forms: he did not then tell me the number I was to provide.

I saw him again in about 10 days. He told me to hurry on with the proofs, as defendant was in town and he wished defendant to see them. I told him I would call on him with them the next morning, which I did; and I went with him to defendant at Phibsborough and shewed defendant the forms. I shewed defendant the proof-copies of all the books and forms mentioned in items in invoice No. 2 to No. 21, both inclusive. Defendant looked at some of the principal ones and said it was all right, particularly as to one, and he desired that the work should be proceeded with. I took Mr. Phelan back to Glasnevin and asked him the quantities I was to give, and he said, "One book of the forms least in use and a moderate quantity of the others, in proportion as they were used in Glasnevin Cemetery, except as to the Railing Book, as it was a book that the cemetery committee here did not encourage, but that it was a favourite mode of interment in England, and that I should make a few more than were used here."

I did not see defendant afterwards. I saw Phelan in about a week afterwards. He told me to hurry on with the work, as he wanted to send them over with

tombstones that were going to defendants from Glasnevin, and not to pack the goods tightly as he had to examine them before they were sent over: that he was told to do so.

I prepared for the Sheffield Cemetery all the goods under that order: they were useless for any other purpose.

I sent the goods accordingly to Mr. Phelan on 17th September, 1862, and sent him an invoice. I never saw them since. I have been supplying similar articles to Glasnevin Cemetery for 4 or 5 years.

Witness was then examined as to the value of the several articles mentioned in the items of said copy invoice, No. 2 to No. 21 inclusive. He stated in substance that the prices charged for same respectively in said copy invoice were fair and reasonable, having regard to the several quantities therein mentioned; and supposing such quantities to be purchased from him, but that if a smaller quantity of any description of articles was to be purchased from him than mentioned in said copy invoice, then that the cost and fair and reasonable charges for such smaller quantity would be at a higher rate for each article of that description than is charged in said invoice, inasmuch as the same expense should be incurred in putting up and setting the types, &c. whatever was the quantity purchased.

Morris, Q.C. for defendant, contended that plaintiff was bound by the prices charged in the invoices, and was not entitled to claim any higher rate of charge; and he objected to plaintiff giving any evidence as to such higher rate of charge. The judge received the evidence subject to defendant's objections.

Witness then stated that supposing only one of the registers mentioned in item No. 2, and one of the account books mentioned in item No. 3 to have been purchased from him, the fair and reasonable charge for the former would be £2 10s. and for the latter would be £1 17s. 6d.; and that with respect to such of the several articles mentioned in items No. 8 to No. 21 inclusive (as to which the quantities stated by Mr. Phelan in his evidence were less than those in the invoice), the fair and reasonable prices to be charged for the following quantities would be at the following rates, viz: at 8s. each for four or five of the articles mentioned in item No. 8; 4s. or 4s. 6d. each for four or five of those in No. 9; 10s. or 12s. 6d. for one of those in No. 10; 3s. 6d. or 4s. each for three of those in No. 11; like rate for three of those in No. 12; 6s. or 6s. 6d. for one of those in No. 15; 6s. for one of those in No. 16; 7s. 6d. or 8s. for a 100 of those in No. 18; 10s. for 50 of those in No. 19; 7s. 6d. or 8s. for 100 of those in No. 20; and 12s. 6d. for 50 of those in No. 21.

Witness also stated he would not swear that Phelan ordered any stationery.

I got back the invoice from defendant about a week after I sent it: I got it with his first letter. I sent the goods to Phelan on 17th of September, packed in two tea chests, directed, as I believe, to Mr. Phelan (as he desired me) for the Rev. Mr. Barlow. I will not swear they were directed to Mr. Phelan.

I have ceased for about six months to work for Glasnevin Cemetery. While I was working for them I kept up my own types of their forms. I had to

alter several of those types, but not all, for the books of the Sheffield Cemetery, and to alter some in the body of them.

The plaintiff's case being closed, *Morris, Q.C.*, for defendant, requested the learned judge either to nonsuit the plaintiff or to direct a verdict for the defendant upon the following grounds:—

1st. That there was no acceptance or other matter to take the plaintiff's case out of the Statute of Frauds, on this point he cited *Astel v. Emery*, (4 M. & S., 262).

2nd. That as there was at all events an excess in the quantity of the goods sent over that alleged to be ordered, there was no duty on the part of defendant to separate and take the portions ordered.

The judge declined to do so.

Morris, Q.C. then addressed the jury for defendant and gave the following evidence.

Witness for defendant, Rev. N. Barlow—Defendant.—I am the Catholic curate in Sheffield. Am native of Ireland, came to Dublin in August, 1862; saw Mr. Phelan in Glasnevin Cemetery. He told me that plaintiff was the printer for Glasnevin Cemetery, and that as he kept his types standing, he would supply me cheaper than any other person. I had seen Mr. Phelan in Sheffield on the 14th of August; I was member of the cemetery committee there: Phelan was with the committee at that time. He shewed me at Sheffield the forms used in the Glasnevin Cemetery. I don't remember having given him any orders in Sheffield. I am positive I did not give him any orders in Sheffield to get any form or book printed by plaintiff.

When I saw Phelan in Dublin afterwards, I was at Glasnevin Cemetery and examined the forms of books, &c. Mr. Phelan suggested that plaintiff should do it as he could do it cheaper. I ordered Phelan to procure me from plaintiff one copy of each of the books used at Glasnevin Cemetery and a very small quantity of the forms used there. I said that I liked plaintiff's forms. I, moreover, said that the copies of the books should be small, as I would probably have soon to change them in order to meet the local peculiarities of the place. Mr. Geraghty was present. The Sheffield Cemetery was not open then. These were the only orders I gave to Phelan. I saw plaintiff about 10 days afterwards at Phippsborough, the morning of the day I went to England, plaintiff on that occasion shewed me about four or five proof-sheets only. I don't know whether he had more with him or not. I don't recollect saying anything to plaintiff about the delivery of the goods. I told Phelan to have them forwarded to me as soon as possible. I did not order any stationery. I heard of the arrival of the goods on the 20th of September, the day I got the invoice from Mr. Walker, and wrote the letter to plaintiff. I examined the invoice and returned it immediately. The goods were at the railway station when I wrote that letter. I saw the goods at the railway station only once since then, about a month ago, directed by a card to the Rev. Mr. Barlow, Sheffield. There were two boxes. I did not see Phelan's name on them. I never gave Phelan any authority to receive or approve of the goods on my behalf. The goods mentioned in the invoice were not in accordance

with my orders. They were greatly in excess. One of the registry books he sent (item No. 2) would last for 50 years according to the population of Sheffield. None at all of the articles mentioned in item No. 8 were required. One of those mentioned in item No. 9 would answer. None of those in item No. 11 were required. Everyone in Sheffield had liberty to erect monuments. One of those in item No. 12 would be enough. 50 of those in item No. 17 would answer. None of the requirement dockets in item No. 18 would be required. 20 perpetuity sheets item No. 19 would do for a year. 50 report sheets item No. 20 would answer. 20 perpetuity returns item No. 21 would answer.

Cross examined.—I first knew Mr. Phelan in Sheffield. We were to have opened the cemetery on the 29th September. I was not intimately acquainted with the working of Glasnevin cemetery. I approved at Phibsboro' of the sheets they shewed me. I knew that Phelan before that had altered the sheets of the books, &c., used in Glasnevin, to correspond for Sheffield. Phelan was my correspondent in Ireland. He was agent to order but not to receive. I may have said to Phelan, to see that the goods were all right. I never told Phelan to forward them to me, but to see that they were forwarded. I did not wish to order more forms than for one year. I have ordered, in Sheffield, one copy of a register book for 15s. bound. I said nothing about the quantity to plaintiff at Phibsboro'. If the goods were according to order, I should have paid the carriage from Dublin to Sheffield.

To the judge.—I have no remembrance of having told Mr. Phelan to send those goods to me by Mr. Walker. I had engaged Mr. Walker, here (before I left Ireland), for some business connected with the Sheffield cemetery, and he was to go over to Sheffield. He did go, and I gave him the letter and invoice, on 20th September.

The evidence on both sides being closed, defendant's counsel, required the judge to direct the jury, to find a verdict for defendant, upon the grounds, already relied on by *Morris, Q.C.* at the close of plaintiff's case, and to tell the jury, that there was no evidence of acceptance of the goods by defendant, to satisfy the Statute of Frauds, and also to tell them, that if the goods sent considerably exceeded in quantity what were ordered, the defendant was not bound to set aside and take the portion ordered.

The learned judge declined to comply with this requirement, but told the jury, that under the statute of frauds, plaintiff was not entitled to recover at all, except there was an acceptance of the goods by defendant. And he left to them, the questions on the evidence, whether Phelan was the agent for defendant, for the purpose of receiving the goods, and if so then, whether there was an acceptance by him, for defendant of the goods, or of such portion of them as he, Phelan, was authorised to order and did order. He also left to the jury, the question of the extent of the authority, given by defendant to Phelan, as to the quantities of goods to be ordered; and told them that plaintiff was not entitled, in any event, to recover for any greater quantity of goods than Phelan was authorised by defendant, to order, and than that he

did actually order. He further left to the jury, on the evidence, the question as to the value and prices to be charged for such portion of the goods as the jury should be of opinion had been duly ordered by defendant, or by his authority. And he directed their attention to the prices charged in the invoice, and to the evidence of plaintiff, as to same, and as to the prices, which should be fairly and reasonably charged for those several articles, of which it was alleged, that the quantities mentioned in the invoice exceeded those that were ordered.

The jury found a verdict for the plaintiff, for £18 4s. 6d., and gave a list they had made out, shewing of what that sum consisted, and specifying the articles for which they considered plaintiff entitled to recover, and the prices they allowed him for same.

The list was as follows, viz:—

	£	s	d.
1 Register book ...	2	10	0
1 Workmen's account book ...	1	17	6
1 Cash book ...	0	18	0
1 Perpetuity book ...	1	0	0
1 Removal book ...	1	10	0
1 Map book ...	2	10	0
4 General ground docket books ...	1	12	0
4 Dressing grave books ...	0	18	0
1 Certificate docket book ...	0	10	0
1 Monument docket book ...	0	6	0
5 Headstone books ...	0	15	0
2 Vault docket books ...	0	9	0
1 Removal docket book ...	0	6	6
5 Railway books ...	0	15	0
200 Weekly returns ...	0	10	0
100 Requirement dockets ...	0	7	6
100 Perpetuity sheets ...	0	10	0
100 Report sheets ...	0	7	6
100 Perpetuity returns ...	0	12	6
	18	4	6

Several portions of the articles mentioned in the invoice were omitted from this list, and were not charged against defendant, by the jury.

After the verdict was given, defendant's counsel applied to the judge to respite execution for a month, which he accordingly did, the defendant undertaking and consenting by his counsel, to return to plaintiff such of the several articles mentioned in the invoice, as did not appear by that list to have been charged against defendant by the jury (excepting the trifling articles mentioned in the first item of the invoice). Plaintiff to be at the expense of the carriage, from Sheffield, of such returned goods.

The list made by the jury shewed that with respect to the articles mentioned in the 4th, 5th, 6th, 7th, 13th, 14th, 16th and 17th items of the invoice, the jury charged the defendant with the same quantities and prices as in the invoice, but that with respect to the several articles mentioned in the 2nd, 3rd, 8th, 9th, 10th, 11th, 15th, 18th, 19th, 20th and 21st items of the invoice; the quantities thereof mentioned in that list, and the sums charged by the jury against defendant, for the same were less than those mentioned in the invoice, while the rate of charge allowed by the jury for each article was greater. And further, that

none of the several articles mentioned in the 1st and 12th items of the invoice, or in the other items, after the 21st were included in that list, or charged against defendant by the jury.

COPY INVOICE.

The Rev. N. Barlow, St. Michael's Catholic Cemetery, Rivelin Glen, Sheffield.
To *Shannon & Co. Dr.*

1862		£	s.	d.
1 11 Sept.	1/2 Quire pot paper, 3d; 2 black lead pencils, 3d. ...	0	0	6
2 17	2 Registers, whole bound, 5 quires each, lettered, 37s. 6d. ...	3	15	0
3	2 Workmen's account books, 5 quires each, 8 by 1/2 bound ... 27s. 6d. ...	2	15	0
4	1 Cash book, 5 quires, 8 by 1/2 bound ...	0	18	0
5	1 Perpetuity cash book, 5 quires, 8 by 1/2 bound. ...	1	0	0
6	1 Renewal book, 5 quires each, 1/2 bound ...	1	10	0
7	1 Mass book, 3 1/2 quires, bound each, 1/2 common cover ...	2	10	0
8	20 General ground docket books ... at 4s. ...	4	0	0
9	10 Dressing grave bks at 3s. ...	1	10	0
10	5 Certificate docket books, at 5s. ...	1	5	0
11	5 Monument docket books, at 3s. ...	0	15	0
12	5 Foundation wall books, at 3s. ...	0	15	0
13	5 Headstone books, at 3s. ...	0	15	0
14	2 Vault docket books, at 4s. 6d. ...	0	9	0
15	2 Removal docket books, at 4s. 6d. ...	0	9	0
16	5 Books to permit railings to be erected at 3s. ...	0	15	0
17	200 Weekly returns of interments... at 5s. ...	0	10	0
18	500 Requirement dockets, at 2s. 6d. ...	0	12	6
19	700 Perpetuity sheets, at 5s. ...	1	15	0
20	200 Report sheets at 5s. 4d. ...	0	10	8
21	200 Perpetuity returns, at 9s. ...	0	18	0
	2 Reams C. L. note paper, headed ... at 8s 6d. ...	0	17	0
	1 " " plain ...	0	6	0
	1 " " cap ...	0	10	0
	1 " " do. feint ...	0	11	0
	1 " " pot plain ...	0	8	6
	1 " " do. feint ...	0	9	0
	1 " " letter ...	0	13	0
	1/2 " best blotting, at 40s. ...	0	10	0
	1 " C. L. No. 4 at 6d. and No. 6. at 8d. ...	0	14	0
	6 Boxes Berry's pens, 6s. ...	0	13	6
	6 Gillott's, 7s. 6d. ...	0	13	6
	1 Dozen black lead pencils 1s. ...	0	5	0
	1 lb. black wax, 4s. ...	0	5	0
	2 Packing cases ...	0	2	6

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On the 24th November, *Morris*, Q.C., for the defendant, obtained a conditional order to set aside the verdict, and for a new trial, on the grounds of the reception of illegal evidence and misdirection of the learned judge, against which

April 24th, 1864, Armstrong, Sergeant, and Anderson, showed cause.

Morris, Q.C., and *M. Blain*, contra.

The following authorities were cited, *Levy v. Green* (8 El. and Bl. 575); *Levy v. Green* in error (1 El. and Bl. 969); *Cunliffe v. Harrison* (6 Exchequer, 909); *Hart v. Mills* (15 M. & W., 85); *Cross v. Eglon* (2 B. & Ald. 106); *Norman v. Phillips* (14 M. & W. 283); *Coke Littleton*, 258 b.

Cur. adv. vult.

May, 7th.—*MONAHAN*, C.J.—This case comes before us on a motion to set aside the verdict on the alleged ground of misdirection. The action was in the common form, for goods sold and delivered. The case was tried in the Consolidated Nisi Prius Court; and it appears, the plaintiff was a stationer, in Dublin, and the defendant is a Roman Catholic clergyman or curate, in Sheffield. Mr. Phelan of Dublin, was the principal witness for the plaintiff, besides the plaintiff himself. It appears the defendant came over to Ireland, and approved of forms, which were used, and employed Mr. Shannon to prepare suitable ones for the Sheffield cemetery. Whether the interview took place in Dublin or in Sheffield is of no importance, but the evidence of Phelan is of some importance. He says that he ordered, from the plaintiff, one copy of each of the large books, and as few as possible of the small forms; that the plaintiff sent up these books. On cross-examination, he says, "I gave no order, but for one of each of the large, and "as few as possible" of the smaller. I had no authority to order more. The articles in the invoice are necessary in a cemetery. I read the invoice. I thought there were too many of some of them, but I did not tell the plaintiff so." Shannon gave evidence; the only material thing is that he will not swear Phelan ordered any stationery. Phelan was re-examined, and said the defendant told him to get the goods from the plaintiff. The defendant was examined, and gave an account a little different, but that is immaterial, because the jury have found what the contract was. The defendant asked for a verdict to be directed—1st, because there was no acceptance within the statute of frauds; 2ndly—because, admittedly, the plaintiff had sent more goods than ordered, and the defendant had done nothing to disentitle him to refuse. The judge declined to comply, but told the jury the plaintiff could not recover, except there was an acceptance, and left to them to say, if Phelan was the agent to accept; and if there was an acceptance; also the extent of the authority; and told them the plaintiff was not entitled to recover more than Phelan was authorised, by the plaintiff, to order, and did order. The latter part of the judge's direction was this: the plaintiff said he made the prices on the supposition that all would be accepted; but if less were accepted, a higher price would be reasonable as every one knows it is not twice as expensive to strike off twice as much. The invoice contained items, 21 in number, eight or nine under one head. The verdict finds, that

some of the things were not at all ordered; the 1st item is a very trifling one; No. 12 is struck out. The jury next went through the other items, and in the last sentence we have the result. They struck out one of the registers; they struck out sixteen of the dockets mentioned in the eighth item; in the ninth item, six; in the tenth, four; in the eleventh item, four; one of the removal docket books, in the fifteenth item; four hundred, in the eighteenth; six hundred, in the nineteenth; one hundred in the twentieth; one hundred, in the twenty-first; and all subsequent to the twenty-first. The result is, that of the items, twenty-six or twenty-seven, they found eight right in quantity; of the others some visibly more; others depending on the question, whether ordered. And, I may say, the jury completely altered the prices, except those of the items, which were quite right, considerably altering the price of the single book, on the ground that it was more expensive than half the two. The verdict was right provided the direction was right; and we must take it, that £18 4s. 6d. was the right sum; that some of the goods were not ordered, that some exceeded the order; that depending on the construction of the order, but others palpably exceeded, and the question is, should a verdict have been directed for the plaintiff, for £18 4s. 6d. Cases of this kind have undergone a good deal of discussion, and I might go through many of them, but our opinion is, that in a Court, where we are as at present, our duty is to ascertain how the law has been ascertained by Courts of co ordinate jurisdiction; and that we are to follow decided cases if they establish a principle, and that they are not to be departed from, on any minute differences. Applying that (and the effect otherwise would be this, that so much uncertainty would ensue, no counsel could advise whether or not, to submit to a demand,) *Levy v. Green* (8 El. & Bl. 575) I need not say, is a binding authority. It was a peculiar case, and if the law was right, *a multo fortiori*, it applies. It appears that the defendant gave an order for a small quantity of delph. On the first page, the items are set forth. They amount altogether, to about eight or nine, or ten items; five items were perfectly right, with the exception, that the fifth is three sets of dishes; but with respect to the others they are identically as ordered. But then come jugs, about £1 6s. worth of jugs, which were confessedly beyond the order, like the stationery in the present case. The whole demand being for £6 or £7; it was tried before the sheriff. The defence set up before the action brought, was that the goods were ordered to be sent within a fortnight, and were not sent till a month had elapsed, and it was not till the trial came on that it was objected; the goods did not correspond with the order. The plaintiff abandoned the £1 6s. worth, and said he was entitled to a verdict for the £5 or £6 worth. And he gave some evidence of the trade, that it was usual to put in extra goods if there was room—sent on sale and return. "I send you what you may keep if you like, and if you don't you may return." A verdict was found for the plaintiff, deducting for the extra goods. The case came before the Queen's Bench, and the question was, if that was right. I need not refer to the arguments of counsel, but it is necessary I should state the judg-

ment of two of the judges, Lord Campbell and Wightman, J., thought the defendant was at liberty to reject the goods, and that his having set up a different reason was no waiver of his real objection, which he had the right to make. Now, though three instead of six were sent in one instance, that is, less than were ordered, Lord Campbell and Wightman, J., thought anything of that kind sufficient. Lord Campbell says, "I think he had the right to reject the goods, but he might waive the objection, and at one time I thought he had done so. I do not lay down any general rule of law, but I say, that under the circumstances, here, the caution being given, and the whole being included in one invoice, all the goods being in one package, under these circumstances he had a right. I therefore think the rule should be made absolute." I need not refer to the judgment of Wightman, J. who concurs; but I refer to the judgment of Erie, J. As I read it, he differed because he supposed the things virtually sent were a few extra articles, with the understanding, they were not sent as sold, but with an option to the defendant, to keep them or not. It shows what Englishmen are. Here are only £5 in dispute, but for the benefit of posterity, and for our benefit, it was thought not right, to leave the thing in doubt, with two such eminent judges conflicting; and the case came before the Court of Exchequer Chamber, where there was not a difference. (1 El. & El. 969). The reporter does not think it necessary, there to give the arguments of counsel, because they were the same; but the judgment of Martin, B. says—"We are all of opinion, that the decision of Lord Campbell and Wightman, J. was correct." [His lordship cited the observations of Willes, J.] Bramwell, B., Watson, B., and Byles, J. subsequently are to the same effect. Applying this to the facts of this case, and the only pretence that a different result should be come to rests on what Erie, J. said, that the goods were sent, perhaps on sale and return; is it possible they could be so here? They were stamped as for the Sheffield Cemetery, therefore they never went with an offer to take, or return the remainder; with respect to these books there is no pretence the plaintiff could have been mistaken. As to the forms there might be some mistake, because the order was to send "as few as possible." But so far from that circumstance making the case favourable to the plaintiff, now that the contract has been construed by the jury, the very circumstance that there was a difficulty in selecting by the defendant, was one thrown on him by the plaintiff; and he would have run the risk of being taken, to have accepted the whole. If this case be taken to have settled the law, I cannot see how the present case can be distinguished from it. The goods were not ordered at all. Neither was the stationery, nor the item No. 12. I think it would be inconvenient to try to distinguish such cases. We have no alternative, but to set aside the verdict.

CHRISTIAN, J.—Two objections were taken to the course pursued by the judge. 1st. That he should tell the jury that there was no acceptance under the Statute of Frauds. I have no doubt the judge was right. Singularly enough both the counsel here erred in laying down the law as to acceptance. Mr. M'Blain cited a case, and Mr. Anderson cited a dictum; but

both were considered in *Morton v. Tibbitt* (15 Q. B. 428), which is now the leading case. In short as Lord Campbell pointed out what is necessary is merely a part performance on one side or other; on one by a payment no matter how minute, and on the other by a delivery no matter how minute. The meaning is as shown by Lord Campbell, that once anything is delivered as purporting to be the thing sold, the question is in the same position as if there was a writing. *Tomkinson v. Staigh* (17 Q. B. 697) is to the same effect. Here the jury have found Phelan was the agent. The defendant's first point therefore fails. The second objection raises a question of great peculiarity, and in my mind great difficulty. The learned judge before whom the case was tried took great pains with it. I can not but think it a great hardship if the plaintiff has nothing for the trouble and expense he has gone to. The order was entirely uncertain as to quantity *i.e.* with respect to the larger portion. There was no suggestion on any ground, but that the plaintiff acted *bona fide* under this uncertainty. We now know *ex post facto* on the evidence of the defendant's agent, but not on anything which the plaintiff might have known what was the quantity. That quantity was considerably less, and some trifling articles were sent which were not ordered. The risk or inconvenience to be run by the Rev. defendant, was comparatively infinitesimal; the verdict is therefore a just one, but if the law be against it, it must fail. The defendant says the case is the same as if that precise quantity had been specifically ordered. I agree with the Chief Justice that a Court should follow a Court of co-ordinate jurisdiction, even if it should wish the law were otherwise; but when the Court is called on to submit to an authority, and in doing so to refuse remuneration, it ought first to ascertain what is the rule of law? secondly, does the case fall within the letter or spirit of the rule? and in judging of the latter, if the case is substantially the same, it ought to be followed. Now it is to be remarked that the case of *Levy v. Green* professed not to lay down any general rule. "I do not," says Lord Campbell, "lay down any general rule." Willes, J. says "adopting the view taken by Lord Campbell, I think," &c., and Byles J. says "I do not say in all cases," &c., therefore *Levy v. Green* lays down no general rule. If not then on what principles do they proceed? This. A vendor shall not be allowed to force on a vendee a contract different from what was entered into. It is a cardinal fact, that in all these the order was specific in quantity as well as kind. *Non hac in foedera veni*, may the defendant say if the vendor send more than the quantity ordered. In *Cunliffe v. Harrison* Baron Parke says, the defendant "had a right to have ten specific hogsheads delivered to him, the delivery of fifteen is no performance; the person can't tell which are the ten." But the leading case now is *Levy v. Green*. That case was this, the defendant gave the plaintiff an order specific both as to quantity and kind. The plaintiff sent less than the quantity of the same kind, and other goods not corresponding with the order at all. The first was ample ground on which to found the decision of the Court in *Levy v. Green*; and when it went to the Court of Exchequer Chamber judge after judge referred to it. It is remarkable that the Court of

Queen's Bench were equally divided in opinion. Coleridge, J. and Erle, J., were of opinion in favour of the plaintiff. When it went to the Court of Exchequer Chamber, that Court held they were wrong. One may venture to say which of the judgments is the most satisfactory to one's own mind, and Lord Campbell's is more satisfactory to my mind. What are the grounds which Lord Campbell bases his judgment on? I think in the Exchequer Chamber, the judges did little more than adopt his construction. At the outset the foundation is that particular quantities and kinds were ordered to be sent, with a caution not to send more. Without referring further to the judgments, it is plain that the basis laid down, and in the other case by Baron Parke, is that where the order is specific in quantity and kind, if the seller send more or less he obtrudes on the purchaser a contract different from the one entered into, and the purchaser has a right to reject the whole. That fact is confessedly wanting in this case. I am speaking of one portion, and will speak of the other by and by. The order was uncertain in its terms. In my opinion there are two cardinal distinctions between this and the cases cited. The first (relied on in the argument), is that the order was not specific. The second (not relied on in the argument) is that the order appertained to a certain measure or standard which was in the possession of the defendant, but not in the knowledge of the plaintiff. So far from trying to force a contract different from the one entered into, he was acting quite in the spirit of that contract. The defendant was a Roman Catholic clergyman, the member of a committee of a cemetery about to be opened in Sheffield. Certain books were in use in Glasnevin, they had been furnished by Shannon. Phelan had been over in Sheffield. The defendant authorized Phelan to 'give' an order. He was afterwards in Dublin, and approved of what he saw. What was it according to Phelan? One copy of the large, and as few of the others as possible. What is the meaning of that order? What was put on it at the trial, and objected to by the defendant's counsel, but in my opinion "as few as possible" meant as few as was consistent with the defendant's object of establishing a cemetery. How was that to be ascertained? How and by whom was it to be cleared up? The size of Sheffield; the mortality, the whole mortuary statistics, all were within the knowledge of the defendant. Be his reason what it may, the order was communicated in these general terms. What was the plaintiff to do? He knew nothing of Sheffield or its burial requirements. It may be said he should have inquired, but the contract did not put it on him. What was he to do? Just what he did. The nature of the order justified him in doing the very thing which the law forbids him to do where the order is specific. The contract here is of the very nature referred to by Coleridge J. and therefore justified the seller in sending the plaintiff a stock from which to select. How were the quantities ultimately ascertained by the jury? By enforced testimony under *subpoena* of the defendant's own agent. This contract differs from all cited just in the particulars relied on. Professing as I do to adhere to *Levy v. Green*, and these cases, I think they do not rule the present. It was strongly argued that the defendant would not know what amount of

money to plead payment into Court of, but that is entitled to no weight. The defendant is in the position of any defendant, where the plaintiff claims unliquidated damages. The defect was from what lay in the defendant's own knowledge. I think the judge was right; the plaintiff did not know but that all the articles would be received, and he therefore was right in pricing them as he did, though the jury may have over elaborated, and it might have been better to keep to the invoice prices. But it is said in one instance the order was precise. If it had been the evidence that two registers and two workmen's account books came within what was called "large", there would have been excess; but for all that appears they may have been amongst those most in use. The evidence did not in my opinion supply the defendant with what would ground an argument. Though the order was uncertain as to quantities, it was perfectly definite as to kind. The plaintiff unluckily put in £5 worth of stationery; shall he lose all for his mistake? No case has yet decided that where other articles—articles *alterius generis* are sent, the purchaser is at liberty to reject the whole. In that case in the Court of Queen's Bench, Coleridge, J. says what I concur in "the mere addition of distinguishable articles," &c., and Byles, J. says, "I do not say the vendor would have a right," &c. I concur in the observation of Coleridge, J. that the addition of things of a totally different kind does not invalidate the sale. I do not feel myself coerced to set aside a verdict right in all other respects, because the plaintiff put these few articles into the parcel. No extra difficulty was thrown on the defendant by it. Justice requires that the defendant should pay for what he had ordered.

KEOGH, J.—I confess if I were satisfied this was a case where injustice would be done, I should feel reluctant though I should follow the Court of Exchequer Chamber. But as to the injustice, I do not think it conducive to the fair transaction of mercantile business, that if an order large or small be given, but particularly small, that the vendor should take on himself to send a much larger quantity of goods than ordered. 2ndly. it would pass, I think all bounds if a man in London or Birmingham should order a specific class of goods, that the vendor should take on himself to throw in another and different class of goods under the same invoice, charging the vendee in the one invoice; in other words sending him a specific demand for money for goods he never thought of and never demanded. Nothing would be more conducive to fraud than that. That is exactly what took place in this case. A gentleman through his agent desired to be furnished with one of each of the large books, and as few as possible of the small forms. What takes place? The plaintiff sends what the defendant swears and the jury finds to be immoderately great, what would satisfy the burials of Sheffield for fifty years. This reduced the demand to something of about one third, and unless the jury went on a principle which I do not understand (that the price should be higher) they would have reduced it to about £11. That is the case before us. Without going into other authorities when we find an authority pronounced by the Court of Exchequer Chamber, I am not sorry that I cannot draw distinctions between that and this. I rather rejoice at it. *Levy v Green*

was decided on what? Lord Campbell holds the defendant is not bound to take the trouble of writing to the vendor. What does Wightman, J. say, "There was an invoice making the defendant debtor and it is said the purchaser might open the package, it would throw upon him the trouble of being thereby made liable," &c. It is said two other judges held differently. Yes they did; but their judgment was overruled. I ask if two judges dissent and the Court of Exchequer Chamber overrule that, what is to follow of books of reports at all, if we are to turn round because these other two went in an opposite direction? The Court of Exchequer Chamber say, "We are all of opinion," &c. We are now in the year 1864. That was in 1859. They had what we have before us—"we are all of opinion that the decision of Lord Campbell and Wightman, J. was correct." What does Willea, J. say "adopting the view taken by Lord Campbell," &c., (exactly as in the case before us). What does Bramwell, B. say, [His Lordship cited some of the observations of Bramwell, B.] In that case the plaintiff sought to contend that the goods were thrown in as durrage. Can that be said here, with prices put to them all? [His Lordship proceeded to quote from the observations of Watson, B., and Byles, J.] I can see no distinction in fact; I acknowledge none in point of law in these cases. I think the grossest injustice would be perpetrated if parties might send what was not ordered with what was, and charge the purchaser for both in the same invoice.

BALL, J.—I have no intention of entering on the justice or hardship of the case. I concur with the majority of the Court.

CHRISTIAN, J.—So far from dissenting from the judgment in *Levy v. Green* I entirely approve of it; and of the judgments given there I stated I approved most of the judgment of Lord Campbell.

Rule absolute.

LOCKHART v. IRISH N. W. RAILWAY COMPANY—May 28, June 4, 1863.

Demurrer—Accommodation Works—14 & 15 Vic., c. 70—Pleading—Jurisdiction—Common Law Procedure Act, 1853, s. 67.

To an action against a railway company for negligence in not making and maintaining sufficient fences for separating certain lands taken for the railway from the adjoining lands, whereby a horse belonging to the plaintiff strayed upon the said railway, and was killed, and also for negligence in not making a sufficient culvert, the defendants pleaded that the works in question were accommodation works, and that while the plaintiff was occupier of the land taken by the defendant, an arbitrator duly appointed in pursuance of the Railway Act, Ireland, 1851, duly made his award directing the works which should be made and maintained, which award was not traversed in respect of the said works, and which award did not direct the

making or maintaining of the works in question. Held, a good plea.

Held, also, that the award of the arbitrator was an adjudication within the 67th section of the Common Law Procedure Act, 1853, and that it was not necessary to set out in the pleading the facts or matters which conferred jurisdiction.

THIS was an action for negligence. The statement of the cause of action in the first count of the summons and plaint was substantially, that the defendants were the owners and proprietors of the Dundalk and Enniskillen Railway, which was authorized to be constructed by a certain Act of Parliament, made and passed after the passing of "The Railway Clauses Consolidation Act, 1845," the provisions of which applied to the said railway; and that although the defendants under the provisions of the statutes in such case made and provided, purchased and took land for the use of said railway, including certain land formerly in the possession of the plaintiff, and although all things happened, &c., to impose upon the defendants the liability to make, and it became and was the duty of the defendants to make and at all times thereafter maintain sufficient posts, rails, hedges, &c., for separating the lands so taken for the said railway from the adjoining lands not taken, and for protecting the cattle of the owners or occupiers of such adjoining lands from straying thereout by reason of said railway; yet the defendants, disregarding their duty in that behalf, did not maintain sufficient fences for the purpose aforesaid, but wholly omitted and neglected so to do; and, on the contrary, the defendants, carelessly, negligently, and improperly suffered and permitted the lands so taken for the use of the railway to be, and the same were, for a long time, and until the injuries therein mentioned, without any sufficient fence or fences for separating the same lands from the adjoining lands, and for protecting the cattle of the owners or occupiers thereof from straying thereout. It was then averred that for want of same, and by reason of the negligence of the defendants in that behalf a horse belonging to the plaintiff strayed from the adjoining lands, into and upon the said railway, and was run down by a train of the defendant's, and was thereby killed, to the plaintiff's damage, &c. The second count complained that before and at the time of the making of the defendant's railway, the plaintiff was possessed of a farm of land situate at Lyslyncahan, in the county of Monaghan, through which a small drain or rivulet ran or was used to flow, and that the defendants afterwards became the owners of the Dundalk and Enniskillen Railway, which was constructed under an Act of Parliament, incorporating therewith the provisions of the Railway Clauses Consolidation Act, 1845, and that said railway ran through a portion of said land of the plaintiff, taken by the defendants for the use of said railway, and crossed the said drain or rivulet running through the said lands of the plaintiff, and that all things happened, &c., necessary to impose upon the defendants the liability, and it became and was their duty to make and maintain all necessary culverts, of dimensions sufficient to convey the waters of said rivulet as clearly from the lands of the plaintiff lying near or affected by the railway, as

before the making, and although the defendants did construct a culvert for such purpose, yet they did not, in the construction thereof, use proper care and skill; but negligently, improperly, and insufficiently made and constructed said culvert, and that same, shortly after its construction, became choked up, &c., and as a further breach of the defendant's duty, it was alleged that they did not maintain any sufficient culvert, and that by such negligence and breach of duty of the defendants, the water of the said rivulet overflowed the lands of the plaintiff, whereby same were injured, &c. The second defence to the first count stated that it was not the duty of the defendants to make or maintain any posts, hedges, fences, &c., for separating the lands, &c., because such works were accommodation works, within the meaning of the statute in that case made and provided; and that while the plaintiff was the occupier of the said land taken by the defendants for the use of the railway, and before said lands were taken by them, and before the happening of the injuries complained of, W. P. Prendergast, who was duly appointed arbitrator of the Commissioners of Public Works in Ireland, in pursuance of the Railway Act, Ireland, 1851, the provisions of which extended to the Dundalk and Enniskillen Railway Act, 1852, duly made and published his award, whereby he awarded and directed the works which should be made and maintained by the defendants, for the accommodation of the lands adjoining the said railway, in the several townlands in the County of Monaghan, and in some of which the said lands required and taken by the railway, and also the adjoining lands not required or taken were situate, which said award was not traversed in respect of the said works, and which were, before the happening of the injuries complained of, duly made and executed, and have since been maintained, &c., in pursuance of the said award, which was the only award ever made by anyone respecting any of said townlands, and which did not direct the making or maintaining of any posts, hedges, fences, &c., for separating the lands so taken for the said railway from the adjoining lands not taken, &c. The plea contained a further statement that the plaintiff agreed to receive, and was paid a certain sum in satisfaction of all claims which he might thereafter have for accommodation works, consequential damages, &c. The second defence to the second count was similar to the second defence to the first count. To these defences the plaintiff demurred.

Fraser (with him *Macdonogh, Q.C.*) in support of the demurrer, stated the plea syllogistically—I argued it was double on a former occasion. [*Monahan, C.J.* Stated syllogistically it ran thus: We were not bound to make these fences unless we were directed by the arbitrator, or had contracted to do so. We were not directed, nor did we contract; therefore, we were not bound]. The arbitrator and award mentioned in sec. 9 of 14 & 15 Vic., c. 70, on which this plea is framed have nothing to do with this case, for the words of that section are "lands in respect of which no agreement shall have been come to." The agreement referred to was of date July 14, 1853, two years before the award, and one by which the defendants got into immediate possession of the lands. Assuming that the Company cannot rely on the award of the ar-

bitrator, assuming that on the face of the plea one part of it destroys the other, then they will have to fall back upon the 68th section of the Railway Clauses Consolidation Act, 8 Vic., c. 20. That section is mandatory as to constructing fences, but relieves the company from making accommodation works, for which compensation shall have been received, but to come within it the defendants should show that these works were expressly within the agreement, and that the plaintiff had accepted a sum from them, distinct from the other sum for the land itself. This is a loose, limping declaration, tacked to the end of this document. [Ball, J.—Is not this the literal meaning of what you call the declaration, that it was to exonerate the company?] It is the literal meaning, but whether or not it is against law. [Christian, J., after reading the section, said it did not apply to exclude from the latter part of it such land as an agreement for the purchase of had been come to.] The plaintiff's name does not appear in the award, and taking it as pleaded, the case of Lockhart does not fall within it. In the second count our allegation is that the company made a culvert, and made it so badly that our lands were flooded. Is it an answer to say they were not bound to make any? They admit they made it, and made it badly, for that is not traversed. No one has a right to construct on his own land what injures his neighbour's. It gives him an action on the case—*Ricketts v. E. & W. I. Docks Co.* (12 C.B. 160), was cited in the argument on the pleadings. That was a case of lands not contiguous to the railway, the lands of another party intervened, and that is the distinction between it and the present case where the lands are contiguous. I admit that the company are not bound to fence against all the world; they are not bound by statute to do more than by common law—*Observations of Jervis, G.J.*, p. 174. *Manchester, Sheffield, and Lincolnshire Railway Co. v. Wallis* (14 C.B. 213), is an authority to the same effect. In *Bessant v. The Great Western Railway Co.* (8 C.B., N.S., 368), it was held that it was no misdirection to tell the jury that by section 68 of the Railway Clauses Consolidation Act, the company were bound to keep their fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands—*Marfell v. The South Wales Railway Co.* (8 C.B., N.S., 525); *Lawrence v. The Great Northern Railway Co.* (16 Q.B., 643); 5 & 6 Vict. c. 55, s. 10, is incorporated with the Dundalk and Enniskillen Railway Act.

J. E. Walsh, Q.C., and Boyd, contra.—Manchester, Sheffield, and Lincolnshire Railway Company v. Wallis disposes of the argument on the section last quoted. By that case, and the case of *Ricketts v. East and West India Docks*, it is settled that the 68th section of the Railway Clauses Consolidation Act does not create a general obligation to make accommodation works, but such fences as by common law must be maintained between the lands of one neighbour and those of another. That section does not declare a public duty, but declares that the Railway Company is in the same position as any one else would be by common law. It follows from this that it is a private right which is given to adjoining proprietors which the latter may waive, and which, if not

enforced by prescribed methods cannot be enforced at all. *Ricketts v. East and West India Docks* will carry us to this extent that the obligation we are now sued upon is one within the control of the plaintiff and the Railway Company, and which, if the plaintiff has debarred himself from enforcing, the company may disregard. When a dispute arises, there are two courses which may be adopted, either that directed by the 14 & 15 Vict., c. 70, or an agreement. Here there were both. In consequence of the agreement, there was an award and money accepted. The case is *a fortiori*. Wherever accommodation works are not included in the award, and where an award has been made, there is no claim for them. [Monahan, C. J.—Your argument is, that it was necessary to show the company had intended to fence.] Not that, but that where there is an award, the works not included in it are not necessary. [Monahan, C. J.—Not even ordinary fences?] No. [Christian, J.—There are obligations cast on the Company, independently of proprietors.] We do not say the company would be protected against the consequences of wanton negligence. Cases might occur where there were no cattle, and there fences would not be required. [Christian, J.—Do you say there was no agreement which excludes the operation of the Act of 1851, but there was an agreement which excludes the plaintiff from having any right?] Yes; it was not made with the owner and occupier. [Keogh, J.—Is not the plea marked by duplicity?] The plaintiff tried to set it aside as double, and failed. [Monahan, C. J.—I can understand that the arbitrator is to put down all such works as there might be a dispute about, but not that he is to put down those about which there could be no dispute. Your argument must be that it is not necessary to make fences at all.] Not under this 9th section of the Act of 1851. Fences might be of the most various kinds, as the parties might wish, some high, some low, some stronger than others. The 26th section corroborates this. If a party had acquiesced in a level crossing, would he be heard to say afterwards that he was not satisfied with it, but would require a tunnel under the railway, or a bridge over it? We made an agreement, and the plaintiff accepted £10 and £20 in lieu of his rights, and cannot therefore, insist upon them. [Christian, J.—Why not put in a simple plea of that?] The duplicity of the plea would not affect it on demurrer. The fact the plea shows is this—the duty the plaintiff alleges does not exist, and there might be many reasons for it. It is not double, but if it were, then it is two good defences instead of one. It may be untechnical. [Monahan, C. J.—Under the old system it would have been a good replication to traverse substantively.] Under the old system, duplicity was bad only on special demurrer. *Lawrence v. The Great Northern Railway Company* only shows there is a difference between an act of gross negligence and a breach of duty. It has nothing to do with this case. [Macdonogh, Q.C., in reply.—The jurisdiction of every inferior Court must be shown to be rightly pleaded. It is absurd that a party should be said to agree to give up fences to which the public are entitled. [Monahan, C. J.—Assume now that there was no agreement.] Then the arbitrator has no ju-

jurisdiction to say that there shall not be a fence. Section 6 of 14 & 15 Vict., c. 70, originates the jurisdiction. The railway company must make maps and plans. The word "duly" is of no value. In the absence of contract, the answer to the summons and plaint should be that the defendants pursued the statutable enactment, i.e., raised a case to be heard by the arbitrator, calling into effect the jurisdiction of the Inferior Court. You cannot assume that the Inferior Court has done everything rightly until the jurisdiction is shown. This is *a fortiori* in the case of a ministerial officer. A single thing required by the statute has not been done, i.e., assuming the agreement to be out of the case, which is a key to the whole of it. [Monahan, C. J.—Suppose you were not entitled to any accommodation works?] We should have no right of action. [Christian, J.—The defendants say in their plea that the arbitrator was duly appointed, and duly made his award.] That will not do. Suppose that in a case of *A. B. v. C. D.* we were to plead that a seneschal made his judgment, you would say, we will presume nothing in favour of the seneschal; we will presume nothing against him, but we will require particulars. [Keogh, J.—That argument would be displaced by the defendants pleading that they lodged the maps.] Taking in the agreement, it excludes the jurisdiction of the arbitrator. [Christian, J.—The defendants say it does not, because it is not made with the owner and occupier.] Then it is no agreement at all, so *qua cunque viâ*, we are entitled to judgment.

June 4.—*M'Donogh, Q.C.*, cited *M'Taggart v. Ellice* (4 Bingham, 114); *Paley on Convictions*, pp. 139, 140; 1 Saunders, Rep. 74, a, note; *Pickram v. Gaskin* (2 Hudson & Brooke, 246). The 67th sect. of the Common Law Procedure Act, 1853, has no reference to an arbitrator. [Christian, J.—Is not an arbitrator appointed under an Act of Parliament which is carried into effect by the instrumentality of public works an "officer of inferior jurisdiction?"

Cur. adv. vult.

June 11.—*MONAHAN, C. J.*—[His Lordship read the first and second counts.] They are substantially the same. They are both framed upon the 68th section of the Act of 1845, which enacts "that the company shall make and maintain the following works, sufficient gates and bridges, &c., (it is material that the summons and plaint transcribes the words of the section, so that it appears the action is framed upon the section), also sufficient posts, rails, hedges, ditches for protecting such lands from trespass, or the cattle from straying thereon, provided always that they shall not be required to make accommodation works with respect to which the owners or occupiers shall have agreed to receive compensation." If the legislation stood thus, the company would be responsible for cattle straying from the adjoining land through defective defences. But the defendants say that subsequently to this the 14 & 15 Vic., c. 70, was passed, and the substance of their plea is a traverse of the general averment, because, they say, the works in that paragraph alleged have always been and are accommodation works, and while the plaintiff was the occupier, and before the taking of the land and the happening

of the injuries, *W. P. Prendergast*, duly appointed under the Act, 1851, duly made and published his award, whereby he awarded and directed the works to be made in the townlands, and that these are included in these townlands, and that no mention is made of an obligation to make these works. They repeat this in answer to the second count, and say there was no order made by the commissioners for draining the land. So that the substance is, that the arbitrator did not award any such works. That depends on the 14 & 15 Vic., c. 70. This Act applies, it is conceded, to this company and the works. The 4th section requires maps and schedules to be furnished, and it provides how these are to be circulated. The 5th section provides that the Board of Works are to appoint an arbitrator. The 8th section then provides how notice is to be given of the appointment of the arbitrator, and that anyone dissatisfied is to make his claims, and by the 9th section it is directed that the arbitrator is to proceed to inquire into and adjudicate upon the works to be made and maintained by the company for the lands adjoining the railway. He is to make his award, which is to contain accommodation works for the benefit of all the occupiers of the adjoining lands, and no such award is to be set aside for irregularity. The effect is this—it is the duty of the company to specify the works; it is the duty of the parties to see that the maps have everything, and if anything is not there to make a claim, and to see that the arbitrator makes provision in his award of the several works for the accommodation works. No doubt, there is a general provision as to culverts, &c., in section 68 of the Act of 1845, but the party is to make his objection to go before the arbitrator, and if dissatisfied, to traverse and take the opinion of a judge and jury. But otherwise the award is to be conclusive. If this award is properly pleaded, it is an answer to the action. *Mr. Macdonough* cited a number of cases to show that where one relies on a judgment or award of an Inferior Court, one is bound to state all facts and circumstances which show its jurisdiction, and we thought for some time this plea was defective, but we were referred to the 67th section of the Common Law Procedure Act—"it shall not be necessary to state the facts conferring jurisdiction, but the same may be stated in such pleading to have been duly entertained," &c. The only question is, is there an adjudication within this section? This is an arbitrator appointed for general purposes. We think this award is sufficiently pleaded. We must overrule the demurrers, and give judgment for the defendants, the Railway Company.

Judgment for the defendants.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK, J.]

RE THE BAGINLSTOWN AND WEXFORD RAILWAY COMPANY.

A railway company incorporated by Act of Parlia-

ment is a joint stock company within the provisions of the Irish Bankruptcy and Insolvency Act, 1857, and therefore liable to be made bankrupt, notwithstanding the 11 & 12 Vic. cap. 45, and the 13 & 14 Vic. cap. 83.

THE Bagnalstown and Wexford Railway Company was incorporated by the Acts 17 & 18 Vic. c. 136, and the 19 & 20 V.c. c. 88, and the company was empowered to borrow certain sums on mortgage, to the amount in the Act mentioned. Amongst others, the petitioner in this case lent the company a sum of £1500, upon three mortgages of £500 each, payable in five years with interest at the rate of five per cent per annum, and for payment of which coupons were attached to each mortgage deed, signed by two of the directors. The petitioner proceeded to make the company bankrupt under the 156th section of the Irish Bankruptcy and Insolvency Act, an arrear of interest on these mortgages being the petitioning creditor's debt. The company not having paid or compounded or given security for the debt as required by the 156th section of the Bankruptcy Act, a petition for adjudication of the company as bankrupts was presented by the petitioner.

T. White moved the petition, and asked to have the company adjudicated. [Judge Berwick was of opinion that railway companies did not come under the operation of the Bankrupt law, but, on reference to the sections of the Irish Bankruptcy Act, and upon evidence having been given of their trading as carriers for hire, he adjudicated the company bankrupt.] Counsel relied on the 7 & 8 Vic. c. 111, and 8 & 9 Vic. c. 98, and cited *Ex parte Barber, Re Tring Reading, and Baringstoke Railway Company* (1 De Gex. 381); *Ex parte Morrison* (1 De Gex. 539); *Ex parte Barber* (1 M'N & G. 176); *M'Kay v. Rutherford* (13 Jur., 21).

Kernan Q. C. on the part of the company shewed cause against the adjudication.—He contended that a railway company having been fully incorporated by Act of Parliament did not come within the operation of the bankrupt law. If such company could be wound up in bankruptcy then the shareholders who have paid all their calls would be liable as contributories for the debts of the company; such a decision would in effect repeal the whole code of railway law, and it was quite clear that the Legislature never intended railway companies to be liable to bankruptcy.

BERWICK, J.—In this case an adjudication in bankruptcy was made by the Court on 27th of May last, and the company has come in to shew cause against its validity, and to have the adjudication annulled. The petitioning creditor's debt being undisputed, and the act of bankruptcy by non-payment of the debt within twenty-one days after service of the copy of the affidavit of debt, and of the statutory notice required by the 156th sect. of the Irish Bankrupt and Insolvent Act being established, the main question which has been argued before me has been the power of the Court to make an adjudication in bankruptcy against this company as not being a joint-stock company within the meaning of that Act. In the notice to shew cause the trading is disputed, and counsel for the petitioning creditor has in answer insisted that if the company be

a joint-stock company within the meaning of the Act, and that an act of bankruptcy has been proved, it is unnecessary to give any evidence of trading such as is required in all ordinary cases to bring them within the jurisdiction of the Court. In my opinion, the only effect of the 151st section is to place the joint stock companies therein referred to in the same category with all other traders, subject to be proceeded against in the same manner, and requiring the same proofs requisite in other cases to give the Court jurisdiction, and therefore I think proof of trading is requisite. I conceive, however, that the deposition filed in this case does establish a sufficient case of trading, bearing in mind that nothing therein stated has been controverted or explained on part of the company, and no answering affidavit has been filed. It has been shewn that the company have used their railway for the carriage of passengers and goods through the assistance of another company, but tolls have been received and tickets issued in their own names for their exclusive benefit, the whole profits, if any, belonging to them, and therefore I think the trading must be considered to be theirs, and it does not lie in their mouth to dispute it, and if this be so, I have only now to consider whether this company is within the jurisdiction of the Court. Now, the 151st section gives to this Court the power to proceed against any joint stock company within the meaning of the Act which shall commit an act thereby declared to be an act of bankruptcy, and the question then arises, is this company a joint stock company within the meaning of the Act? and I must own that when the case was first brought before me, I felt very much disinclined to make an adjudication, for two reasons—First, because no similar case had ever before arisen in this country; and secondly, because I was under the strong impression that railway companies were of that exceptional class, that they were intended to be dealt with by a code of laws framed exclusively to meet their exceptional case. In order to see whether this view be correct or not, I am in the first instance referred to the interpretation clause of the Irish Bankrupt and Insolvent Act, and in section 4 the term "joint stock company" is there declared to include "every company and body of persons associated for any banking or other commercial or trading purposes in Ireland, and incorporated by statute or charters, or what derives any immunity, privilege, or power under any Act of Parliament, or has been registered either provisionally or completely under any Act of Parliament, *save as herein-after expressed*, and all commercial or trading companies, associations, or partnerships in Ireland, the capital or profits of which is or are divided into shares, and transferable without the express consent of all the partners." The only words of exception in this most comprehensive enactment are those words, "*save as herein-after expressed*," and these words plainly refer to the 177th section, which declares that the provisions of the Act shall not apply to any company registered under the Joint Stock Companies Act, 1856, of any Act amending the same, and it is not suggested that the present company comes within the exception. In support of the adjudication it is insisted that this company is included in and answers to

every condition of the alternative branches of this definition. First, that it is "a company and body of persons associated for commercial or trading purposes in Ireland and incorporated by statute," and to establish this proposition I am referred to the 17 & 18 Vict., c. 136, of the Local and Personal Acts for such interpretation, and to the judgment of Lord Cottenham in the case of *Ex parte Barber* (1 MacNaghten and Gordon, p. 182), and to the case of *M'Kay v. Rutherford* (13 Jurist, 21), to shew that the making of a railway for the carriage of persons and goods is a "commercial purpose." Secondly, that it is a company and body of persons which derives immunities, privileges, or powers under an Act of Parliament. Thirdly, that it is a commercial or trading company, the capital or property of which is or are divided into shares, and transferable without the express consent of all the partners. Now, if it answers any one of these descriptions, it is plainly brought by the 151st section within the operation of the bankrupt laws of Ireland, and I have not heard an argument used or a case cited to shew me that it does not fulfil or is excluded from any one of these legislative descriptions of the word "joint stock company." Counsel for the company has pressed upon me that the Legislature did not intend that railway companies *fully incorporated* should be affected by this enactment, but where the language of an Act of Parliament has a plain and intelligible meaning, I do not understand what right a judge has to speculate on what may have been the intention of the framers of the law, much less to exclude from its operation a class of cases plainly answering the description given, and which by ordinary construction must be included thereon. It is further said that no case can be cited of a railway company in this country having been heretofore brought within the operation of the bankrupt laws; but the answer given to that is, that this is the first instance of a railway company in Ireland being in insolvent circumstances. But the case is not entirely without authority in England, and for the purpose of shewing the application of the English authorities to the present case, and to the law in Ireland, which we are now discussing, the following observations appear not unimportant. By comparing the whole enactment relating to joint stock companies in the Irish Bankrupt and Insolvent Act with the 8th & 9th Vict. c. 98, which is thereby repealed, it is quite plain that it is intended to be a re-enactment of this statute, being nearly a transcript thereof, the only difference, where there is any, being merely in this, that the present Act is more comprehensive in its terms—substantially, however, it is plainly intended to include all that the repealed Act contained, the repeal of the Acts appearing to have been with the view of introducing into and including in the one Act the whole code of laws relating to bankruptcy and insolvency in Ireland. Now, the 8 & 9 Vict., c. 98, is merely an extension to Ireland of the 7 & 8 Vict., c. 111, English Act; therefore, whatever class of joint stock companies was included in or affected by the 7 & 8 Vict., c. 111, is plainly within the meaning of the joint stock company by the present bankruptcy law of Ireland, and we have thus an opportunity afforded, independently of the plain lan-

guage of the interpretation clause, of discovering what construction has been put on the terms of that Act in any of the English cases. Now *Ex parte Barber in the Matter of the Tring, Reading, and Basingstoke Railway Company* (1 De Gex. 381), appears to be an express case of a railway company, which was dealt with in the Court of Bankruptcy in London, under the provisions of the 7 & 8 Vict., c. 111. In that case the fiat was issued against a public company, under the 7 & 8 Vict., c. 111, and no difficulty appears to have been raised to that course of proceeding, either in the Court below or by the Court of Review, before whom the case finally came. Mr. Kernan has attempted to explain this by suggesting that it was the case of a company only *provisionally registered*, which he has conceded, is within the jurisdiction of this Court. Now, independent of the fact that the interpretation clause distinctly includes joint stock companies, registered *either provisionally or completely under any Act of Parliament*, I think he is mistaken in supposing that the case of *Ex parte Barber* (1 De Gex.), is the case of a company *provisionally* registered; and I am inclined to think the mistake has arisen from confounding the case in De Gex with the case of *Ex parte Barber* (1 M. & G.), which is the case of a totally different railway, which certainly was only provisionally registered; but I do not see anything in the Act of Parliament to give rise to this distinction. It is true that the 7 & 8 Vict., c. 110, appears to be conversant only with companies in their inception, and not after complete registration, and that one of the classes of cases mentioned in the 7 & 8 Vict., c. 111, is that of companies registered under the Act of 7 & 8 Vict., c. 110, and comprehended within the definition of joint stock company therein contained; but independent of the fact that this is only one of the classes referred to in that Act, it is to be remarked that the present Act which I am now administering, has enlarged very much the terms of the 7 & 8 Vict., c. 111, and extends its operation apparently designedly to "all companies registered either provisionally or completely under any Act of Parliament, save only the Act of 1856." I think it also not unworthy of observation that whereas the Act of 7 & 8 Vict., c. 110, pointedly excludes from its operation any company for executing any railway, which cannot be carried into execution without obtaining the authorities of parliament, and also companies incorporated by statute or charter, the Act of 7 & 8 Vict., c. 111, passed at the same time, not only does not exclude railways either directly or impliedly, but does include companies incorporated by charter or Act of Parliament. It certainly would appear as if I were now dealing with a state of the law which had not been intended to remain in force, because I can have little doubt that when the Legislature repealed by the "Companies Act, 1862," the Irish Act, 8 & 9 Vict., c. 98, which had been, in fact, repealed long before, though to a great extent re-enacted by the Irish Bankruptcy and Insolvency Act, it was intended to assimilate the law of both countries relating to joint stock companies, but it appears that the framers of the Act of 1862 were unaware of the re-enactment of that Act, and it still remains therefore in full force, or if its existence were known it is an additional proof

that it was intended that it should continue to be the law of this country. I have been referred to other cases in which railway companies have in England been brought under the operation of the 7 & 8 Vict., c. 111, while it was in force, but I think it unnecessary to refer to them as they appear to have been cases of railways provisionally registered, and if there be any distinction, they possess it. I have been referred to a passage in Lindley on Partnership, vol. 2nd p. 1031, in which, after an elaborate disquisition on and elucidation of the law relating to joint stock companies, and the statutes passed on the subject, he expresses a doubt whether railway companies incorporated by special Act of Parliament are within the 7 and 8 Vict., c. 111, but he adds, "such companies are expressly excepted from the Winding-up Acts, 1848-9, and can only be wound up (if at all) under the 7 & 8 Vict., c. 111, or 13 & 14 Vict., c. 83, which last Act applies to railway companies, which were authorized to make a railway by an Act passed before the 14th August, 1850." Now this mere expression of doubt can hardly be considered of much weight, when I consider the more comprehensive nature of the definition of the words 'joint stock company' in the present Irish Bankruptcy and Insolvency Act, and when I find that he also suggests a doubt whether such a company can be wound up at all, I certainly should require some distinct authority, or more conclusive argument, to induce me to deprive the creditors of the company of this the only way open to them to proceed against the company, to enforce payment of their debts. I have only further to add, that having as already stated been impressed with the idea, that railway companies were only to be dealt with under a code of laws peculiar to themselves, and being aware that without express legislation, the bankruptcy laws were not applicable to incorporated companies, whether their business consisted in trading or not, I have given the best consideration in my power to the numerous and voluminous Acts of Parliament which have from time to time been passed relating to joint stock companies and railways, and the result has been to satisfy my mind that whereas the present Irish Bankrupt Law is sufficiently comprehensive to include this company within its operation according to the plainest meaning of its words, there is nothing in any of the Acts to which I have referred which can withdraw it from its operation, and I must accordingly confirm this adjudication, and refuse the application for annulling it with costs.

Court of Chancery.

MASTER LITTON'S COURT.

LYSTER v. O'SULLIVAN.—Feb. 1. 1864.

*Will—Construction of—Marshalling of assets—
Donatio causa mortis.*

Testator by his will directed as follows: "I direct all my just debts to be paid by my executors and trus-

tees hereinafter named, whom I also direct to pay the following legacies," [which amounted to £800] "and as to my freehold estate of D., in the King's County, I devise and bequeath same to T. O'S. and T. D. O'F. whom I hereby nominate, constitute, and appoint executors and trustees of this my will upon the trusts," [therein mentioned, and as to his household furniture and other effects] "my will is, and I order and direct my said executors to sell same by auction, and out of the funds to be realized thereby, and also with the debts and costs due to me, when collected, to pay the several pecuniary legacies hereinbefore bequeathed by me." The creditors of testator having been paid out of the personal estate, which was insufficient to pay them and the legatees, it was contended that the pecuniary legatees were entitled to have the assets marshalled in their favour as against the devisees, and that the debts were well charged on the realty. Held, that the real estate was charged in aid of, but not in exoneration of the personalty, and that the personal estate was the primary fund for the payment of the debts.

Where testator knew that he was in his last illness, and delivered several articles into the possession of his sister as a gift in case he should die, and where also immediately before his death he told her that he gave her his gold repeating watch which was on the table in his bedroom, but which he did not deliver into her possession, and which she did not take possession of until after his death, Held that the several gifts were good as donationes causa mortis.

THIS was a cause petition under the 15th section of the Chancery Regulation Act, for the administration of the assets of the late Thomas Mark Lyster, solicitor, who died on the 19th of April, 1862. The petition was presented by his sister, Julia Lyster, who was interested in the administration as a creditor, a specific legatee, and also a residuary legatee. The respondent, Thomas O'Sullivan, was the sole acting executor of the testator, and had possessed himself of the goods and chattels of the deceased. The principal questions for the consideration of the Court were two: first, whether, under the terms of the will, there would be a marshalling of assets, and whether the legacy bequeathed to petitioner was or was not a charge on the real and freehold estate of the devisee;—and the second question was, whether certain gifts made by the deceased to the petitioner were good gifts as *donationes causa mortis*. The following was so much of the will as the opinion of the Court was required upon: "I direct all my just debts to be paid by my executors and trustees hereinafter named, whom I also direct to pay the following legacies, that is to say, to my beloved sister Julia (petitioner) £300, to Thomas O'Sullivan (the respondent) £300," [and several other smaller sums to different legatees, making in all a sum of £800.] "And as to my freehold estate in the lands of Derreen, in the King's County, I devise and bequeath the same unto Thomas O'Sullivan and Thomas Denis O'Farrell, whom I hereby nominate, constitute, and appoint executors and trustees of this my will, upon the trusts and to the uses, intents, and purposes following, that is to say, as to that one-half part, moiety, or portion of said lands of Derreen

called and known as the Cottage Division thereof, upon trust to permit and suffer my beloved sister Mary Jennings, wife of Richard Jennings, Esq., to have, receive, and take the rents, issues, and profits thereof for and during the term of her natural life, to and for her own sole and separate use and benefit, free from the control, debts, and engagements of her said husband, but subject to an annuity of £10, which I bequeath to my servants P. and M. S. for and during the term of their natural lives and the life of the survivor of them; and from and immediately after the decease of my said sister Mary Jennings then to hold the same in trust for my nephew Richard John Jennings, son of said Richard and Mary Jennings, until he shall attain the age of twenty-one years, and thereupon and on his attaining that age, to the use of said Richard John Jennings, his executors, administrators, and assigns, subject however, as aforesaid, and charged with the payment thereof of £10 a year; and in case said Richard John Jennings shall die before attaining his said age of twenty-one years, then upon trust for all the other children of said Richard and Mary Jennings, to go to and be divided between them share and share alike. And as to the other one-half share or proportion, I give and bequeath same to Joseph Wyer Boyne, his heirs, executors, administrators, and assigns, to and for his and their own use [subject to certain annuities therein mentioned.] And as to my household furniture, linen, and other effects in my house in Upper Gardiner-street aforesaid, and the furniture, linen, and all other effects in my cottage at Derreen aforesaid, and all my farm produce, implements of husbandry, horses, cattle, sheep, and oxen, my will is, and I order and direct my said executors to sell same by auction, and out of the funds to be realized thereby, and also with the debts and costs due to me, when collected, to pay the several pecuniary legacies hereinbefore bequeathed by me." The testator then appointed petitioner and his sister Mrs. Jennings to be his residuary legatees. O'Sullivan, the respondent, was, as it was before observed, sole acting executor. T. D. O'Farrell, the other executor, having declined to act, O'Sullivan proceeded to realise the assets, which he estimated would produce £1200. Thereout he paid £700 debts, leaving a balance of £500 to pay the several legacies, which amounted to £800. Thus it appears that the personalty was deficient by £300, which the legatees must lose unless the Court declared that the debts were well charged on the real and freehold estate of deceased. The date of the will was 15th March, 1862.

Oliver Burke appeared for the petitioner.—It is submitted that the legacies bequeathed by the testator are a charge on the real and freehold estate in the hands of the devisees. The executor O'Sullivan has paid £700 debts out of the personalty, which only leaves £500 to pay the costs of the administration suit and of the legacies. There must be a marshalling of assets here. The creditors have two funds to resort to, namely, the personalty and the realty, and from the terms of the will the legacies were thrown exclusively on the personalty. This case is similar to *Foster v. Cooke* (3 B. C. C. 347) where a testator had charged his real estate with his debts, and given legacies not so charged. The creditors having been

paid out of the personal estate, which was not sufficient to pay them and the legatees, the latter were allowed to come on the real estate, so far as it had been applied in the payment of debts; in *Paterson v. Scott* (1 De Gex. M'N. & G. 531) a testator devised real estates upon trust for payment of his funeral and testamentary expenses, and subject thereto upon various trusts, and bequeathed legacies and annuities, and it was there held a case for marshalling at the instance of a legatee of an annuity, when the personal estate had been exhausted in the payment of debts. The rule given in 2 Jar. on Wills, as to marshalling assets, is thus stated at page 640, third edition, "Wherever a creditor, having more than one fund resorts to that which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order, is entitled to be placed in the same situation as if the assets had been applied in due course of administration—in other words, to occupy the position of the creditor in respect of that fund, or those funds which ought to have been applied to the extent to which his own has been exhausted." It is admitted that pecuniary legatees are not entitled to have the assets marshalled in their favour as against devisees, unless the lands are charged with debts; but if the lands be charged with debts, then as it is said in 2 Jar. 642, the assets will be marshalled; did then the testator charge his real estates with his debts, so as to bring it within the above cited case of *Foster v. Cooke*? He did charge the lands; firstly, he desires his trustees to pay all his debts, and according to the rule laid down by Lord Loughborough in *Chitty v. Williams* (3 B. C. C. 347), it will be held that the testator has charged his lands: that rule is as follows, "that wherever there is mention of debts in a will, and that will devises real estate, that shall throw the debts on the real estate;" in that case a testator ordered all his debts to be first paid, and then proceeded to devise his real estate. Lord Loughborough's first impression was that the real estate was not charged, but he ultimately came to a different conclusion.—See also *Trott v. Vernon* (2 Vernon, 708); *Harris v. Inglefield* (3 P. W. 91). In *Graves v. Graves* (8 Sim., 56), Sir L. Shadwell says "that a general direction to pay debts in whatever part of the will contained operates to throw them on the testator's real estates." Thus in the case of *Ball v. Harris* (8 Sim. 485), a will which commenced with the following words—"First, I direct all my just debts, funeral and testamentary expenses, and the charges of the probate of this my will to be paid," and then contained pecuniary legacies and devisees of real estate, was held by both Sir L. Shadwell and Lord Cottenham to charge the testator's real estate; lastly, in *Shalleron v. Finden* (3 Ves., 739), Sir P. Arden says, "I am clearly of opinion that whenever a testator says that his debts shall be paid, that will ride over every disposition either against his heir-at-law or devisee;" we then have Lyster first directing his debts to be paid, and afterwards, in the same instrument, devising his lands, and that is sufficient to cast the debts on these lands, following the rule laid down in *Chitty v. Williams*. If, then, it be held that the debts are well charged upon the realty, and that, being so charged, the exe-

entor paid them out of the personalty, then the legatees are entitled to be declared to have their legacies charged on the realty to the extent that the personalty has been withdrawn in paying said debts.

Beytagh (with whom was *Morris, Q.C.*) said he appeared for *O'Sullivan*, who was also a legatee for £300, and who, so far as establishing same, was interested in the same manner as Miss Lyster, in having the realty charged with the debts and legacies: not alone are the debts a charge on the realty, but even also are the legacies, supposing the fund out of which he directed them to be paid insufficient—*vide Aubrey v. Middleton* (2 Eq. Ca. Al., 497, pl. 16—Vin. Ab. Charge (D.) pl. 15), where a testator gave several legacies and annuities to be paid by his executor, and then devised all the rest of his goods, and chattels, and estate to his nephew, and appointed him executor of his will, Lord Cowper held that the real estate was chargeable with the annuities. So in the case of *Alcock v. Sparhawk* (2 Vernon, 228), the testator devised certain lands to A. and his heirs, and he then gave a legacy to B. to be paid by the executor within five years after his decease, and appointed A. sole executor of his will. It was held that the legacy was charged on the lands devised to A. So in the case of *Alcock v. Sparhawk* (2 Vern. 228) the testator devised certain lands to A. (his heir at law) and his heirs; he then gave a legacy to B. to be paid by his executor within five years after his decease; and appointed A. sole executor of his will, desiring him to see the will performed; it was held that the legacy was charged upon the land devised to A. In addition to the cases already above cited, *vide Dormay v. Borrodale* (10 Beav. 263).

David Sherlock, Q.C., appeared for the devisees of the lands.—The personal property of the testator is primarily liable to pay the debts, and what is struggled for by the legatees is to throw the debts primarily on the realty—in other words, to exonerate the personalty. Mr. Lyster directed the legacies to be paid out of his personalty. This, however, must be taken to mean that the personalty was liable to the legacies after it had discharged the debts. The real estate is charged in aid of the personalty for the payment of debts, but it is in no way charged with the payment of the legacies, and yet it is sought here to exonerate the personalty, and operate the realty with the debts. In order to exonerate the personalty, express words are required.—*Fereyes v. Robinson* (Bunb. 301); 2 Jar. on Wills, 3rd ed., 614. There must be an intention expressly stated not only to operate the realty but to exonerate the personalty. Thus in numerous cases it has been held that neither a charge of debts on the testator's lands generally, or on a specific portion of them, will exonerate the personalty; and so it was held by Sir William Grant, Master of the Rolls, in *Tower v. Lord Rous* (18 Ves. 132.)

Lawless, Q.C., replied.

DONATIO CAUSA MORTIS.

Feb. 14.—The petitioner, in her cause petition, prayed that she might be declared entitled to the under-mentioned gifts, viz., 1st, to a gold watch; 2nd, a large diamond ring; 3rd, two brooches; 4th, a gold bracelet, and 5th, a heavy jewelled necklace; 6th, a re-

peating gold watch; and 7th, all testator's deceased wife's clothes, some of which were costly. The case made by the petitioner in her affidavit, and also in her *viva voce* examination, was, "that my brother, the late Thomas M. Lyster, died of dropsy. His death happened on the 30th of April, 1862. After he made his will, and six weeks before his death, he delivered all the above-mentioned articles into my possession; he said to me, 'If I die I give them to you.' He then gave them into my possession, with the exception of the repeating watch. He did not hand me that, but he told me the night before his death that he gave it to me, and that it was mine; it was lying on the dressing-table in his bedroom, but I did not take further possession of it until after his death, though I could." On her cross-examination, in answer to Mr. Morris, Q.C., Miss Lyster said that her deceased brother was ill with dropsy for eighteen months previous to his death; that though he made his will he never gave by will those articles now claimed by petitioner.

Oliver Burke in support of the *donationes*.—The deceased made those gifts in his last illness; it will therefore be presumed that the deceased contemplated when he made the gifts that he did it in contemplation of death—*Miller v. Miller* (3 P. Wm. 356); *Lawson v. Lawson* (1 P. Wm. 441); *Walter v. Hodge* (2 Swanst. 100.) There are two circumstances requisite to constitute a good *donatio*; first, that the gift be made in contemplation of death; secondly, a delivery. Both these requisites have been fulfilled. It is true that the repeater watch was not delivered absolutely, but it will be held that there was a constructive delivery. As to the point which, from the question put by Mr. Morris, it was anticipated would be made, namely, that testator disposed of by will of the gifts, and that having done so it was not open to Miss Lyster to claim articles left by testator to his executor in his will to be disposed of. *Vide Drury v. Smith* (1 P. Wms., 405). There the marginal note says, "One by will disposes of his personal estate, and afterwards by parol gives £100 to one to deliver to his nephew if he should die of that sickness. Such gift was held to be good." And Lord Hardwicke there says that testator had power to give away any of his estate after making his will. *Vide also Ward v. Turner* (1 W. & T. 721.)

Morris, Q.C., contra, said he was for the executor, *O'Sullivan*, whose duty it was to realize as much of the assets as possible. The Court looks with great aversion on donations. The man who it was alleged made the gifts was dead, and if a jury were trying this case, the strongest evidence would be required to establish those donations. It cannot be presumed that the late Mr. Lyster made the gifts in contemplation of death; he was in dropsy, and may have expected to live a long time in that illness. As to the repeating watch, there was no *traditio* at all of that watch, and consequently no complete *donatio causa mortis*.

Feb. 15.—MASTER LITTON delivered judgment as follows:—Two questions have been propounded in this case for my opinion—first, whether the debts of the testator are charged upon the realty in exoneration of the personalty, or are at all charged on the realty. Second, whether Miss Lyster has a title to the seve-

ral articles claimed by her as gifts by way of *donationes mortis causa*. On the second question the case of *Ward v. Turner* (1 White & Tudor) has been referred to. On the first point, the cases of *Foster v. Cook* (3 Brown C.C., 347); *Chitty v. Williams* (3 Vesey, 545); *Graves v. Graves* (8 Simon, 55); *Barber v. Duke of Devonshire*; *Dormay v. Borrodaile* (10 Beav., 263; 3 Vesey, 545); *Aubrey v. Middleton* (2 Eq. Ca. Abr. A. 3, 497). Williams on Executors, Jarman on Wills, and Roper on Legacies, have also been cited on both sides. I am of opinion first, that the real estate is not charged in exoneration of the personality. That it is charged in aid of the personality for the payment of debts, is, I think, clear. Upon a review of the several clauses of the will, I am of opinion that it is not charged in exoneration of the personality. In the cases where it has been held that the real estate has been charged in exoneration of the personality, and where consequently there has been a marshalling in favour of legatees, there has been a distinct and express declaration that the real estate was to be subject to the payment of the debts, the result of which is dealt with in the cases where there is a "devise of the real estate after the payment of the debts." The effect of the exoneration of the personal estate must be to make the real estate the primary fund. Here there are not any express words which charge the debts, and still less the legacies, on the real estate. The charge is by implication, and so far as the legacies are in question that implication is negatived by the subsequent provision in the will, which provided an express fund out of the personal estate for the payment of the legacies. As to the debts, no doubt they are spoken of in connexion with the real estate, but they are also spoken in connexion with the personal estate. The words are, "to be paid by my executors and trustees." Therefore, this being my view of the construction of the will, it would follow that the debts have been rightly paid out of the personality, and such is my ruling.—Upon the second question of the *donationes causa mortis*, I am of opinion that the gold watch and chain that belonged to the testator, and the gold repeating watch that belonged to his wife, and her dresses, did pass to the petitioner. The cases upon this question are very numerous—their name is "legion;" and having reference to the examination and cross-examination of petitioner, I am of opinion that testator was in his last illness, and knew that he was in his last illness; and secondly, that there was an actual delivery by him of the property in question so far as it was possible to deliver it. Those two elements suffice to constitute a valid *donatio mortis causa*, and I am of opinion that they did create it in this case.

Exchequer Chamber.

[Reported by William Woodlock, Esq., Barrister-at-Law.]

REGISTRY APPEALS.

[BEFORE O'BRIEN, J., FITZGERALD, J., AND FITZGERALD AND DEASY, BB.]

MICHAEL PATRICK HOWLETT AND OTHERS, APPELLANTS;
SAMUEL THOMAS HARMAN AND OTHERS, RESPONDENTS
—Nov. 30, 1863; Feb. 9, 1864.

Free Burgess of New Ross—Election—Taking oath—Payment of stamp duty—Residence.

A person elected a Free Burgess of New Ross, but having neither taken the oath, nor paid the stamp duty on his admission, is not entitled to be registered as a voter for that borough.

Quære, is residence within seven miles of the borough requisite in the case of a Free Burgess admitted since the Reform Act, 2 & 3 Wm. 4, c. 88?

THIS was a case stated for the opinion of the Court by the Chairman of the County of Wexford. The case originally stated was as follows:—"At a Court held at New Ross on the 24th day of October, 1863, for the revision of the list of voters for the borough of New Ross, the names of the Rev. John Alexander, Richard Clayton Brown Clayton, and Samuel Thomas Harman, appeared on the list of persons entitled to vote at the election of member for the said borough, and notices of objection having been duly served upon said several parties by Michael Patrick Howlett on the several grounds that the said several parties had never been sworn as Free Burgesses of said borough, or paid any stamp duty on admission as such Free Burgesses, or had ever, in right of such admission, attended any meetings, or taken any part in any of the proceedings of the said corporation, and that the said several parties claimants had not resided in said borough, or within seven statute miles of the usual place of election therein for six calendar months next previous to the 20th of July last; in support of said objections the books of the late corporation of New Ross were produced, by entries in which it appeared that the several claimants were respectively nominated and admitted as Free Burgesses on the 30th day of September, 1839, the 29th of June, 1837, and the 30th day of September, 1839, but there is no entry of any payment of stamp duty on said several admissions, nor upon the admission of any of the Free Burgesses of said corporation, nor does it appear by any entries in said books that any or either of the said several claimants ever attended any of the meetings of the said corporation, or signed the books of said corporation; and on behalf of said claimants the Rev. John Alexander and Richard Clayton Brown Clayton, it was admitted that they had not resided within said borough, or within seven statute miles thereof, for six calendar months previous to 20th of July last, and no evidence was tendered on behalf of said claimant, Samuel Thomas Harman, that he resided within the prescribed limits. I overruled the said several objections so tendered, and admitted the claims of the said several parties to

be placed on the register of voters for the said borough. The said several claimants having been admitted Free Burgesses subsequent to the passing of the Reform Act appear to me not to come within the provisions of the 9th section of that Act, nor within the provisions of the 14th section of the 13 & 14 Vict., c. 69. This I certify this 24th day of October, 1863, at New Ross.

WM. N. BARRON,
Chairman Quarter Sessions for the
County Wexford.

I appeal from this decision.

MICHAEL P. HOWLETT.

It appearing to me that the validity of the said several claims depends upon and has been decided by me upon the same points of law, and the parties dissatisfied with my decision thereon having given notice of their intention to appeal thereupon, I declare that the appeals of such decisions ought to be consolidated, and I hereby nominate Samuel Thomas Harman to be respondent in such consolidated appeal, and said Michael Patrick Howlett to be appellant in said consolidated appeal.

WM. N. BARRON,
Chairman Quarter Sessions, Co.
Wexford, at New Ross, Oct.
24, 1863."

When this case came on to be heard, the Court considering that it did not sufficiently state the facts made an order that it should be remitted back to the chairman to be amended by stating the facts that were established and the evidence, and setting out the entries in the corporation books admitting the respondents as Free Burgesses, and otherwise to amend it as he might consider necessary to bring the question raised before him on which he desired the opinion of this Court, before it. In pursuance of this order the following additional case was stated by the chairman:—"In compliance with the rule of the Court of Registry Appeal made in this matter I beg by way of addition to my former statement to submit that I required the several respondents in this matter to prove their title to be registered as voters for the said borough of New Ross, whereupon they produced the books of the late corporation of the said borough which contained the following entries:—June 29th, 1837.—John Usher, Esq., proposed Richard Clayton Brown Clayton, of Carrigbyrne Lodge, Esq. as a freeman and burgess of said corporation, seconded by John French, Esq., unanimously elected.—September 30, 1839.—Standish Hartrick, Esq., proposed Samuel Harman, Esq., as a fit and proper person to be a freeman and burgess of said corporation, seconded by G. Alexander, Esq., and unanimously elected. Richard Usher, of New Ross proposed the Rev. John Alexander as a fit and proper person to be a freeman and burgess of said corporation, seconded by Samuel Hartrick, Esq., and unanimously elected.—There does not appear any entry in the said books of the payment of stamp duty on admission by the said claimants, or by any other burgess. There is no entry of the swearing in of any of the said claimants as Free Burgesses of the said borough. There are entries in the said books

of the swearing in of other burgesses. The books appear to be signed by the several burgesses who are mentioned as having been sworn in and as attending meetings. I was of opinion that the said several persons were duly elected as Free Burgesses of the said borough, and as such were qualified to be registered as voters for the said borough. And I was further of opinion that, inasmuch as the said several claimants were so elected since the passing of the Reform Act it was not necessary to entitle the said several persons to be registered as voters for the said borough, that they should have resided within the said borough, or within seven miles thereof, for six months previous to the 20th of July last. This I submit this 6th day of January, 1864.

W. N. BARRON."

The case now came on for argument.

Shaw, Q.C. (with him *J. P. Hamilton*) for the appellants.—The respondents never were admitted as Free Burgesses. Admission is essential, and election alone is not sufficient.—Willcock on Corporations, p. 219, section 556. If a corporator is not sworn within a reasonable time after his election, there is a waiver of the election. *The King v. Jordan* (Cas. temp. Hardwicke, 242). The Legislature has imposed a stamp duty on the admission of freemen to their corporate rights.—Stat. 56 G. 3, c. 56, s. 113; 33 G. 3, c. 38, s. 3 (Ir.) [*Fitzgerald, J.*—Is there any form of oath on the admission of freemen?] Stat. 4 G. 1, c. 15, s. 6 (Ir.) refers to "the usual oaths of freemen." [*Fitzgerald, B.*—What is admission?] Being sworn in, and paying the stamp duty. If the freeman is sworn in that, is evidence of his having paid the stamp-duty. The cases of *The Freemen of Coleraine* (Alc. Reg. Cas. 9); *The King v. Bonworth* (2 Str. 1113); *Davies v. Humphreys* (3 M. & Selw. 223); *Williams v. Evans* (8 T. R. 246) are all important in our favour to show the necessity of taking the oath and paying the stamp duty. So also *The King v. Mayor of Galway* (Alc. and Nap. 191). The length of time which has elapsed since the election of the respondents is no answer to the present appeal.—*Hoy's case* (1 Ir. Jur. N.S. 73; a.c., 5 Ir. C. L. R. 62); *The King v. Courtenay* (9 East. 246); st. 13 & 14 Vic. c. 69, s. 55. The question as to residence arises on s. 9 of the Reform Act, 2 & 3 Wm. 4., c. 88, and s. 14 of 13 & 14 Vict., c. 69. The Free Burgesses of New Ross are freemen within the meaning of section 14, of statute 13 & 14 Vict., c. 69. They are proposed and seconded as "freemen and burgesses of the Corporation." Why should the first part of the description be left out? *Tottenham v. Meadows* (2 Ir. C. L. R. 572), and *Molyneux's case* (Alc. Reg. Cas. 19) turned altogether on a. 9 of the Reform Act. Section 14 of the 13 & 14 Vic., c. 69, makes a great difference in the matter.—*Spelman's Glossary*, Burgess; *Madox, Firma Burgi*, Burgess; *Johnson's Dictionary*, *sub voc.* Schedule C. of the Reform Act, No. 9, gives a form of oath, which would apply in the case of burgesses. [*O'Brien, J.* referred to s. 13 of the Reform Act.]

Tottenham and *J. E. Walsh, Q.C.*, contra.—It is not necessary to shew that the entry in a corporation's books of the admission to freedom, is stamped

in order to maintain the right of freemen to vote—*Re Carolin, Re Hyde* (3 L. Rec. N. S., 230). It is not necessary that a Free Burgess should be sworn in order to perfect his admission. There is no form of oath prescribed for him to take. The charter of New Ross will be found in Gale's *Corporate System of Ireland*, app. 52. Especially in the case of this corporation, there is a difference between freemen and Free Burgesses—*Commons' Journals (Ireland)* vol. 2, p. 512, and p. 542. The case of *Tottenham v. Meadows* is decisive on the point of residence in the case of a Free Burgess admitted since the Reform Act; it is a decision pronounced in a very full Court. The case of the *Freemen of Coleraine*, is not an authority against us, because it does not apply in the case of a Free Burgess. *Molynaux's case*, on the other hand does apply to Free Burgesses, and it is high authority in our favour; it establishes the right of Free Burgesses elected since the Reform Act, to be registered. The form of oath given in Schedule C., No. 9 of the Reform Act, is that to be taken by resident freemen, and forty shilling freeholders, and has nothing to do with this case—*Williams v. Evans* was a case which arose on a statute that has no reference to Ireland—1st Kidd on Corporations, 363. St. 13 & 14 Vic. c. 69, s. 14, does not carry the matter as to residence, further than s. 9 of the Reform Act. Peckwell on Elections, vol. 1, p. 158, shews what burgesses are as distinguished from freemen; statute 21 G. II., c. 10, s. 8 (Ir.); 4 G. 1, c. 15, (Ir.) Orders in Council, 25 Car. II.

J. P. Hamilton replied.

O'BARR, J.—In this case we are of opinion that the appeal should be allowed, and that the decision of the revising barrister should be reversed. Two objections were made; one was that as there was no evidence either of the necessary oath having been taken, or of the necessary stamp duty having been paid, there was no evidence of the party having been duly elected. That amounts to this, that there was something requisite to be done besides the mere fact of an election in order to constitute him a member of the corporation; and the two other things were contended for as necessary—the taking the oath and the payment of the stamp duty. We are of opinion that it was necessary that something should be done to complete his admission besides the mere fact of election, and there has been no evidence of that having been done. It occurs to myself that with respect to some form of oath being requisite, that may be inferred from the cases, but at all events the stamp duty should be paid. If the oath was taken it might be presumed that the stamp duty had been paid; but there is no evidence of that. With regard to the other point of residence, it is not necessary to pronounce any opinion on it. Some of us have pronounced opinions on it during the argument, but it is not necessary.

FITZGERALD, J.—I wish to add a word to correct any possible misconception. In deciding this case on the ground that the claimant has not shewn that he was admitted as well as elected, it might be supposed that the Court thought that he had a right if admitted after the Reform Act, though not resident, to be an elector; but I wish to guard myself against deciding

anything of that kind, and to leave it open to come before us again.

FITZGERALD, B.—I wish to say that I decide this case shortly on the ground that there was nothing more than election.

DEASY, B.—These gentlemen come here twenty-five years after their election. They acquired by their election an inchoate right, and they do not come till now to complete it. During the period intervening since their election, they might have come and claimed the only privilege remaining to them after the abolition of the corporation. I think the presumption is that they never became members of the corporation.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

ARCHBOLD v. EARL OF HOWTH.—April 27; May 4.

Leave to plead the Statute of Limitations.

The plaintiff having brought an action against the defendant for the breach of an agreement to execute a lease of lands of which he had been the tenant, and for false representation and fraudulent concealment in reference to the same, the defendant, by leave of the Court, pleaded seven defences to the count upon the agreement. The defendant applied to the Court for liberty to plead the Statute of Limitations in addition to the pleas already pleaded, he having omitted to do so within the right time by mistake. Held, that as the defences disclosed a case of acquiescence on the part of the plaintiff in allowing his rent to fall into arrear, and permitting himself to be ejected, and the land to be re-set to a third person without making a claim on the foot of the alleged agreement, the defendant was entitled to every legal defence, and might, therefore, plead the Statute of Limitations (Christian, J., dissentiente).

And, (per Christian, J.,) that the defendant was in the position of one seeking a favour from the Court; that the Court had a duty to look into the circumstances of the case, and that as there were pleas on the record which exhausted the merits, it would be unfair to allow the defendant to defeat the plaintiff by the Statute of Limitations, in case the latter should succeed on the merits.

Macdonogh, Q.C., (with him Monahan) applied that the defendant in this case might be at liberty, in addition to the pleas already pleaded, to plead the Statute of Limitations to the first count of the summons and plaint. The action was brought by the plaintiff against Lord Howth for breach of an agreement to execute to him a lease of lands of which he had formerly been the tenant. The counts in the summons and plaint subsequent to the first were for false representation and fraudulent concealment in reference to the same subject-matter. The summons and plaint purported to be filed on the 15th December, 1863, from which it had been erroneously inferred that it was issued before

the 30th November. On that day, six years would have elapsed from the date of the alleged agreement, and in this way the defence of the Statute of Limitations had been omitted to be pleaded. The Statute of Limitations is now considered a plea to the merits—2 Archbold, 945; 1 Tidd, 568. [*Christian, J.*—A defence of the Statute of Limitations by a landlord to an action by a tenant on a contract to make him a lease, is not very meritorious.] There was acquiescence by the tenant. Lord Howth got into possession and demised to another. [*Christian, J.*—Have you a defence of rescission?] Yes; but the equity is with Lord Howth, the plaintiff having lain by. He allowed the defendant to act as if there was no contract, and his position is altered. When the pleadings were oral under the old system, as repeatedly as an error was fallen into, as repeatedly was it amended; and the same principle applies now, when the matters are on paper. In *Kiernan v. Halliday* (the report of which I cannot find) we got leave to plead the Statute of Limitations. [*Christian, J.*—I can understand a landlord deliberately abstaining from pleading the Statute of Limitations.] There was no intention to omit any plea.

Serjeant Armstrong and Jellett, contra.—This application comes very late. The plaint was issued Dec. 15. There was an application to the Court to plead several defences and seven were filed, to which it is now sought to add this defence. The first defence is a traverse. The second is a rescission of the agreement. The third, that the plaintiff was not always ready and willing to execute the lease and take the lease. The fourth, that all the conditions entitling the plaintiff to maintain the action were not performed, because he never tendered a lease for execution. The fifth, that the defendant did not refuse. The sixth, (which was amended) that after the making of the agreement, a large sum of money became due, and a notice of possession demanded.

There was an application to set aside part of the plaint, and that was a good opportunity to suggest this, and it was not done. It is said counsel were misled—by whom? By their own attorney, if any one. There is at the bottom of the writ what conveys to everybody the day it was issued. The least Lord Howth could do would be to show he had a case in fact of the Statute of Limitations. Was a plea of the Statute of Limitations ever permitted to be added when the party had deliberately pleaded other pleas, and seven in number? [*Monahan, C.J.*—Is there any authority in point?] None. We could not find a case. It is treated as a matter in the discretion of the Court. There is not a positive statement from Lord Howth as to the date of this agreement. Could not the witness to the agreement have made an affidavit? Evident relief is impossible, because the new tenant who is in possession of the lands is a purchaser without notice. We cannot put in a replication that there was fraudulent concealment. [*Christian, J.*—As I understand, Lord Howth, by his act in putting another person into possession has prevented you from having recourse to the procedure in which the Statute of Limitations would be no answer.] Yes.

Monahan, in reply.—We take the blame on ourselves of a slip. We are accountable, and the clerk

also. It is in the spirit of modern legislation that cases are to be disposed of on legal grounds, and that slips and mistakes which formerly were fatal shall now, if possible, be amended. In the early cases it was said not to be meritorious to plead the Statute of Limitations, but the law would not administer morals. We do not seek to plead the Statute of Limitations to the counts charging deception, but to the contract. It is sworn by Lord Howth, and proved by Stewart and Kincaid, that the plaintiff was in arrears. He allows Lord Howth to make another lease to another man, and now seeks to charge him with a vast liability, the estimable profits of his farm. If the plaintiff has merits, it is upon all the other counts but the first, i.e., assuming him to have merits. His case in the first count is, I knew my rights all through. We say you let us make a lease to a third party. Assuming that all that would not be a rescission of the contract (which it surely would be), would it not nevertheless be hard that Lord Howth should have to pay about \$700? Supposing there was a failure of proof of rescission, but not a failure of the defence to the fraud, would it not be a hard thing that because of the technical failure of proof of rescission, Lord Howth should have to pay this sum? As to the delay which is alleged in bringing forward this motion, the point was mentioned to the Court as soon as it occurred to us. If brought in Chamber, it is the sort of motion a judge would reserve for the full Court. Messrs. Stewart and Kincaid's assistant has made an affidavit stating that a letter was sent to twenty-seven of the tenants; that twenty-seven, as he believes, signed the notice; that he attended at the town of Lusk to meet them; that he brought forms of leases with him. It is an extraordinary statement that the party has forgotten (and above all a tenant who signed a document) the next year, and forgotten ever since. The affidavit states that when the plaintiff was asked by some one why he did not attend at Lusk that day, he said he did not care to take out a lease. It states it was a notorious fact that the deponent was to attend that day and that sixteen of the tenants did attend. If the plaintiff could snatch a verdict on the first count, assuming that we succeeded on the others, it would be a gross hardship. The case must be decided upon principle. [*Christian, J.*—There are pleas on the record which cover the entire of the merits. Supposing Lord Howth fails on the merits, would it not be an unfair advantage to give him the benefit of the Statute of Limitations, and especially where, by his own act, he has prevented the plaintiff from resorting to equity? Would it not be a strange thing for the Court to allow this when in its discretion?] There is great difficulty in feeling satisfied that the facts proved will amount to a legal rescission.

Serjeant Armstrong referred to *Ritchie v. Van Gelder* (9 Exch. 762)

Cur. adv. vult.

May 4.—*MONAHAN, C.J.*, delivered the judgment of the majority of the Court. [His Lordship stated the first and second counts]. The third states not that Lord Howth was guilty of fraudulent misrepresentation, but what is very near it, that he fraudulently concealed from the plaintiff the existence of the

agreement. The substantial issue is, if Lord Howth was guilty of fraud or of misrepresentation. Then with regard to the count in which no fraud is alleged, Lord Howth's case is—this is a very hard action to bring against me, admitting I did enter into the contract. For some years you had an opportunity of taking out the lease. You were in possession—your rent was in arrear. I served a notice to quit; you did not demand a lease. I brought an ejectment; you did not then demand it. I executed the *habere*; you did not then demand a lease. I inferred from all these acts that you had abandoned all claim on foot of it. There were four or five opportunities for you to make the claim. I concluded, rightfully or wrongfully, you had abandoned it. It was a farm I intended setting to a stranger. I have now set it, and cannot perform the contract. I think I have a right under that state of facts to avail myself of any legal defence. The answer is, you have been guilty of gross fraud, and that prevented me from coming forward; and, therefore, the Court should not assist you to commit a fraud. I disclaim the idea of going into a long examination to know where the honesty or dishonesty of this case is. I disclaim any notion that I have the means of judging or prejudging where the honesty or dishonesty is. The plaintiff says by his able counsel, and this was the principal part of the argument of Serjeant Armstrong and Mr. Jellett,—it is very hard now to allow the plea of the Statute of Limitations to be pleaded, because I cannot have a replication of the fraud to it. If I could I would not have any great cause of complaint. The answer to that is—Quite true; but fortunately for you, and unfortunately for Lord Howth, you have counts on the fraud where the Statute of Limitations will not be relied on. It is said again by the plaintiff's counsel, by Lord Howth's executing this lease to a third party he has disabled the plaintiff from suing in a court of equity. The answer is, it does not follow that there would be relief in a Court of Equity if one tithe of the allegations made by Lord Howth be proved true. A Court of equity will not grant specific performance merely because the Statute of Limitations is out of the way. What is one's own experience? I am not aware of any case where the Court of Chancery has given specific performance where the tenant has allowed himself to be ejected where he had a legal and an equitable right. After new rights were acquired, it is idle to suppose a Court of Equity would grant specific performance after laches. The Statute of Limitations, far from being an unfavoured is a favoured plea. It occurs to the majority of the Court that Lord Howth should be allowed to plead the plea of the Statute of Limitations. The application being late, he must pay the costs. It is said that Lord Howth has the other pleas, but I do not know how many of them may be demurred to, or may lead to a motion for judgment *non obstante veredicto*.

CHRISTIAN, J.—I think this motion ought not to be complied with. First, I do not doubt that the Court has the most absolute discretion. The only question is, what are the materials by which the exercise of that discretion should be guided. I concur that the plea is not to be rejected, because it is the plea of the Statute of Limitations. It was once considered that

the law looked with disfavour on that plea; so much so, that if a party having been under terms, pleaded the Statute of Limitations, it was considered a violation of his undertaking to plead issuably, and it was set aside as of course or judgment marked. That was altered. It is not necessarily unconscientious; but in one of these cases, and one in which the Court of Queen's Bench retraced its steps, reported in 3 Term Reports, after the Court had refused the motion, a new motion was made on the special circumstances, calling on the Court to strike out the plea. The Statute of Limitations was pleaded along with the general issue. The defendant would have had a right to plead the two; but the Court went into the whole merits of the case, and they made this rule; they allowed the statute of Limitations to be relied on, the defendant giving up the plea of the general issue. That is a clear authority, for this, viz., that when a party in a position of default comes forward for a favour as regards the addition of a plea, the Courts holds itself at liberty to look into the merits, and give or withhold. In the case reported in 9 Ex. R. 762, the Court held, first, that they had a discretion, and secondly, that they would exercise it. [His Lordship cited the observations of Alderson, B., and Platt, B.] It is argued that the plea ought to be allowed, because it is a plea which the Common Law Procedure Act allows as of course, and which, upon the common affidavit, is allowed to be pleaded with others. I do not appreciate the force of that argument applied to this case. In fact, that observation goes to ignore the existence of the discretion. It is because the party has lapsed and made a slip; it is for that reason the Court is invested with an absolute discretion to go into the merits of the case. It does occur to my humble judgment that to say the plea was one the party would have had a right to plead is irrelevant to the purpose before the Court. The party having made default, and come to ask for a favour, I am clearly of opinion that it is not only the right, but the bounden duty of the Court, to look into the circumstances of the case, and if it thinks justice is more likely to be done in the absence of the favour asked for, than with it, to refuse. Looking at the nature of the case; looking at the pleas already on the file, if the Court sees the defence to be either unnecessary or unjust, one which must manifestly be either useless or mischievous, it ought to refuse. What are the facts here? The action is by a late tenant of the Earl of Howth, on an alleged promise for a lease. The case is presented in two points of view; first, one of contract; secondly, one of fraud. That is a case which all (and, I will add, the noble defendant) ought to be desirous to have tried on the merits, and the defendant has made a case of merits strictly, and one which exhausts the merits. He meets the allegation of fraud by a direct and simple denial. These are, therefore, out of the case. His counsel took some credit for not pleading the Statute of Limitations to the charge of fraud. What are the defences to the action on the contract? They are equally meritorious and equally exhaustive of the merits; they deny the contract, and in addition to that in every way that the most fertile ingenuity could devise, it has been put that the plaintiff has abandoned his right. Not one of these defences has

been demurred to, nor was there any suggestion that they will be, nor do I see how they can; therefore, nothing remains but issues in fact, and on these issues the whole merits must be tried out. If any one of these defences be supported, the plaintiff fails. If on the other hand, Lord Howth fail to prove that the plaintiff has abandoned his rights, the plaintiff will succeed on the merits. Supposing Lord Howth shall fail on the merits; supposing it be proved he made the promise and broke it (and I, like the Chief Justice, disclaim the notion of prejudging that question, but it is that question which will be tried, and it will be for the jury to do that;—supposing the jury come to the conclusion that the plaintiff has not acquiesced, as imputed to him, it will follow that Lord Howth will then have the power to fall back on the plea of the Statute of Limitations and say, I will defeat your action, because the plaint was issued, not on the 29th November, but on the 15th December. Is that what the Court ought to be active to help the defendant to put on the record, the defendant having lapsed the time to plead it? But the circumstance adverted to by Mr. Jellett of the inability to file a replication of fraud, appears to me a very trifling matter. This is the proper court. The defendant could in equity plead everything to the merits. The defendant has by his act interposed between himself and the plaintiff the insuperable barrier of a purchaser for value. That may have been a rightful act, or it may have been a wrongful act, but that is the very question which the jury are to try. Justice requires that in this Court, so far as the Statute of Limitations is concerned, Lord Howth should be in the same position as in a Court of Equity. In both all the merits are open to him. Justice requires, I think, that he should not have the statute pleaded here. If he had pleaded it at the proper time, we could not have prevented him. It is said this is but the slip of the counsel. In every case it is the slip of the pleader, which gives the Court the power over the pleadings. I took the liberty of suggesting that cases might be imagined, in which a defendant might deliberately abstain from pleading the Statute of Limitations. I deny that this has any resemblance to a right on the part of Lord Howth. I think the Court has a right to look narrowly into the merits of the case, and if the plea has no effect, but to restore to the defendant a right which he had, but deliberately forewent, to refuse it.

Motion granted.

ATKINSON v. MILLS—May 6, 7.

Jurisdiction—Costs of abortive trial—Misconduct.

At the trial of an action in July, 1861, for the diversion of a water course, a view jury went out to inspect the locus in quo. Those acting for the defendant having made unfair representations to the view jury respecting the causes of action, the plaintiff withdrew his record. The defendant did not within a month enter a rule for costs, but obtained

a verdict in a subsequent trial of the same cause of action. Held, upon motion by the plaintiff, that the taxing officer be directed to review his taxation. 1, that the Court had jurisdiction to entertain the question of the costs of the abortive trial, anything in the 105th section of the Common Law Procedure Act, 1853, to the contrary notwithstanding. 2, that the delay in bringing forward the motion being partly attributable to the defendant, the plaintiff had not committed such laches as disentitled him to relief. 3, that a case of tampering with the view jury by the agents of the defendant having been made by the plaintiff, and not specifically contradicted by the defendant, the plaintiff was entitled to be declared not liable to pay the defendant's costs of the abortive trial. 4, that the plaintiff was not entitled to be paid by the defendant his own costs incurred in the abortive trial; though in an extreme case, it would be competent to the Court to make the defendant pay them.

Semble, Where the plaintiff withdraws his record, and the defendant omits within a month to enter a rule for the costs of the day, and the plaintiff ultimately succeeds in obtaining a verdict, he ought not, as a matter of course, to be allowed in the taxing office the costs of withdrawing his own record.

Srjeant Armstrong (with him *Monahan*) for the plaintiff, moved that the taxing officer be directed to review his taxation in this case, and that the plaintiff be declared not liable to pay the defendant's costs of the first abortive trial as directed by the taxing officer, and that the defendant be directed to pay the costs incurred by the plaintiff in the same trial. The action was brought for the diversion of a water course, and came on for trial before Lefroy, C.J., at the Kildare Summer Assizes, 1861. The plaintiff had made an affidavit in the same year to ground a motion similar to the present, but as the case was proceeding to a second trial, he was advised not to make use of it. The verdict had in the trial in the following Spring Assizes was set aside by the Court on the 6th November, 1862. The venue had been changed previously to this trial, and subsequently, on the application of the plaintiff, was re-changed—*Atkinson v. Mills* (8 Ir. Jur. N.S. 163); a third trial resulted in a verdict for the defendant. At the first trial it was arranged that eleven jurors should have a view, but owing to the conduct of those acting for the defendant during the view, the plaintiff withdrew his record. The plaintiff's affidavit stated that one Benjamin Reed, a friend of the defendant, went with the view jury, and threatened them with an action of trespass if they crossed his land; that a number of persons, whose names were given, communicated with them, and exercised an influence prejudicial to the plaintiff; that Whitelaw, one of the showers, did not confine himself to his duties as shower, but called to the jury to come back and view a flag, saying, "Gentlemen, I call attention to this flag. What is it doing here? We shall see what use shall be made of this;" that Mr. Adair, the defendant's solicitor, and his assistant, accompanied the jury, the latter having a long pole in his hand. The Chief Justice reserved the question of the costs, as we say, at

the instance of the plaintiff, but even if the defendant got the reservation, that would give the Court jurisdiction. A statement of what took place under the hand of the late Mr. Courtenay, the Chief Justice's registrar, has been procured by the other side. [*Monahan, C.J.*—What are the circumstances which should lead us to take the case out of the ordinary rule?] The most distinct interference is shown. Whitelaw has not made any affidavit. The order which sent out the eleven jurors cautioned them against holding intercourse with any person. The defendant's counsel was then instructed to say to the Chief Justice that there was as much misconduct on our side, but that is not sworn now.

Battersby, Q.C., and Byrne, contra.—1. This application ought not to be entertained. 2. If entertained, it ought to be refused. The following is Mr. Courtenay's memorandum:—

Wednesday, July 24, 1861.

"Jury called over and sworn, and by consent of both parties, and, on their application, eleven of the jury went out to view the premises, and mearsmen were named on both sides. The jury were cautioned not to have any communication save with the parties named as mearsmen, and the parties agreed to pay the expenses of the jurors on the view. The defendant said he could not well attend the view, as he lived too far. Some of the jury (but before the foreman came into Court) admitted that some persons endeavoured to obtrude themselves upon them, and to make observations, but stated that such observations were only partially heard, and had no effect whatever upon their minds. The jury stated there were persons there from both plaintiff and defendant, but they emphatically denied that their minds were affected, and said that they came into the box perfectly indifferent, and determined to try the case without favour. The Chief Justice said the plaintiff must either go on and try his case, or withdraw his record. The question of costs was allowed to be reserved, but if the Chief Justice had no jurisdiction to make such a tack to the order, that to go for nothing." No rule was entered, and by the 105th section of the Common Law Procedure Act, "if such rule be not entered, such costs shall be costs in the cause." The Court, therefore, has no jurisdiction. A month after the record had been withdrawn, the costs became costs in the cause. [*Christian, J.*—Notwithstanding any misconduct on the part of the defendant? Suppose the opposite party's most material witness had been spirited away, would you say in that case there was no jurisdiction?] The English legislation did not make the same rule as the Irish; it did not go on to provide for the case of no rule being entered. [*Keogh, J.*—Suppose a party finds his witness spirited away, he withdraws, because he cannot go on.] He should apply to postpone. [*Keogh, J.*—He did that here,] and failed in his application. [*Monahan, C.J.*—Your argument is that the Chief Justice exceeded his jurisdiction]. Yes; in *Skinner's case* (4 Exch. 885), costs were given to the party ultimately successful. There is no case subsequent to the Common

Law Procedure Act shewing that the court has a jurisdiction. "Formerly a mistake in the form of the judgment as to costs was ground of a writ of error, but it is no longer so, and any error with respect to costs may be amended by the Court in which the judgment was given, upon the application of either party."—R. G. Pr. r. 27." *Smith's Action at Law*, 5th edition, p. 179. There is no such rule in Ireland, and this shows after judgment and execution executed, the Court has no jurisdiction. [*Monahan, C. J.*—That never can apply to the amount of costs.] [The taxing-officer, in answer to questions by the Court, said that by the practice of the office, a plaintiff would get the costs of withdrawing his own record if he ultimately succeeded.] This is an application to review the officer's taxation, and it is an elementary principle that it cannot be granted unless the matter was properly brought before him. [*Christian, J.*—Your argument is that not only the judge of assize, but the Court here have no jurisdiction, no matter what the misconduct may have been.] At no period of the assize has the judge a jurisdiction to deal with the costs of that stage of the action. [*Christian, J.*—That appears to have been the Chief Justice's opinion.] The plaintiff has been guilty of laches. Three years have elapsed. An application should have been made to the Chief Justice in the life time of Mr. Courtenay. The matter should have been presented to the Court while it was fresh in the recollection of the parties. It is said we were as much to blame, but we were confident of ultimate success. 2. The application, if entertained, should be refused. There is no sufficient misconduct on the affidavits. We were not able to procure the affidavits we might otherwise have obtained, the parties being at a fair. How, at the end of three years, in the absence of specific statements, is the court to determine what is tampering? As to the word "frivolous" it may have been wrong to express any opinion, but that opinion has been confirmed by three verdicts. As to the jury being called by Whitelaw to look at the flag, it was to see flags and gates that the jury went there. As to Reed, he had a farm adjoining the defendant's, and it was natural he should join the crowd. We had no control over him, and he had a right to say, "Do not go on my land." There was no order of the Court. It is sworn to in all the affidavits that the view occupied five hours. The plaintiff and Brett are the only persons who have made affidavits, and Brett's only contains a general allegation of believing what is in the plaintiff's. The affidavit of Adair, the defendant's solicitor, states that the jury appeared to be dissatisfied at being kept a long time; that Reed was a grand juror; that he did not hear a single observation in respect to the causes of complaint which could have prejudiced the jury, and did not believe there was any, and would have stopped any if there had; that he saw the plaintiff's attorney walking with members of the jury during the day; that the Chief Justice stated he would proceed with the trial, in consequence of which the plaintiff withdrew his record; that he believes the reason he withdrew was because he was advised he had not a fair case to present to the jury; that the plaintiff had since brought an action against the defendant in the Court of Exchequer, in the name of a pauper

plaintiff, one Rorke, and that the defendant has no remedy for the costs of that trial.

Monahan in reply.—A motion made by the plaintiff to postpone a trial, because a witness is absent is not generally acceded to, unless upon strong grounds. There was the ordinary rule, regarding the month before this Act was passed. The defendant was not entitled to the costs, unless he applied by motion to the Court; he was bound to show that the omission to proceed to trial was not owing to any fault on his part; and the Court had jurisdiction not only to refuse him his costs, but to make him pay costs. What is the meaning of "such costs shall be costs in the cause?" The same as the defendant would have been entitled to if he entered a rule within the month; these costs shall be costs in the cause. If owing to the misconduct of the defendant, the record is withdrawn, the course is to move to discharge the rule. If therefore the difficulty of the defendant was such that by the old practice he would not have been entitled to his costs, we would have been entitled if he had entered his rule to move to discharge that rule, and even to get an order that he should pay costs; but by his own omission to enter the rule, his case is that he has compelled the Court to give him costs. If the not proceeding to trial was owing to the defendant, it was not such a non-proceeding to trial as is within the section. "Such costs" mean the same as were referred to in the former portion of the section—*Shannon v. Copper Mines* (5 D. & L. 451). [*Ball, J.*—Is there any rule in England analogous to the latter part of the section?] These words do not occur in the English Act—*Pope v. Fleming* (5 Ex. 249). [*Monahan, C. J.*—Your argument is that if the rule had been entered, the Court would have had discretion to discharge the rule if misconduct were brought home to the defendant; that the costs in the cause are substituted for costs that would have been recovered under the rule.] In *Pope v. Fleming*, the plaintiff entered his cause on the commission day. There was a rule calling on the plaintiff to show cause why he should not pay the costs of the day, for not proceeding to trial. This case shows the Court has a discretion—*Worn v. Hill* (7 C.B., N.S., 726), was subsequent to the Common Law Procedure Act. It was argued that the defendant was entitled to a rule for the costs of the day as a matter of course, under the terms of the first part of the English Act, which is the same as this Act. I refer to 10 W. R. 354. [*Ball, J.* objected that he did not know the Weekly Reporter.] Lord Westbury recently praised the Weekly Reporter, and said it was more accurate than the regular reports. These cases show where the rule is entered for the costs of the day, if the plaintiff can satisfy the Court there has been misconduct on the defendant's part, the hands of the Court are not tied absolutely, and it has jurisdiction to see whether this arose from the default of the opposite party, and if it does see that to hold the plaintiff has done all that he could, and that there is not a case of not proceeding to trial within the section. [*Christian, J.*—The Court has a jurisdiction over costs in the cause. It appears to me that there may be two courses, a present order for costs, or that they

shall be costs in the cause; in neither case is the jurisdiction of the Court taken away.] The Court has jurisdiction to entertain the question of merits. [*Monahan, C. J.*—No doubt, *prima facie* they are costs in the cause, you being *prima facie* in default, though I doubt the construction in the office. *Christian, J.*—The early part provides only for the defendant's costs, and then says "such costs." *Monahan, C. J.*—I only notice it, lest it should be supposed, because Mr. Colles stated it, that it might be taken to mean both. Are you about to show, for that is the material question, that the record was withdrawn owing to the misconduct of the defendant?] It is mainly a question of fact. The case of misconduct is not merely made out, but it is not attempted to be answered. There are specific allegations of misconduct, not in the defendant himself, but in those acting for him—in Whitelaw, in the assistant of the attorney, in Adair, the attorney of the defendant, and in the nephew of Mills. As to Benjamin Reed, it has been sworn he was interested against the plaintiff; that when this view jury came to inspect, he forced himself on them, made observations calculated to have an unfavourable effect; that he threatened the jury with an action of trespass if they went across his land. It is sworn on the other side he was a grand juror, but it is admitted he was interested. Whitelaw pointed out a flag, telling the jury it had been placed dishonestly for the purpose of throwing the water back, and making the jury think the plaintiff had been injured by what the defendant did. The assistant has made no affidavit. In our affidavit at Naas, 26th July, which is not contradicted, we state that the assistant commenced at the first point of view, and having a long pole in his hand, stated to the jury that no gully existed there. The jury were in consequence annoyed, as they supposed they were unnecessarily detained. These acts *prima facie* were improper. In *Simon's case* (Barne's Notes, 157), the Court said the showers might show marks, boundaries, &c. That shows it would be contrary to justice to allow evidence to be given in the absence of the judge, in the absence of counsel which might creep into the jury's minds, and that they are to go in with their minds unprejudiced. Adair does not make an affidavit meeting these things. Our allegation is, "that the said Samuel F. asserted as a fact several times that the water had come over higher up." There is only a general denial that deponent or his assistant interfered with the jury as alleged. The application was not to postpone the trial, but to withdraw the record. The plaintiff had a right to do that as a matter of course; therefore the application must have been to this effect, either in consideration of not having to pay the costs, or on condition that the defendant should pay the costs. Now, by Mr. Courtenay's memorandum it appears costs were reserved at the instance of the defendant. That is reconcileable in this way: the application was met at Naas, "You were as bad as we." What the Chief Justice may have said was, he would not decide the question of costs. When the Chief Justice said (as appears by the end of the memorandum) that the plaintiff must go on or withdraw the record, that seems inconsistent, and looks more like conversation. It might have happened in

this way. The plaintiff's counsel say, If you be of that opinion, we move that the record be withdrawn without costs, and Mr. Courtenay added this, and it only means a distinct motion with reference to withdrawal of the record must be brought forward. Such a motion was brought forward. As to what took place in the taxing office, if a distinct order had been produced and drawn up by the registrar, I apprehend he would have refused to give the costs. The defendant gets a certificate which omits all statement that the record was withdrawn. The plaintiff swears that he felt it would be unjust to him that the trial should proceed with a jury who had been so tampered with. Brett's affidavit made at Naas says that deponent heard several of the jurors say that the causes of action were frivolous. As to the time which has elapsed, much depends on the construction of the order. If it means that nobody is to get these costs without applying to the Court, then there have been as much *laches* on the part of the defendant as the plaintiff; and that is the true construction of the order. [*Christian, J.*—Was not the last trial in Trinity Term, 1863, two terms since? From July, 1863, you knew that the defendant would in the ordinary way be entitled to the costs.] That is, assuming that that is the construction of the order. The time is since the 24th January at most, because then only the costs were certified. It is not pretended we knew of the existence of this memorandum in Mr. Courtenay's office.

Cur. adv. vult.

May 9.—*MONAHAN, C. J.*—This was an action for the disturbance of a water-course. The case went down to Kildare to be tried. It was arranged that the jury should have a view, and it was a portion of the verbal order that nobody was to interfere with the jury. It appears the jury went out, that the plaintiff was dissatisfied with the conduct of the parties acting for the defendant; that he thought they interfered with the jury, and made certain allegations calculated to influence them; that he applied to withdraw his record. Everybody knows that, generally speaking, anyone can withdraw his record. It appears from the lamented death of Mr. Courtenay there was not evidence of what occurred under his hand. Since the commencement of the present motion, a document in the handwriting of Mr. Courtenay has been produced, and it substantially corroborates the statement. The Chief Justice reserved the question, and said if he had no power it was to go for nothing. The plaintiff made an affidavit to ground the motion the next term. He alleges it was premature to bring it on, and though the affidavit was made he did not use it. There was another trial. The verdict was set aside on the ground of surprise or some such thing. We changed the venue on the ground that a proper trial could not be had fairly and ultimately, the defendant got a verdict. The plaintiff says he should not be liable for the costs of that first trial, and that not only should he not be obliged to pay, but that he should be recouped by the defendant the costs incurred by him in that abortive trial. Mr. Byrne, for the defendant, made a very serious objection, which seemed at first such, viz., that by the 105th section of the Common Law Procedure Act, wherever a record is withdrawn, if the defendant

does not enforce the costs of the day they become a portion of the costs of the cause, and therefore that no matter what were the circumstances, the Court has no jurisdiction. We are of opinion a proper answer was given during the argument. [His Lordship read the section.] The cases we were referred to clearly establish our own impression that if it should appear the party was not in default in withdrawing, but was coerced to do so, or in the exercise of his discretion did withdraw from the misconduct of the defendant, that before this Act, and since it was competent to the Court to see why the plaintiff withdrew the record, and if for impropriety in the defendant the plaintiff could have the rule set aside if the defendant had entered it. We adopt these cases, and say, if the defendant had entered the rule, and brought the matter for adjudication within the time, it was within our jurisdiction to consider whether we should set it aside or not. They become costs in the cause, which we apprehend to be costs in the cause subject to the same jurisdiction as if the rule was entered, and that it is competent to us to see if there was misconduct. I do not mean intentional misconduct. I must next consider the delay. If I am right, that is to a certain extent attributable to the defendant himself, for if within the month he entered that rule, the matter should be disposed of by an application to discharge it. But the question might never arise, because, not having entered his rule, he never would have been entitled unless he succeeded in the cause. It was then only the plaintiff was called on to interfere to get rid of these costs in the cause. Having regard to Mr. Courtenay's death, we think there was not delay sufficient to disentitle the plaintiff to relief. The question of the merits comes to this. That the assistant of Mr. Adair acted in a way contrary to what either party should have done. That he made allegations that there was no cause of action, that Adair pointed out where particular water had come over a bridge, and said that that was the *gravamen*, and not what the plaintiff relied on. Adair's affidavit in reply does not controvert this allegation; nor does his assistant nor do the others contradict what is said against them. There is a general allegation that Adair committed no misconduct, but there is no doubt of the matters charged, and it may be Adair did not suppose these things were culpable in the eye of the law. We must take it that he and they did these acts. What induced the plaintiff to withdraw the record? It is said that, owing to the observations of the jury, he thought they had showed a hostility to him. I do not doubt that; but what did he attribute that hostility to? Not to the inherent weakness of his case, or badness of it, but to the allegations improperly made. We think, on the merits, the plaintiff is entitled to what he seeks; that he should not have to pay the costs of the defendant of that abortive trial. The money was paid under protest. If the parties disagree as to the amount, Mr. Colle must settle that. Then the plaintiff not only seeks that, but that he should be paid by the defendant the costs incurred by him. We think he fails in that; we think that under the terms of the rule, there is a mistake in the office of the taxing master. I do not mean to say there might not be an extreme case in which the Court might visit him

with these costs. As to the costs of the present motion, the substantial question is, whether the plaintiff was liable to pay the costs Mr. Colles had directed him to pay. Our order is, that the defendant do pay these costs, as also the costs of the present motion.

Rule accordingly.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

REVENUE SIDE.

IN RE J. C. AN ACCOUNTABLE PARTY FOR LEGACY DUTY.

Practice as to enforcing an account of legacy duty by attachment against an accountable party, not being a personal representative, trustee, or legatee.

THIS was an application made to the Court to make absolute a conditional order for an attachment against one J. C. the solicitor for Mrs. L. M. C. Joy, a legatee, and also the administratrix of Harriet Joy, deceased. An order had been obtained on the 6th June on behalf of the Commissioners of Inland Revenue in the following terms:—"that J. C. in the affidavits mentioned do shew cause within six days after the service of this order upon him, why he should not deliver to the Commissioners of Inland Revenue, an account upon oath of a certain sum of £70, which he received from L. M. C. Joy (administratrix with the will annexed of Harriet Joy, deceased), as and for legacy duty payable under the said will, and that the same be forthwith paid to the Receiver General of Inland Revenue in Ireland." This order was grounded on the affidavits of L. M. C. Joy, the administratrix, and of B. N. Hindes, comptroller of legacy duties; the former stating the fact of a draft for the sum of £70 having been handed by her to J. C. her solicitor in the year 1857, for payment of legacy duty, and her belief that the draft had been honored; but that the proceeds had not been applied to the payment of the duty, and the latter stating that he had examined the books of his department, and that it did not appear by them that J. C. had paid the said sum for legacy duty or lodged an account of it. The order was made under the 13 & 14 Vic. c. 97, s. 8, as the usual course of proceeding by summons and attachment under section 47 of the Succession Duty Act (16 & 17 Vic. c. 51) was not applicable, J. C. not being an accountable party within the 44th and 45th sections of that Act. The 8th section under which the order was sought to be made is as follows: "That if any person shall have received or gotten into his hands or shall receive or get into his hands, any sum or sums of money as and for the stamp duty upon or in respect of any deed, instrument, or transaction, or intended deed, instrument, or transaction, or the duty upon or in respect of any legacy or residue, and shall improperly neglect or omit to appropriate such sum or sums of money to the due payment of such duty, or shall otherwise by or under any means or pretence whatsoever improperly with-

hold or detain the same, every such person shall be accountable for the amount of such duty or sum or sums of money, and the same shall be a debt from such person to Her Majesty, her heirs and successors, and recoverable as such accordingly; and it shall be lawful for the barons of Her Majesty's Court of Exchequer in England, Scotland, or Ireland respectively, upon application to be made for that purpose on behalf of the Commissioners of Inland Revenue, upon such affidavit as to such Court may appear sufficient, to grant a rule requiring such person, or his executor or administrator, to shew cause why he should not deliver to the said commissioners an account upon oath of all such duties and sums of money as aforesaid, and why the same should not be forthwith paid to the receiver-general of Inland Revenue, or to such person as the said commissioners shall appoint or authorize to receive the same; and it shall be lawful for such Court to refer the taking or auditing of any such account to the proper officer of such Court, who shall examine any such person as a debtor or alleged debtor to the Crown, on personal interrogatories, if such Court shall think proper so to do; and it shall be lawful for such Court to make absolute any such rule as aforesaid, in every case in which the same may appear to such Court to be proper and necessary, and to enforce by attachment or otherwise the payment of any such duties or sums of money as on such proceedings shall appear to such Court to be due together with the costs of such proceedings." The 44th section of the Succession Duty Act states what persons are accountable for duty under that Act, and is as follows, "The following persons besides the successor, shall be personally liable to Her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement of this Act, that is to say, every trustee, guardian, committee, tutor or curator, or husband, in whom respectively such duty shall be vested by alienation or other derivative title at the time of the succession, becoming an interest in possession; and all such trustees, guardians, committees, tutors, curators, husbands, and persons shall be authorized to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty, the amount thereof, or to raise such amount and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor; and in the event of the non-payment of such duty as aforesaid, every person hereby made accountable shall be a debtor to Her Majesty in the amount of the unpaid duty for which he shall be so accountable." The 47th section enacts, "That if any accountable party required by the commissioners to deliver any such account as aforesaid shall make default in doing so, it shall be lawful for the commissioners to sue out of Her Majesty's Court of Exchequer in England, Scotland, or Ireland, as they shall think expedient according to the circumstances of the case, and for such Court to issue a writ of summons in such form as the judge of such Court shall from time to time frame commanding the party so in default

to deliver such account within such period as may be appointed in the writ, or to shew cause to the contrary; and on cause being shewn, such order shall be made as shall be just.

Jebb now moved to make the order absolute, and for an attachment in case of disobedience upon a certificate of no cause shown, and an affidavit of service.

PER CURIAM.—Let the said J. C. within a week after service of this rule upon him, deliver to the Commissioners of Inland Revenue an account upon oath of the said sum of £70; and let the said sum be paid within the time aforesaid to the Receiver General of Inland Revenue in Ireland; and in default thereof let an attachment issue against the said J. C. without farther motion.

House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

DELACHEROIS v. DELACHEROIS—July 20. *

Manor—Alienation of part of manor—Repurchase by lord in fee—Escheat—Wills Act—Evidence of manor.

Whatever may be the origin of the distinction, there is a settled distinction between the case of a lord of a manor re-acquiring lands once severed from the manor by escheat and by re-purchase. In the former case the lands become reunited to the manor so as to pass by a previous devise of it; but in the latter case this is not so.

A patent from the Crown, 2 Car. 1, granted lands to H. with power to create manors thereof. A later patent re-granted the lands to H. and declared that certain of such lands, including the lands of B, should form the manor of D. In 1721, the then owner of the manor of D. made a fee-farm grant of the lands of B. to L, paying rent and doing service therefor at the Court of D. The manor courts had been held at D. from before the time of living memory, and the occupiers of the lands of B. attended these courts. In leases of B. the tenant was bound by covenants to do suit to the manor courts of D.

Held, that there was evidence to go to the jury that there was, in 1721, a manor of D, comprising the lands of B. as part of its demesnes.

Quære, whether the effect of the deed of 1721 was to vest the lands of B. in L, wholly severed from the manor of D, or to be holden as of the manor of D.

This was a proceeding by way of appeal from a judgment of the Exchequer Chamber of Ireland.

The defendant in error, as plaintiff below, brought an action of ejectment against the plaintiff in error to recover one-third of the lands of Ballyhayes. The defendant, in error, claimed as heir-at-law of his uncle,

Daniel Delacherois: while the plaintiff in error claimed as devisee under the will of the said Daniel Delacherois. The said Daniel made his will before the Wills Act, viz., on 3rd of March, 1836, devising all his real estate. He died on 1st of October, 1850. The question was whether the property in question passed by the will. It was part of a manor vested in the testator at the time of his will. The lands, though originally part of the manor, had been sold and then reconveyed in fee to the lord. It was contended, on the one hand, that the reconveyance made the lands once more part of the manor; while, on other hand, it was contended that the lands could not again become part of the manor after being once severed from it.

The Court in Ireland held that the lands did not become again part of the manor, and gave judgment for the plaintiff below, which judgment was affirmed by the Irish Exchequer Chamber. Error was then brought to the House of Lords.

The following learned judges attended the argument: Pollock, C.B., Blackburn, Williams & Willes, J.J., and Bramwell, B.

Sir H. Cairns, Q.C., Law, Q.C. and C. Hall, for the plaintiff, in error, contended that lands held in fee of a manor, if purchased by the lord, when seized of the manor, became reincorporated with and parcel of the manor; that there is no distinction between the lord re-acquiring by purchase and by escheat; that, therefore, on the re-purchase of these lands in 1842, they became parcel of the manor and passed by the devise in his will—1 Cruise Dig. tit. "Tenure," 36; Wright's Tenures, 4; Butler Co. Litt. 191 a; 3 Pres. on Conv. 26; Montague's case, Ley 63; Anon., Saville, 24; Cresswell's case, 1 Moo. 729; Mountjoy's case, 5 Rep. 3 b; Temple v. Cooke, Dyer, 265; Holmes v. Hanby, 2 Keb. 28; Anon., 12 Mod. 128; Bingham v. Woodgate, 1 Russ. & M. 32; Robinson on Gavelkind, 85; Com. Dig. "Gavelkind," Bro. Ab. "Disclaimer."

The Attorney-General (Sir R. Palmer, Q.C.), Whiteside, Q.C. and Dart, for the defendant in error, contended that the power of creating tenure never attached to these lands, that they were not granted to be held as of the manor of Donaghadee; and when tenemental lands are purchased by the lord they do not again become parcel of the manor; and that a purchase differs from escheat in its legal effect—Hawkins v. Gathercole (6 De G. M. & G. 1); Attorney-General v. Wyggeston, (13 Beav. 113); Doe v. Davidson, (2 M. & S. 175); Bradshaw v. Lawson, (4 T. R. 443); Vin. Abr. "Manor," 218; Burgess v. Wheate, (1 Eden, 177); Brunker v. Cooke, (11 Mod. 122); Roe v. Wigg, (6 T. R. 708); Glover v. Lane, (3 T. R. 447); R. v. Mein, (4 T. R. 480); Passingham v. Petty, (17 C. B. 363); Doe v. Williams, (11 M. & W. 807).

At the conclusion of the argument the following questions were put to the learned judges:

First, whether there was evidence to go to the jury that there was on 5th January, 1721, a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof?

Secondly, assuming the existence of such a manor was the effect of the deed of 5th January, 1721, to

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vest Ballyhayes in Luke St. Lawrence and his heirs wholly severed from the manor of Donaghadee; or was it to vest the estate in him and his heirs, to be holden of the grantor as the manor of Donaghadee?

Thirdly, assuming the existence of the manor, and that the lands of Ballyhayes remained after the deed of 5th January, 1721, a tenement portion of or holden of that manor, did the third part of those lands conveyed in fee to the lord of the manor in 1842, become so re-united to the manor as to pass by the devise of that manor made on 3rd of March, 1863?

The learned judges having taken time to consider, afterwards returned the following unanimous opinion, read by

WILLES, J.—My Lords, as to the first question, we are of opinion that there was evidence to go to the jury that there was on the 5th of January, 1721, a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof. The first patent of Charles I. granted manorial rights in respect amongst other things of holding, not merely courts leet, which, although usual incidents of a manor, do not necessarily involve that the lord should have a manor or seignior in respect of services rendered by the suitors, but also courts baron, which are proper incidents to a manor or seignior, and cannot exist without freeholders owing suit and service to the seignior, or, if there be demesnes in the hands of the lord, to the manor over the limits of which the jurisdiction extends. A court leet involves only limits and residents. A court baron further involves the existence of freeholders owing suit and service to the manor, for, failing them, the barons of the court and the court baron must *de facto* expire together: (Coke Littleton, 58 a). It therefore involves a manor or seignior, and nothing less than such a manor, with the right of creating holdings, which owe suit and service to the manor, and not immediately to the Crown, can satisfy the grant. The greatest caution and learning appear to have been bestowed upon the framing of this and the subsequent grant of the same king, which are studiously extensive and precise. The framer both of the first and the second patent anticipated the difficulty which was raised in *Chetwode v. Crew*, (Willes, 614) as to creation of tenure in modern times upon a conveyance in fee-simple of the demesnes of an English manor, so as to keep up or revive a court baron which had failed for want of freeholders. And, accordingly, each of the patents in so many words professed to authorize sub-infeudation in fee-simple of any of the lands within the manor, to be held by suit of court, and any other services or rents, with a *non obstante* of the statute of Quia Emptores, and any other statute to the contrary. This and other patents of the like kind were soon brought into doubt, and it was thought proper they should be confirmed by Act of Parliament, which they accordingly were, and, if effectually so confirmed, the result is, that this case was properly considered in the court below as if the main question were unaffected by the statute of Quia Emptores and De Prerogativa Regis. With the view then of confirming amongst others the title to the manor in question, the Act of Car. I. sess. 1, c. 3, provided for the confirmation of defective titles by letters patent founded upon commissions of grace, and

it extended, *inter alia*, to "manors," and it enacted that all and every person, &c. should enjoy "all such manors, lands, tenements, and hereditaments of what nature soever according to the purport of the said letters patent, for such fines, &c. and with such privileges, liberties, profits and commodities, and in such manner and form, as in and by the said letters patent shall be limited and appointed." It went on to ratify the confirmatory patents to be granted, and to make them of the same force as if every clause was *verbatim* enacted by Parliament, and it enacted that "every clause, article and sentence in them, or any of them, to be contained for ever from and after the making of the same letters patent, shall stand, be, and remain and be adjudged and taken to stand and be of such and the same force and effect to all intents and purposes as if the same letters patent and every of them, and every clause, article and sentence in them and every of them to be contained, were specially and particularly herein expressed, and by the authority of this present Parliament enacted." This statute, it will be observed, expressly dealt with "manors," and contained words large enough to include all incidental rights. It was followed by the 10 Car. I. sess. 3, c. 2, which explained and confirmed it. It mentioned, as one species of defect to be cured, the "lack or omission of sufficient and special *non obstantes* of particular statutes." In 1637 a general commission of grace, in terms extensive enough to authorize all that was done under it in this particular, accordingly issued, upon which the patent of the same year was issued re-granting the land, and in express terms granting or creating (for the words are large enough for either) a manor of which Ballyhayes was part, and also in express terms the right to make sub-infeudations in fee-simple, and also the right to hold a court baron and a court leet. This patent appears to have been amply authorized by the terms of the commission of grace. That commission further declared that the king would ratify what was done under it at the next Parliament. Accordingly, the 15 Car. I. c. 6, (not set out in the papers, but to be found in 2 Irish Stats. 194) was passed for the purpose of confirming such patents of, amongst other things, "any manors, franchises, liberties, or other hereditaments," of what nature soever, by virtue of any commission of grace, and which render such patents valid, "notwithstanding any defect whatsoever, or any statute, ordinance, law, cause, matter or thing, which might in any way impeach, enfeeble, avoid, or destroy any of the said letters patent in all points whatsoever." It seems difficult to construe this latter statute in any other manner than as a statutory confirmation of the patent of 13 Car. I. in its very terms, and as creating a manor with the right of sub-infeudation in fee therein, notwithstanding the statutes of Quia Emptores and De Prerogativa Regis; and, indeed, in our opinion, stopping here, the second patent was confirmed in terms, and a manor with such a power of sub-infeudation was created. That power thus conferred by statute constitutes, in our judgment, the chief peculiarity of the case, and distinguishes the capacity of the lord of such a manor from that of the lord of an ordinary manor in this part of the kingdom, in respect of creating tenure in fee-simple at the present day. Add to

this, that the lands have been enjoyed under the said grants, and that in the conveyance to Luke St. Lawrence of 1721, the lands of Ballyhayes are described as in a manor, and that part of the consideration for that conveyance was suit and service to the manor court, and that enjoyment was had under that conveyance. Further add, that manor courts were held and attended. Under these circumstances we cannot doubt that there was at least (in the terms of the question) evidence to go to the jury that there was a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof. It is scarcely necessary to observe that copyholds, or a copyhold court, of which the steward alone is the judge, or customary freeholds, as they are incorrectly called—see *Thompson v. Hardy*, (1 C. B. 940) are not necessary to the existence of a manor, although, in this part of the kingdom they are common incidents of one. We are not aware that these base tenures exist in Ireland. In them the freehold is always and immediately in the lord only, though the usufruct is in the tenant. Without attempting to define a manor in the abstract, it is enough to say, that the seisin of a defined district, with the power of sub-infeudation therein, and the existence of freeholders holding of the manor, and the right to a court baron, in which the feudatories are judges, does of itself constitute a seignior or manor within the considerations applicable to the present case. As to the second question, assuming the existence of such a manor, we are of opinion that the effect of the deed of the 5th of January, 1721, was not to vest Ballyhayes in Luke St. Lawrence and his heirs wholly severed from the manor of Donaghadee, but that it was to vest the estate in him and his heirs, to be holden of the grantor as of the manor of Donaghadee. As to the capacity of the lord to create such a tenure, we consider that to have been established by the second patent of Charles I., and the statutory recognition thereof in the fifteenth year of the same king. And under this head, therefore, it is only necessary to consider the effect of the conveyance of 1721. That conveyance was by way of lease and release, at the time the “common assurance of the realm.” The effect of such a conveyance was, we apprehend, to convey the same estate and interest, and no more, than if the same words were in a deed of the same estate executed with livery:—(Com. Dig. “Release,” C. 2). What then was the effect at the common law before the statutes of *Quia Emptores* and *De Prerogativa Regis* of a feoffment by a mesne, without expressly stating whether the feoffee was to hold of the lord paramount, or of the mesne? According to Littleton, it was that he should hold of his own feoffor. This is approved and repeated by Coke: “Before that statute (*Quia Emptores*),” says Littleton, a. 316, “if a man had made a feoffment in fee-simple by deed or without deed, yielding to him and his heirs a certain rent, this was a rent service, and for this he might have distrained of common right, and if there were no reservation of any rent or of any service, yet the feoffee held of the feoffor by the same service as the feoffor did hold over his lord next paramount.” Upon this latter point Lord Coke observes, that “this is evident, and agreed with our books, that in this case the law created this tenure, where it is to

be observed how the law regardeth equity and equality without any provision or reservation of the party.” And, again, in the second Institute, 500, the Commentary upon *Quia Emptores* is, if the tenant had made a feoffment in fee before the statute generally, without reservation of any tenure, the feoffee should have holden of the feoffor as he had held over; “for example, if he had holden by knight’s service, the feoffee by creation of law had holden by knight’s service of the feoffor, in respect of the tenure over by him; and, therefore, if the lord had confirmed the estate of the feoffor, viz., the mesne, to hold by fealty only, (which was socage) the tenure between the tenant and the feoffor should be socage, also because the tenure created by law followed the tenure in respect of which it was created.” This was founded upon obvious good sense, for the mesne could not convey the fee simple without seignior and right of reverter remaining in somebody, and there seems to be no good reason why, in the absence of express words to the contrary, that right should not remain in the feoffor himself, in so far as that was consistent with the passing of the entire estate stipulated for to the feoffee. This reasoning applies still more strongly to a case like the present, where there is an express reservation of rent, and where the conveyance is made in terms, “subject always to the payment of the said yearly rent of 5*l.* sterling, and to the performance of the covenants,” one of which was, “to do suit and service at the manor court,” a tenant’s duty. As to the large words of the all-estate clause, viz., “and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and of every part and parcel thereof, and all the estate,” &c. it must be remembered that the conveyance is dealing with and operating upon what was to pass as between Lord Mount Alexander and Luke St. Lawrence. The ultimate seignior must either have remained in the releasor, or become vested in the Crown. The estate could not pass to Luke St. Lawrence without the seignior remaining in one or other. It did not affect the estate granted to him, but merely what should become of his land upon the cesser of that estate, whether it was holden of the manor or of the Crown. There is no reason for construing these general words as a creation of a seignior in the crown any more than for construing them to release the fee-farm rent expressly reserved. Further, the covenants to render suit and service would be inoperative unless tenure existed between the parties, and the whole deed must be read together. It may be argued that these covenants sound in contract only, and not in render. But a reservation does not require any particular form of words, and a lease with a covenant by the lessee to “pay rent has been treated as a reservation: (see Hargreave’s note to Coke upon Littleton, 47 a. It is there said, “Lease for years by indenture, and lessee covenants to pay £5 a year;” this is a reservation: (Dy. 276, H. 6, Car. B. R. Crook, n. 1, *Drake v. Munday*.) But if there be reddendo rent, and the lessee covenants to pay two capons, there it seems to be only covenant: (M. 40, 41, Eliz.; *Bruerton’s case*, Hat. MSS.; see Cro. Car. 207, and Hardr. 326). To this we may add Lord Coke’s judgment in *Attos v. Hemmings*, (Bula, 281) that a demise with a co-

venant by the tenant to pay a yearly sum constitutes a rent as much as if that yearly sum had been reserved with a formal *reddendo*. These authorities show that a covenant for service may be construed according to the intention of the parties as a reservation, otherwise it would be a covenant in gross, and so could not go with the reversion according to the obvious intention of the parties expressed by the words "heirs and assigns." The circumstance of the covenant to do suit, which can only be actually performed by a tenant and the effect of the clause making the lease subject to the rent and covenants, distinguish this from the case of the capons, and require us acting on the golden rule of construction, to give effect to the intention of the parties as it appears on the whole instrument; though the language used be not strictly and technically correct, to construe the deed as reserving suit of Court as a service; at the least, a rent is reserved, and in respect of land described as being within this manor. It may be suggested, that in this view the clause of the distress would be inoperative. But that was no doubt intended *ex majori cautela*, and for the benefit of the lord, and it cannot affect the character of the rent. Clauses of distress have often been unnecessarily inserted in leases. In Littleton's time, it was usual to insert a clause of distress even in leases for years, (see Littleton, s. 331), and such clauses being in the affirmative do not take away what is incident of common right: (Coke Littleton, 204, b.) It appears to us, therefore, that upon the execution of the deed of the 5th Jan. 1721, Luke St. Lawrence held of Lord Mount Alexander, *inter alia*, by suit of Court, and so necessarily of the manor. The words "ut de manerio" are not, as it seems to us, necessary for this purpose, if the subject-matter be part of a manor, and there is no intention shown absolutely to sever the part from the manor. There is a precedent in West 420, with a reservation of suit of Court in which the words, "ut de manerio" do not occur. Indeed, if a tenure exist, the reservation of suit of Court of itself indicates a holding as of the manor to which the Court is incident. It is right to add, that neither the first nor the second question was discussed in Ireland, and in dealing with them we have been spared from expressing any opinion at variance either with that of the majority of the judges in the Exchequer Chamber, there, or that of Pigot, C.B., who dissented from the judgment. As to the third question we concur with the Lord Chief Baron in opinion, that assuming the existence of the manor with the statutory power of sub-infeudation already referred to, and that the lands of Ballyhayes remained, after the deed of the 5th Jan. 1721, a tenement portion of or holden of that manor, the third part of those lands conveyed in fee to the lord of the manor in 1842, did become so reunited to the manor as to pass by the devise of that manor made on the 3rd March, 1836. This question turns upon the effect of the Wills Act in force at the latter date, whereby a will passed only what the testator had at the time of the making of the will. Now there can be no doubt that if the conveyance of 1721 is to be treated as one whereby the grantor "aliened away absolutely" parcel of the manor so as to disannex it therefrom, and to convey it to the grantee discharged of any tenure or service,

the repurchase would not have so reannexed that parcel to the manor as that the parcel should pass by a previous will. To this effect were numerous authorities cited in the argument. These cases, however, are altogether distinct from the present, for in them there was no tenure or service, but in fact and in law an entire severance from the manor. And the introduction of these authorities into this argument has tended to create much confusion. It is enough to point out that in such cases the right of escheat or other incident of seigniority did not exist, and upon the ceasing of the estate the Crown or other superior lord, and not the testator, had the right to enter and hold, not that estate, but as of his former estate free thereof. A good instance of this class is *Bradshaw v. Lambert* (4 T. R. 448). In this case on the contrary, it cannot be disputed, in arguing the third question, that if the land had been reannexed by escheat or descent, it would have passed under the general words of the will, which are large enough to include the manor. But it is said that there is a distinction between the case of escheat or descent and purchase, and that in the latter case the lord must be held to have acquired the tenant's estate in the same plight as if he had purchased a piece of land out of the manor. We cannot recognise the soundness of this distinction. In each case, as it appears to us, the right acquired by the lord is the seigniority discharged of the tenant's interest. His title is not a new one to stand in the shoes of the tenant, but it is his former title, with the burden of the tenancy removed. Whether it is removed by escheat or descent, or by the purchase of the tenant's interest, there is equally a resumption of the freehold by the lord, upon which tenure expires, and the immediate seisin is again in the lord as part of the manor. It seems a strained construction of the law to say, that if the lord had not purchased the interest of the tenant, the right of reverter and the services would have passed by the will, but that because the lord has purchased that additional interest in the land nothing shall pass. It is as much as to say that the seigniority of the lord is extinguished in the interest of the tenant, which alone remains, instead of the lord holding as of his former title discharged of the tenure, which is more consonant to analogy. In effect, the land which was never absolutely severed from the manor, returned into the hands of the lord as part of his manor. A very wide field of authority was traversed in the argument, over which we think it no part of our duty to follow. We content ourselves by selecting the following authorities, and with expressing our concurrence in the propositions which they lay down. In the second Institute, 501, it is said, "If the mesne release to the tenant, the tenant shall hold *per eadem servitium* as the mesne did, and so if the tenant enfeoff the mesne shall hold *per eadem servitium* as he held before, and so it is if the tenancy comes to the mesne by act in law as by escheat or descent, the mesne shall hold *per eadem servitium et consuetudines* as he held before; for albeit the tenure between the tenant and the mesne in those cases be extinct, yet the seigniority paramount, which also was issuing out of the tenancy, remaineth still." And see Co. Litt. 313 a, 314 a. Here no distinction is drawn between release or feoffment and act in law,

the effect in each case being stated to be that the tenure between the tenant and the mesne is extinct. There is therefore an express authority for Mr. Preston's comment upon the passage in his edition of the Touchstone, p. 439, the text of which is: "If a man make his will the first day of May, and thereby give the manor of Dale to one in fee, and the 10th day of May one of the tenancies escheat, and the 20th of May the deviser dieth; in this case, and by this devise it seems the devisee shall have his tenancy that doth escheat." To which Mr. Preston adds, "for the tenancy is extinguished in the seignior." This has been found fault with as unauthorised; but it is in accordance with the passage from the second Institute applying both to purchase and escheat, and is, in our opinion sound law. For the same reasons we adopt as sound law (applied to a fee created at such a time and under such circumstances as to be held of the manor so as to escheat of the lord, not the Crown), the passage in Mr. Preston's work on Abstracts, vol. 3, p. 30, that "lands which become part of a manor by an escheat or by purchase after the publication of a will, will pass as part of the manor." We thus answer all the questions which have been put.

Cur. adv. vult.

LORD BROUGHAM.—My Lords, in this case I have had very considerable doubts, but those doubts are now completely removed. I have had access to the very able statement of my noble and learned friend who sits opposite (Lord St. Leonards), and which I have no doubt he will read to your Lordships. I am of opinion, ultimately, that the Court below in Ireland were right in differing with the Lord Chief Baron, and the result of that is, that I should advise your Lordships to give judgment for the defendant in error, he being the plaintiff below, and the heir-at-law, for I am of opinion, that the third part of the lands of Ballyhayes, which had been reunited to the manor, did not pass by the devise of the manor in March, 1836. The result of that will be that your Lordships ought in my humble apprehension, to give judgment against the plaintiff in error, who was the defendant below, and for the defendant in error, the heir-at-law, who was the plaintiff below, I being of opinion that the devisee has not substantiated his claim. I may state in a few words, that I have read with very great pleasure and satisfaction the able and well-reasoned, but in my opinion ultimately erroneous opinion of the five learned judges in which they all concurred. I shall therefore move your Lordships to give judgment against the plaintiff in error, and for the defendant in error, who was the plaintiff below, he being the heir-at-law.

LORD CRANWORTH.—My Lords, this was a writ of error from a judgment of the Court of Exchequer Chamber in Ireland, in an action of ejectment brought in the Court of Common Pleas by the defendant in error, against the plaintiff in error, to recover one-third part of the lands of Ballyhayes, in the County of Down. Daniel Delacherois, the testator duly made his will, dated the 3rd May, 1836, and he thereby devised all the real estates of which he should die seised, to the use of his sister Mary, for her life with remainder to the use of such of his nephews, sons of

his deceased brother Samuel, for the life of such nephew as she should by deed or will appoint. He died on the first October, 1850, without revoking or altering his will, leaving his said sister and also the plaintiff and defendant in error, his nephews, being the two sons of his deceased brother, Samuel, him surviving. Nicholas the defendant in error, being his heir-at-law. Mary, the sister, entered on all the lands whereof the testator died seised, including the third part of Ballyhayes; and by her will dated in 1852, she, in exercise of the power conferred on her by the will of the testator, appointed all the real estates of her late brother to her nephew Daniel, the now plaintiff in error. She died on the 10th March, 1854, without having revoked or altered her will, and thereupon the said Daniel her nephew entered on the lands so appointed, including the third part of Ballyhayes, which forms the subject of this action. If this third part of Ballyhayes passed by the will of Daniel the testator, the title of the plaintiff in error is clear. But the defendant in error, Nicholas Delacherois, claims it as heir-at-law of the testator, on the ground that as to this third he died intestate. It was conveyed to him and his heirs in March, 1842, long after the date of his will made in 1836, and the defendant in error contends that it was therefore unaffected by the will, and so descended on him and his heirs. As the will was made before the Wills Act, 1837, the contention of the heir appears on the first view of the case to be well founded. But the plaintiff in error contends that the third of the lands though purchased by and conveyed to the testator after the date of his will, yet passed by it, because he says the lands were freehold lands holden of the manor of Donaghadee, of which manor the testator was seised in fee when he made his will in 1836, and the plaintiff in error contends that by the conveyance to the testator in 1842, the third part of these lands became reunited to the manor, and so passed by the previous devise of it. The defendant in error, the heir-at-law, brought this action in the Court of Common Pleas in Ireland, against the plaintiff in error, and the same came on for trial before Ball, J., at the summer assizes for the county of Down, in the year 1856. At the trial the defendant in error, the plaintiff below, gave in evidence the conveyance of the property in question to the testator in fee-simple in 1842, and his seisin thereof, from thence and up to the time of his death; and further that he the plaintiff below was the heir-at-law of the testator. The plaintiff in error the defendant below, offered, on the other hand evidence to shew that there was a manor of Donaghadee of which the testator was seised in fee when he made his will in 1836, and that on the 5th Jan. 1721 the then lord of the manor conveyed the lands in question, being then parcel of the manor, to one Luke St. Lawrence and his heirs, so as to vest the same in him and then to be holden of that manor. At the close of this evidence the learned judge directed the jury that if they believed the evidence the plaintiff below was entitled to their verdict. To this direction the defendant below (now plaintiff in error) excepted and called on the learned judge to direct the jury, that if they believed the evidence, then he was entitled to their verdict. The judge however refused to alter the direction he had given, and the jury accordingly re-

turned a verdict for plaintiff below, the testators heir-at-law. The ruling of the learned judge was sustained first by the Court of the Common Pleas in Ireland, and afterwards by the Exchequer Chamber, Pigot, C.B. however dissented. The case was then brought to this House by writ of error, and was elaborately argued at the bar in the presence of five of the learned judges. The ruling of the learned judges below was clearly right unless there was evidence at the trial on which the jury might find that there was a manor of Donaghadee of which the testator was seised in fee when he made his will, and that the lands in question were holden of that manor; and further, unless assuming the evidence of such a manor of which the testator was seised in fee when he made his will, and that the lands in dispute were freeholds holden of it, still those lands would not pass by a devise of the manor made prior to their conveyance to the testator. In order to enable us by the assistance of the learned judges to arrive at a just conclusion, your Lordships at the close of the arguments put to them three questions, and in answer to these questions the learned judges who heard the arguments, have through Willes, J., given it as their unanimous opinion, first, that there was evidence to go to the jury that there was on the 5th Jan. 1721 a manor of Donaghadee, comprising the lands of Ballyhayes as part of the demesnes thereof; secondly that the effect of the deed of 1721 was to vest the estate of Ballyhayes in Luke St. Lawrence and his heirs, to be holden of the grantor as of the manor of Donaghadee; and thirdly, that the third part of Ballyhayes conveyed to the testator in 1842 did become so reunited to the manor as to pass by the previous devise of 1836. Whether your Lordships concur in that opinion is the point now to be decided. In the first place, as to the two first questions, I have no difficulty in expressing my full concurrence in the opinion of the learned judges. Their reasons are so fully and so clearly expressed in their opinion, delivered by Willes, J., that I need do no more than refer to that opinion. But it is on the third question that the difficulty arises. On this point also I was at first strongly inclined to concur with the learned judges. I could see no satisfactory ground for a distinction between the case of a tenancy coming to the lord by purchase, and its coming to him by escheat, by his own act, or by act of law. But after all, this is a matter pre-eminently *juris positivi*. That in some cases there is a different legal result when the same thing arises from the act of the parties, and when from the act of the law is certain, and the only question is whether the authorities shew that this difference does exist in such a case as the present, though if the third of Ballyhayes had come to Daniel Delacherois the testator, after the date of his will by escheat, they would have become reunited to the manor, so as to pass by the previous devise of it, yet that this is not so when he acquired it by purchase. I feel bound to say that an attentive examination of the old authorities has satisfied me, contrary to my first impression, that such a difference does not exist, and so that the judgment below upon this point was correct, and I come to this conclusion quite as much from a consideration of the cases relied on by the plaintiff in error as of those brought forward by the defendant. The case to which we were referred

by the plaintiff in error, of *Hutton v. Gifford* reported in Saville, p. 21, had struck me as strongly supporting his argument. But a more attentive examination of it has convinced me that it bears in the opposite direction. The case is to this effect: John Hutton seised in fee of the manor of Chambers, purchased from the Crown the manor of Crowland, of which the manor of Chambers was holden. On the death of John Hutton these manors descended to John Hutton who conveyed them to feoffees, not treating them as having become one, but still remaining two, to the use of himself and his wife and his own heirs. He afterwards purchased lands holden of the manor of Chambers, of which he afterwards made a feoffment to Gifford. It was said by Manwood, C.B., in giving judgment, that by the purchase of this tenancy by the lords, it became parcel of the manors, and holden of the manors were, of the king *in capite*. It is to be observed that throughout the case the report speaks of the manors in the plural, as if both were still in existence, which would not have been the case if by the purchase by John Hutton of the superior manor the inferior manor had become merged in it. It may be admitted however, that if the case had ended at the passage I have quoted from the judgment of the Chief Baron, it would have afforded strong support to the appellant's case. But the judgment goes on to say that when he (that is John Hutton) enfeoffed Gifford, Gifford shall hold this as the feoffor held it before. This shews that when it was said that by the purchase of the tenancy it had become parcel of the manor, it could not have been meant that it had been reunited to the manor in the same way as if it had been escheated. For in that case it would have been bound by the previous feoffment to uses, and John Hutton could not have made a feoffment of it to Gifford so as to prevent his wife, if she should survive him, from being entitled for her life to the land. It is plain from the judgment of Shute, B., following Manwood, C.B., that in the view of the Court the wife had no such right, for he says that if John Hutton die leaving his wife, the tenant (that is Gifford) shall hold of the wife during his life—a proposition incompatible with the notion that she would herself be entitled to hold and enjoy the land itself as part of the manor. The Court decided that in her favour, the seignior would, after her husband's death, revive during her life. And this could not be if there had been such a union of the lands with the manor as would have subjected them to the operation of the previous feoffment to uses. This case therefore appears to me to be an express decision, not in favour of, but against the appellant. Two other old cases were much pressed in the argument at the bar: *Montague's case*, (Ley. 68), and *Creswell's case* (Moo. 729). But they do not support the appellant's case, but by implication point in an opposite direction. In the former of these cases the facts were that Sir Edward Montague seised in fee of the manor of Workton which was holden *in capite* of the Crown, purchased seven acres of the land holden of the manor in socage. It was decided that these seven acres from the time of the purchase were holden of the Crown *in capite* by knight's service, as the said manor was holden. This it was contended at the bar on behalf of the plaintiff in error, showed that these seven acres had become

parcel of the manor. But that is not so. The language of the Court cannot be reconciled with the supposition that these lands were considered to have become parcel of and to have been reunited with the manor. The lands and the manor are treated as being two distinct things. If the lands had become part of the manor it would have been incorrect to say that they were holden as that of which they formed part was held. The tenure was changed from socage to knight's service, because that was the tenure by which the manor was holden, not because the lands had become parcel of the manor. I do not go into the details of *Creswell's* case, because the observations I have made as to *Montague's* case apply equally to *Creswell's* case. The learned judges refer to and rely upon a passage in the second Institute in support of their view of this case. But with all deference to them, I cannot think that Lord Coke meant in that passage more than was established in *Montague's* case, namely, that when the lord of a manor purchases lands holden of his manor, he shall hold the purchased lands not according to the tenure by which they were holden of him before the purchase, but by the same tenure as that by which his manor is holden. Lord Coke can hardly have meant more than this when it is recollected what he states to have been held in *Mountjoy's* case (5 Rep. 6 a.) One of the questions there was "as to what would amount to a variation of the accustomed rent, and it was held that in some cases where a variation of the accustomed rent would be bad if made by act of the parties, it might yet be supported if occasioned by act of the law. And the report proceeds: "And as to the case of escheat of a tenancy it was agreed for good law. For the act of law or of God will not prejudice any one. But if the lessor had purchased the tenancy it would be otherwise, for that which is purchased is not parcel of the manor because he acquires it by his own act." On these grounds I feel bound to say that on this third point I am unable to concur with the learned judges. They refer us to several passages in the works of the late Mr. Preston in which he certainly treats the case of a freehold acquired by the lord by purchase as carrying with it the same incidents as would have attached in the case of an escheat. If I had found any old authority warranting what Mr. Preston has so laid down, I should have been glad to follow it. I am not ashamed to say, that I had always understood the law to be as he stated it; but a closer examination of the authorities has convinced me that I was wrong, and therefore I think that there ought to be judgment for the defendant in error.

LORD ST. LEONARDS.—My Lords, this case although apparently a simple one, is one of much difficulty, and upon which there has been great difference of opinion between the judges of Ireland and the judges of England. Your Lordships are in possession of the facts. The facts are, that Delacherois, being the owner of the manor or reputed manor of Donaghadee, made a will under which the appellant claims. The testator afterwards purchased a fee simple estate within the manor, and if this estate was afterwards held of the manor, it passed by the prior will as part of it; otherwise it descended to the heir-at-law of the testator, the defendant in error. The Court of Common Pleas

in Ireland decided in favour of the heir-at-law, the defendant in error in this House, and the Court of Exchequer Chamber in Ireland affirmed the decision, six judges being for the affirmance, and one judge dissenting therefrom. The case upon appeal to this House from the judgment of the Exchequer Chamber in Ireland, was heard by your Lordships with assistance of five judges, whose opinion has been delivered in the House, disagreeing with the judgment in Ireland, and giving their reasons why the devisee and not the heir-at-law ought to have the estate. The questions which your Lordships put to the judges were three. The judges certified their opinion to be as follows:—On the first question, that there was at least in the terms of the question evidence to go to the jury that there was a manor of Donaghadee comprising the lands of Ballyhayes as part of the demesnes thereof. On the second question they were of opinion, assuming the existence of such a manor, that the effect of the deed of the 5th Jan. 1721 was not to vest Ballyhayes in Luke St. Lawrence, and his heirs wholly severed from the manor of Donaghadee, but that it was to vest the estate in him and his heirs to be holden of the grantor as of the manor of Donaghadee. They say that it is right to add that neither the first nor the second question was discussed in Ireland, and in dealing with them they were spared from expressing any opinion at variance either with that of the majority of the judges in the Exchequer Chamber there, or that of Pigot, C. B., who dissented from the judgment. As to the third question they concurred with the Lord Chief Baron in opinion that assuming the existence of the manor with the statutory power of sub-infeudation, and that the lands of Ballyhayes remained, after the deed of Jan. 1721, a tenement portion of or holden of that manor, the third part of those lands conveyed in fee to the lord of the manor in 1842 did become so reunited to the manor as to pass by the devise of that manor made on the 3rd March, 1836. These opinions if acted upon by your Lordships, would lead you to reverse the decision in Ireland, and to decide the case in favour of the devisee of the late Mr. Delacherois. I shall now consider these three questions separately, and state to your Lordships my opinion thereon. I will assume that the grants from the Crown and the Acts of Parliament gave to the grantees a power to create manors and allotted demesnes to them, and gave to him the power of granting the lands in fee or otherwise to be held of the manors, although the Act of 15 Car. 1, c. 6, particularly referred to by the judges in their certificate, would require some explanation to ascertain how it bore on the estate now in dispute, if the right depended on that Act. Upon this question the judges in Ireland gave no opinion. Now, upon the first point, although I agree that there was sufficient evidence to go to the jury that there was a manor of Donaghadee comprising the land in dispute as part of the demesne, yet this is a very doubtful question, and if there was such a manor, it is still more doubtful whether by subsequent events it did not cease to exist long before the purchase by Mr. Delacherois. It should be borne in mind that nearly a century had elapsed before the tenant under the Crown granted the estate to Luke St. Lawrence in 1721, and it would require much further evidence to shew that the manor

in question remained a legal manor with its court baron down to the period which would enable the devisee to maintain the foundation of his title. But assuming the existence of the manor and validity of the grants by the Crown, I am now to consider the operation of the deed of 1721, the grant from the Earl of Mount Alexander and his son to Mr. St. Lawrence. Mr. Baron Greene, in his elaborate judgment in the Exchequer Chamber, which was not adopted by the majority of the other judges, concluded by saying that he was of opinion that it was nowhere established that the teneemental lands once severed from a manor can be re-annexed and again become parcel of that manor by being purchased by the lord. That proposition was indispensable to sustain the devisee's case, and had not been in his judgment established, particularly with reference to the law of devise. Upon the hearing of the appeal in this House the learned counsel for the devisee did not dispute this proposition, but denied that it was the point to be decided, so that if the land were severed from the manor it is not disputed that the judgments in Ireland were correct. Upon this point all are agreed. I must now call your Lordship's attention to the terms of the conveyance of 1721 from the then lords of the manor (if the manor then existed) to Mr. St. Lawrence. I assume that they might, if the manor existed, make a grant in fee, to be held of the manor. Of course the grant by the Crown in no respect restricted them from dealing with the property as they pleased. They could have sold out and out all the demesnes, and so have destroyed the manor, or have severed any portion of the demesnes by a sale of the fee. Now the deed of 1721 is not what one should have expected to find it, if it were executed under the power in the King's charter, and there was still an existing manor. The grantors are not described as lords of the manor. The land is not described as held of or part of the manor, but in the description it is merely stated to be (locally) in the manor, just as in describing the boundaries it is stated to be bounded on the west with lands of Druneag, in the manor of Newton, belonging to Robert Colville, Esq. The grantee is not to hold of or under the manor. There is not that of which the statute of Quia Emptores complained, that grants were made to hold of the feoffors, and not of the superior lords; and although before the statutes under a feoffment in fee generally, without reservation of any tenure, the feoffee would, as Coke tells us, have holden of the feoffer, yet in 1721, unless in a case not governed by the statute, no such subinfeudation could be created, and therefore, if the case were taken out of the operation of the statute by the King's grant, we cannot doubt but that some trace of the intention to exercise the delegated power would appear on the face of the grant. But the entire frame of the deed, shows I think, that the framer of the deed—and it is scientifically drawn—was aware that, although there was a reputed manor, there was not a legal one; and therefore as he could not rely on tenure, he must trust to contract, just as amongst many instances was done in the case of *Chetwode v. Crew*, (Willes, 614); and *Bradshaw v. Lambert* (4 Term. Rep. 448.) The deed I say is in every respect precisely what a competent draftsman would draw, to give to the grantor who had not a legal manor all the bene-

fits which contract could confer, although tenure would not. Every drag-net clause is inserted, in order to leave no interest in the property in the grantor. A rent is reserved not as an incident to tenure, but with an express power of distress, and a covenant by the grantee, for himself, his heirs and assigns, to pay it, and covenants are also inserted from the grantee, in like manner to do suit and service at the manor court, and to pay leet money. The covenants by the grantors are the largest that could be framed from a grantor parting for ever with all interest in the estate except what was secured by contract, and they are accompanied by a general warranty. I am of opinion therefore that the deed of 1721 did operate to sever the demesne land comprised in it from the manor, and if I am right, it is admitted that the devisee has no title. If I am wrong in the view I take of the operation of the deed of 1721, and the estate under that deed was holden of the manor, then the third question still remains to be considered, viz., whether assuming the existence of the manor, and that the land of Rallyhayes remained after the deed of 1721 a tenement portion of or holden of that manor, did the part of those lands conveyed in fee to the lord of the manor in 1842 become so reunited to the manor as to pass by the devise of that manor by the will of 1836? Now, as we have seen this land was held by the lords in fee-simple; and they conveyed it as such. If the demesne lands of a manor are treated by conveyance as a distinct property, they cease to form part of the manor, although the rents and dues may remain: for example a fine formerly levied of them, and the same estate taken back, would have severed them. Where the fee was in a grantee originally, the lord had only the seignior which he held in common cases of the Crown. The land ceased to form part of the demesne and was held by a freehold tenant of the manor. If ultimately the lord repurchased the land, he thereupon became the fee-simple owner of it, and he held not of himself; for a man cannot be lord and tenant; but he held this portion now of the chief lord. It had lost its character of demesne land, and there being no tenant of it, it is no longer held of a manor. There is no custom which attached to it. The lord is simply seised in fee, as he was before the grant was made; but it is no longer really part of the manor, though in common parlance it may be so termed. With these general observations we may first consider the conveyance of 1842 to Delacheriois, then lord of the manor, if it existed. Here again, we are surprised at the form of the conveyance. It is in all respects just such a conveyance as Mr. Bradshaw, the then owner, would have made to any stranger as the purchaser. It is throughout in the common form of such a conveyance. The purchaser is not stated to be lord of the manor; it is not described as held of the manor; nothing is said of suits or services. The deed recites the seisin in fee in the sellers of the property, subject to the yearly head or chief rent of £2 per annum. The property is described in the operative part as lying in the manor and in the barony and county, and the purchaser accepts the covenants for title from the seller as against all possible estates and incumbrances. It is, I repeat, precisely such a conveyance as would be made of a common fee-simple estate to a purchaser wholly uncon-

nected with the seller or the property in estate or privacy. And this strengthens the view I have before suggested, that the manor, as a legal manor, had ceased to exist. It is a remarkable circumstance, that the original grant of the land by the lord, after nearly a century of enjoyment by the lords for the time being, should have been silent as to its being to be held of the manor, or as to it forming still a portion of the manor; and that, after nearly a century and a quarter's enjoyment of the land by the grantees and those claiming under him, when the then lord repurchased the land, the conveyance to him should have assumed the form to which I have drawn your Lordships' attention. In my opinion this reconveyance did not operate to make the land once more demesne land of the manor; but the lord became seised in fee of it as a distinct property held of the Crown, and therefore I hold that it did not pass by Delacherois, the purchaser's, prior will. Still, however, treating the estates as held of the manor before the conveyance to Delacherois, there arises an important question of law, namely, whether there is any distinction in such a case between escheat to the lord, and purchase by the lord. It is well settled from the earliest period, that in the case of escheat or descent, acts in law, the land would be re-annexed to the manor, and in this case the property would have passed by the prior will as included in the manor. The learned judges whose assistance we had are of opinion that the case of purchase by the lord cannot be distinguished from the case of escheat or descent; they do not recognise the soundness of the distinction. In each case as it appears to them, the right acquired by the lord is to the seigniority discharged of the tenant's interest. With great submission it appears to me that the lord's seigniority was in no respect acquired by the lord under the conveyance, for in the view we are now taking it was never out of him; but what he did acquire was the actual fee-simple in possession of the land itself, and the real question is, whether that would be reunited to his seigniority so as to form once more, properly speaking, a part of the manor; if not, of course there was an end of the seigniority, for he could not hold of himself. It appears to me that it is much too late to overrule the settled distinction between escheat and purchase. It has, I think never been decided that they stand upon the same footing. I call the distinction a settled one, because from a very early period it has been handed down to us from the highest authorities as existing. Nor is there anything unusual in the law in distinctions between the operation of acts of the party and the operation of law, and although we may not see why the distinctions were established, it is our duty to pronounce upon the law as it stands; and this distinction prevails as to manors and demesnes, as we find in *Sir Moyle Finch's case* (6 Rep. 64); and in *Knight's case*, (Moo. 203), Rolle's Abr. "Manor," G. 122, and many other authorities. After the opinions which have been delivered upon this point, I think it necessary to refer to some of the authorities which establish this distinction. In *Mounjy's case*, (5 Rep. 6 a.) it is distinctly laid down, "And as to the case of escheat of a tenancy, it was agreed for good law, for the act of law, or of God will not prejudice any one; but if the lessor had purchased the tenancy it would be otherwise, for

that which is purchased is not parcel of the manor, because he acquires it by his own acts." Coke winds up his report by saying, "Many other matters were moved by the counsel on both sides at the bar in this case, which I purposely omit, because the Court gave no resolution of them." This gives great weight to the resolutions which are retained. In *Knight's case*, (Moo. 199), Pirryan, J. said, if three acres were held by suit of Court, and the lord purchased one of them or granted over his seigniority in one, the suit is gone for all; yet if an escheat, or if it be aliened in mortmain, and the lord therefore enter, the suit shall remain for the residue. In *Jenkins' Centuries*, 232, the case was this: A. was lord of a manor, and he had purchased some tenancies of the manor, being within the manor and held of it. B. purchased the manor. Held, that the purchases belonged to A., for they were not parcel of the manor at the time of sale. Then B. purchased these tenements, and upon a *partitio facienda* of the manor, yet the said tenements so purchased are not to be divided where the suit is of the manor only. In *Thetford's case* (1 Leonard, 304), Anderson, C. J., put this case: One seised of a manor maketh a feoffment in fee of part of the demesnes, and afterwards repurchases them, and then makes a feoffment of the whole manor. The demesnes repurchased shall not pass thereby, for they were once severed from the manor and not reunited by the purchase. But he and Pirryan, J. agreed that although in truth it is not a manor, yet if it hath been reputed such it shall pass by that name. In the case *R v. Duchess of Buccleugh* (6 Mod. 151) it was resolved by the whole Court of King's Bench, that lands once severed from a manor can never afterwards become parcel of it in reality, but they may by reputation, as if lands, part of a manor be aliened away absolutely, and repurchased, and a unity of possession of a considerable time after. This however, it may be said, does not rule the case before us upon the point which I am now considering, for there was an admitted severance. In an anonymous case in 12 Mod. 138, Holt, C. J., said, a tenancy escheated to the lord becomes part of the manor, but if the lord purchases part it is only holden of the manor and not part of it, but the rent and services are part. I may here observe, that if the lord purchase all the frank tenements, or all but one, the manor is extinguished in the first instance, because there cannot be a manor without a court baron, and in the second instance because there cannot be a court baron without two suitors. And in these instances the law is the same as to escheat for both escheat and purchase have the same operation, namely, they deprive the manor of its court baron, and that necessarily works an extinguishment: Rolle's Abr. "Manor" F. p. 121. But this in no respect affects the general settled distinction between escheat and purchase. There are many other authorities in favour of the distinction, but it is unnecessary to refer to them, as they will be found in Greene, B's, judgment in the Exchequer Chamber. The Lord Chief Baron of Ireland in delivering his opinion as opposed to the rest of the judges, relied upon *Montague's case* (Ley. 63). He said he did not go into the details of it, but he did not find it possible to reconcile the judgment of the court in that case with any other view than this, that where lands are held in fee as of a manor by service,

to be rendered of the owner as such, these lands are capable of being reunited to the manor by purchase of the land from the owner in fee of the manor, and the same appeared to him to be the result of the case in Sav. 21, and in Moo. 729. These cases were not relied upon by the learned judges who delivered their opinion in this House, and they appear to me not to warrant the construction put upon them by the Lord Chief Baron. Take *Montague's* case as an example. Sir Edward Montague held *in capite* the manor of Workton. Of that manor seven acres of freehold were held in socage; so that he held his manor *in capite*, and the owner of the seven acres held of his manor in socage. He bought the seven acres, and if the purchase would have reunited them to the manor of which previously to the purchase they were held, they would have been reunited to Sir Edward's manor; but the Lord Chief Justices and Chief Baron Montague Hubbard and Tanfield resolved that the seven acres were holden of the King *in capite* by knight's service as the manor of Workton was held, of which manor the seven acres were some time held in socage, until the said purchase. It was not said that they again formed part of the manor; but, as it appears to me, they were treated as severed from the manor, and as sub-infeudation was forbidden by the statute of Quia Emptores, they were holden of the King *in capite* like as the manor itself was. If the seven acres by the purchase had been reunited to the manor of which they were originally holden, the manor including them as still part of it, would have been holden of the Crown *in capite* and they as a separate independent subject would not have been holden of the Crown. I am unwilling to enter into a long explanation of the case in Saville 21, reported there as anonymous, but which is the case of *Hutton v. Gifford*. The lord of both manors there having by his purchase of the superior manor extinguished the sub-manor whereby the tenant paravail then held of the superior manor which was held of the Crown *in capite*, and the service having been in every case knight's service, the lord then purchased the land of the tenant paravail, and then sold it to a stranger, and the question was, of whom held. There was, therefore, there both a repurchase by the lord and a subsequent sale by him, which of course operated as a severance. Knight's service in any view was due for the land in the hands of the last purchaser, and the question was decided in favour of the Crown, so that he held direct of the King *in capite* by knight's service. It does not appear to me to support the case of the appellant. The last of the three cases relied upon in Ireland is *Cresswell's*, Moore, 729, which was governed by the same rule as the last case. The manor of Gomershall, Towerhill, which came to the Crown upon the dissolution of monasteries was granted by the Crown to Sir Edward Walsingham in fee *in capite*. The manor of Pallingfold was held of the above manor by suit of Court and 8s. 4d. rent. Certain lands were held of the last-mentioned manor by suit of Court and 33s. 4d. rent. Sir Edward Bray purchased the superior manor, and also half of the mesne manor, and the lands held of it by suit of Court and 33s. 4d. rent. They descended to his son who purchased the other half of the mesne manor, so that he became seised of both manors, and of the lands

before referred to. He afterwards conveyed those lands to another by feoffment, and the question was, of whom did the feoffee hold, and it was, by the opinion of Popham and Andrews, C.J.J., resolved that he held *in capite* by an entire knight's fee. It seems that he was held to stand in the place of the Brays, and they were considered to have held these lands by knight's service *in capite*. The lands were of course wholly severed from the manors, and the decision, like that upon the case in Saville, appears to me to have depended upon the land in question having become no longer part of the manor of which it was holden originally, or of the superior manor, but acquired by Sir Edward Bray by purchase, and held by him of the Crown as a distinct subject, and by the same service as the superior manor was itself held of the Crown. It appears to me that the appellant can derive no aid from these cases. I may observe that, in cases like this, the judges of that period had a strong leaning in favour of the rights and revenues of the Crown. But although the learned judges, in their certificate, did not rely upon the cases to which I have thought it necessary to draw your attention, yet they did rely upon two authorities which I am under the necessity of considering with all the attention which is due to the opinions of those very learned persons. The first authority is from the second Institute, 501, where it is said: "If the mesne release to the tenant, the tenant shall hold *per eadem servitium* as the mesne did; and so if the tenant enfeoff the mesne, the mesne shall hold *per eadem servitium* as he held before; and so it is if the tenancy comes to the mesnalty by act in law, as by escheat or descent, the mesne shall hold *per eadem servitium et consuetudines* as he held before; for albeit the tenure between the tenant and the mesne be extinct, yet the seigniorie paramount which also was issuing out of the tenancy remaineth still." Here, the learned judges add, no distinction is drawn between release, or feoffment, or act-in-law, the effect in each case being stated to be, that the tenure between the tenant and mesne is extinct. This passage from the second Institute is referred to in the appellant's case, page 133, as an example in our early law books, in which the purchase by and escheat to the lord of a manor are classed together and treated as producing the same effects. No doubt there may be cases in which they may have the same operation, as in the instance which is also referred to in the same page of the appellant's case, and which I have before mentioned, where the manor is extinguished by the acquisition, by the lord of all the freeholds, and it is there of course indifferent whether the extinguishment is caused by escheat, or descent, or purchase. There are no longer any freeholders of the manor, and the manor itself is extinguished. Now it does not appear to me that the rule stated in the second Institute bears the construction put upon it, namely—that where the lord repurchases the tenemental estate, the immediate seisin is again in the lord as part of the manor. As the rule is stated, if the mesne lord release to the tenant, the tenant shall hold by the same services as the mesne did. This release would of course sever the land from the manor of which it was held, and the releasee would hold of the chief lord, and, if that tenure was *in capite* by knight's service, might have

had to pay whole knight's fee. The rule then states, "And so if the tenant enfeof the mesne, the mesne shall hold by the same services as he held before." This does not prove that the land is again in the immediate seisin of the lord as part of the manor, but that he holds it of course in fee, and like as he held the mesne manor, and therefore holding of the seignior paramount, and if the holding under that was in *capite* by knight's service, he might have had to pay for the land a fee for a whole knight's service. The case before your Lordships cannot, as it appears to me, be governed by the construction which has been put on the rule from the second Institute, and indeed, if that rule was in itself sound, and had been recognised as law, the opinions during so long a period of so many eminent judges, that the distinction between escheat and purchase did and does not exist in law, never could have been expressed. Coke himself could not have considered the rule as breaking in upon the settled distinction which he had reported specially, as resolved in *Mountjoy's* case. If, as it is now urged, this rule is opposed to the resolution in that case, surely Coke would have drawn attention to the circumstance, and explained the true meaning of the rule. The other authority relied upon is Mr. Preston, who, in his edition of the Touchstone, and his works on Conveyancing and on Abstracts, states that the law on this subject is the same as to purchase and escheat, and the learned judges consider the rule as laid down in the second Institute as an express authority for his statement in the Touchstone, although he makes no reference to it, and his other statement they adopt as sound law. It does not appear to me that Mr. Preston had any intention to lay down any abstract proposition which could bear upon the case now before the House. He was not likely to treat as a settled point, without referring to any authority in support of his view, that purchase and escheat were in the cases we are considering equal to each other, whilst the ancient reports and law books in so many instances draw a clear distinction between them. I think it will be sufficient to refer to what he says in the third volume of his Conveyancing. He there refers to the merger of estates in fee of the copyhold tenure in a particular estate of the freehold tenure. "It is," he says, "the tenancy rather than the estate which is extinguished; therefore cases applicable to copyholds do not strictly fall under the law of merger." He then shows where the tenancy by copy will be extinct or superseded by the accession of the freehold tenure to the tenure by copy of court-roll. So if the lord of the seignior purchase a tenancy, the tenancy will be extinct, and go inclusively with the manor. For this he quotes *Bunker v. Cook* and *Roe v. Wegg* which are confined to copyholds. He then proceeds: "The consequence is that purchased lands will pass by the will of the owner as part of the manor, though the will by which the manor is devised is made before the purchase. The same point applies to a purchase of a tenancy, also to the devise of a manor, and the subsequent escheat of a tenancy in the manor;" for which he cites *Doe v. Pott* and *St. Paul v. Lord Dudley*, both cases of purchases by the lord of a copyhold held of the manor. Mr. Preston adds: "For though it be a rule that lands purchased after the publication of a

will, will not pass by that will without a republication, yet lands which become part of the manor by an escheat or by purchase after the publication of a will pass as part of the manor. In fact, the manor comprises the tenancy, the possession comes in the place of the seignior, and the land becomes parcel of the manor. The seignior when purchased by the tenant is extinguished, and has no distinct existence, and being once extinguished there is an end to all further deduction of title. Following the same analogy there will, on the purchase by a lord of a manor of a copyhold tenement, be an extinguishment of the copyhold tenure, although the demiseable quality may remain." And for this he cites *Doe v. Pott*, and *Roe v. Wegg*, in which the very point was decided, and *St. Paul v. Lord Dudley*. This somewhat confused statement may be accounted for from the subject not properly forming part of the merger of estates of which he was treating. It seems clear to me that his remarks were intended to be confined to copyholds, to which alone his authorities refer, and that he had not in his view the question now before your Lordships, which he knew those authorities did not touch, and for which he did not quote any authority; nor indeed if he had intended his observations to apply to a case like the present, could he as it appears to me, have found an authority to support his views. His concluding observation, that the seignior when purchased by the tenant is extinguished, and had no distinct existence, may require explanation. By the purchase by the copyhold tenant his tenancy is extinguished and he holds the fee-simple. There is no longer any seignior, for he cannot hold of himself. The passage in the Touchstone, 439, is a copy of what fell from Manwood, C.B., in *Brett v. Rigles* (Plowden, 343), and is confined to escheat. Mr. Preston's addition, "for the tenancy is extinguished in the seignior" may be correct, but it does not appear to me to bear upon the present question. Upon the whole I am of opinion, that the lands in question did not pass by the will, and that the appeal should be dismissed; but considering how much difference of opinion has been expressed on the abstract points in the case, simple in itself, as it seems, there should I think, be no costs.

The LORD CHANCELLOR.—Is it your Lordships' pleasure that the judgment below be affirmed, and that the appeal be dismissed without costs?

The Attorney General.—Will your Lordships allow me to say one word upon that point?

LORD ST. LEONARDS.—No.

Judgment affirmed.

Plaintiff in error's attorneys.—Gregory & Co.
Defendant in error's attorneys.—Eyre and Lawson.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

DOMVILLE v. BRACK, Jan. 16, 19.

Practice—Landlord and Tenant—Security for means rates and costs—Instrument executed by tenant only—St. 23 & 24 Vic. c. 154, s. 75.

An agreement to take a lease, signed by the tenant only,

and not by the landlord, is not such an instrument regulating the terms of the tenancy as will entitle the landlord to require security for mesne rates and costs under st. 23 & 24 Vic. c. 154, s. 75, in an ejectment against the tenant overholding.

THIS was a motion on behalf of the plaintiff under section 75 of the Landlord and Tenant Law Consolidation Act, that the defendant should be compelled to give security for the costs and damages and mesne profits which should be recovered in the action. The action was one of ejectment on the title, brought by the plaintiff, the landlord, to recover certain lands situate in the county of Dublin, from the defendant as an overholding tenant. The defendant held the lands under an instrument dated the 1st January 1859, by which he agreed to become tenant from year to year to the plaintiff from the 29th Sept. then next, at a rent payable quarterly, the tenancy being determinable at a month's notice on either side. This instrument was signed by the tenant, but not by the landlord. Possession, enjoyment, and payment of rent by the tenant under the instrument were sworn to on the part of the landlord: service of notice to quit within the time specified in the instrument, and a demand of possession were also proved. The affidavit of the tenant on the other hand, besides going into matters not necessary to be here specified, stated that he had not paid rent under the agreement in question, but half yearly; that he had never held under the agreement, and that he and his family had been in possession of the lands for forty years.

William O'C. Morris for the plaintiff.—We are entitled to carry this motion. [*Hayes, J.*—One difficulty in your way is that the instrument is not executed by the landlord.] [*O'Brien, J.*—In cases under the Registry Act it is held that "executed" means "executed by the granting party."] We have here the instrument regulating the terms of the tenancy. [*Hayes, J.*—No: under that instrument the tenant could not regulate anything, it is only an instrument stating the terms on which the tenant would take the land if it was given to him.] There is nothing in the 75th section of the Landlord and Tenant Act to shew that the words "execution of the same" there used, mean execution by both parties. [*O'Brien, J.* referred to *Hutchins v. Vaughan* (11 Ir. C. L. Rep. 349) where it was held that ejectment for non-payment of rent could not be maintained under the ejectment statutes upon a minute in writing executed by the landlord only, and not by the tenant.] [*Fitzgerald, J.*—The tenant swears that he and his family have been in possession of the lands for forty years. Have you anything to shew that that old tenancy was determined?] No. [*Hayes, J.*—The date of the instrument here is the 1st. Jan. 1859. When did the landlord begin to be bound by that?] On payment of the first gale of rent. [*Hayes, J.*—But suppose the rent is the same as that which the man and his family had been paying for the last forty years.] The affidavit of the defendant, though it states possession for forty years, does not state what the tenure was.

Dillon for the defendant.—This section is borrowed from st. 1 G. IV. c. 87; but there is a difference between the two sections. The present one enables

the Court to "make such order as shall seem to it to be just." That gave the Court a discretion which it will not exercise in the present case against the tenant. It has been decided that if the tenant has any case to go to a jury, the Court will not order security to be given. *Pentland v. Murtagh* (11 Ir. C. L. Rep. app. xi.) Suppose the tenant wanted to give up the land on a month's notice, he could not rely on this instrument, which is not signed by the landlord. Can such an instrument then be called an instrument regulating the tenancy?—*Hutchins v. Vaughan* (11 Ir. C. L. Rep. 349); *Pitman v. Woodbury* (3 Exch. 4).

The Court directed the case to stand for further argument.

January 19.—*W. O'C. Morris* referred to *Furlong* on Landlord and Tenant, 1054, summing up the authorities on st. 1 G. IV. c. 87; *Lessee Keily v. The Casual Ejector* cited in *Jack d. The Duke of Devonshire v. Lynch* (1 Jebb and Symes 403); *Doe d. Phillips v. Roe* (5 B. & Ald. 766). [*Hayes, J.*, referred to an anonymous case in 1 L. Rec. O. S. 342, as shewing that to support an application under st. 1 G. IV. c. 87, the instrument should be executed by both parties.] An agreement under the statute of Frauds need not be executed by both parties in order to charge the party signing the document.

Dillon for the defendant, in addition to the authorities referred to by him on the former day, cited *Beakey v. Murphy* (8 Ir. Jur. N. S. 161).

W. O'C. Morris, replied.

LEFRAY, C. J.—Where there is an instrument binding both parties, and under the hands of both, ascertaining their rights, the legislature has established that in that case the landlord is entitled to what he would not be entitled to in any other case, and the tenant subjected to what he would not be subjected to in any other case. There is good sense in that, where the matter is such a certainty, or so nearly approaching to a certainty, that the tenant who confesses the right of his landlord daily, and the relation between them, should not be allowed to contest that relation where there is an instrument which *prima facie* ascertains the rights between the parties. But in this case where there is nothing in writing to bind the landlord, I cannot conceive that he is entitled to the privilege given by the statute. There might be sufficient to bind the parties under other circumstances, as in the case of a proposal by the tenant, under which the landlord allows him to go into possession; that is very good under the Statute of Frauds, but the question is, is it good under this Act? I do not think so. It is necessary to make such a case as would make it *prima facie* just and right to make the tenant subject to this security.

O'BRIEN, J.—Notwithstanding the ingenious and able argument of Mr. Morris, I think it clear that this motion must be refused. I would refer to the word "executed" in the section, and it was with reference to that that I called attention to the provisions of the Registry Act. It appears there that the execution means execution by the party whose execution was necessary to make an estate pass at all by the instrument: no estate passes by the instrument here, and as *Pennefather, B.* put it in the case in 1 L. Rec. O. S. the tenancy from year to year in such a case is not

created by the instrument, but by occupation and payment of rent. The instrument there produced contemplated a lease for three lives, and here the instrument contemplates a tenancy from year to year, determinable at the end of a month by notice. We were referred to cases under the Statute of Frauds; but it never was intended that a Court of Law exercising this summary jurisdiction should go and investigate matters of this kind on affidavits. The party should throw down the instrument and verify it without more. *Jack dem. the Duke of Devonshire v. Lynch* in *Jebb & Symes*, is a strong authority against Mr. Morris. The Court there says that the tenancy there was not either for a term of years certain or from year to year; but a tenancy determinable upon a notice in writing at the option of either party being given, and not upon a regular notice to quit. Here the tenant may say, "my tenancy is one originally speaking from year to year, but this instrument imports another condition which enables you to get rid of that by a month's notice." Then also an instrument cannot contain a contract which is not executed by the principal party to it.

HARRIS, J.—The application in this case is made to prevent this tenant from exercising his common law right of taking defence to the action till he has given security for the costs and damages. Whenever such an application is made to restrict the exercise of a common law right by force of a statute, I think it is not too much to ask that the statute be complied with both in letter and in spirit, and I think the statute ought to be construed strictly. Let us then see whether there has been a compliance with the requisites of this statute. The meaning of the legislature was that the tenant should not be deprived of his right to defend, unless it was clear that no question was likely to arise; but that if a question was likely to arise it should be the duty of the Court to refuse the motion; and, if this question was such as could be discharged by shewing the real interest which had passed to the tenant, that it should be made plain by writing, and the only way in which that can be done is by shewing, not that a proposal was made by the tenant to take from the landlord, but the real mode of doing it was by producing an instrument executed by the landlord, showing not only what the tenant was willing to take, but what the landlord was willing to give. The case before Pennefather B., in the *Law Recorder*, is I think quite in point in this case. But there is another matter. When I read this agreement, I do not think it such an agreement as ought to deprive the tenant of making every possible defence to the action. The agreement is made on the 1st. January, 1859. The power of giving notice is not mutual. That does not seem just. I have heard more ridiculous questions argued than that there is a repugnancy here, where we have a tenant in one line a tenant from year to year, and in another from quarter to quarter, and in another liable to be made to quit on a month's notice; and I for one will not exercise my discretion in favour of the application.

FITZGERALD, J.—Refuse the motion with costs.

Motion refused with costs.

M-PHAIL v. LITTLE, April 29.

Demurrer—Wages and salary—Want of averment of request.

A count for "money due by defendant to plaintiff for the wages and salary of the plaintiff as nurse-tender to the defendant," Held bad on demurrer.

DEMURRER.—The summons and plaint (which was not signed by counsel) stated that the defendant "was indebted to the plaintiff in the sum of £65, on account of money due by defendant to plaintiff for the wages and salary of plaintiff as nurse-tender to the defendant." The defendant demurred.

Edward Gibson in support of the demurrer.—The count is bad. It does not appear from it that the plaintiff was employed by the defendant or at his request. The form of action for work and labour given in the Common Law Procedure Act, 1853, Schedule C, states a request. So the form in *Bullen and Leake, Precedents in Pleading*, p. 32. So the form 67 in *Hennell's Forms*, p. 82, avers both hiring and retainer. *Corah v. Young* (6 Ir. C. L. Rep. 138).

Philip Keogh for plaintiff.—This is not a count for work and labour, which distinguishes the case from *Corah v. Young*. This is an action brought on an executed consideration for a certain sum known as "wages and salary."—*Archbold's Nisi Prius*, 2nd edition, page 134. *Webster's Dictionary, sub voc.* "wages" and "salary." At all events this is a case in which an amendment ought to be allowed.

THE COURT allowed the demurrer, but gave plaintiff liberty to amend as he might be advised on payment of the costs of the demurrer, and if the amendment was not made within ten days, the defendant to be at liberty to mark judgment.

DAVIS v. M'MAHON, May 31.

Practice—Commission to examine witnesses—Affidavit.

Order made for a commission to examine witnesses to issue, the affidavit on which the application was made stating that the evidence of the witnesses sought to be examined was necessary and material, but not stating that it was admissible.

Dillon on behalf of the plaintiff applied that a commission might issue to examine witnesses named, who were resident in Spain. The affidavit on which he moved stated that the evidence of the witnesses sought to be examined was necessary and material. The action was one of ejectment for non-payment of rent; the defence was a denial of the tenancy.

Richardson contra.—The affidavit is not sufficient; it ought to state not only that the evidence is material and necessary, but that it is admissible.—*Lloyd v. Key* (3 Dowl. Pr. Cas. 253).

Dillon in reply.—*Lloyd v. Key* was an application on behalf of the defendant. An affidavit not containing a statement that the evidence was admissible, was

held sufficient in *Baddeley v. Gilmore* (1 M. & W. 55). The form of affidavit used here is that given in Chitty's Forms 179.

THE COURT allowed the commission to issue, returnable in five weeks; cross-interrogatories to be furnished within a week from the furnishing of plaintiff's interrogatories.

QUAN V. FRASER, May 31, June, 1, 13.

Practice — Costs — Common Law Procedure Act, 1853, s. 243—Action of Contract.

An action brought by a client against an attorney for negligence, the summons and plaint averring a retainer of the defendant by the plaintiff, is an "action of contract," within s. 243, of the Common Law Procedure Act, 1853, and the plaintiff in such an action having recovered less than £20, is only entitled to half costs.

THIS was a motion by way of appeal, from the ruling of the taxing master, that he might be directed to review his taxation, and tax the costs of the action on the footing, that the plaintiff was entitled to full costs, and not half costs merely. The action had been brought by the plaintiff, against the defendant, an attorney, for negligence. The summons and plaint stated the retainer by the plaintiff of the defendant, as her attorney, for certain fees, to advise her as to the purchase of certain lands, in the county of Limerick, for a sum of £850; that it was his duty to advise her correctly in respect thereof; that at the time the defendant had notice of a previous purchase; that he did not communicate that knowledge to the plaintiff, and encouraged her to purchase the lands, and that she did in fact purchase them, and paid him a sum of money for preparing a conveyance; that afterwards proceedings were taken in equity against her, and the purchase set aside with costs; and she claimed £1000 damages against the plaintiff, for his negligence. At the trial it was ruled that all that she was entitled to recover was the amount paid by her to the defendant for preparing the conveyance; and, in accordance with this ruling, she obtained a verdict for £10. When the costs of the action came to be taxed, the taxing master taxed them on the footing of allowing her half costs only, and from this taxation the present appeal was brought.

O'Riordan for the plaintiff.—The taxing master should have allowed the plaintiff her full costs. We say the action was for a wrong. On the face of the summons and plaint, there is nothing about a contract. The action is brought against the defendant, by reason of the relation between solicitor and client, and accordingly the case does not come within the provisions of sec. 243 of the Common Law Procedure Act, 1853, "that in case the plaintiff in any action of contract (except for breach of promise of marriage) shall recover, exclusive of costs, less than twenty pounds . . . the plaintiff in any such action shall be entitled to no more than one-half of the ordi-

nary costs." I will admit that it is not an "action for any wrong or injury disconnected with contract," within the other branch of the same section, which will be the contention on the other side. That contention involves the fallacy, that all classes of actions are provided for by the two branches of the section, and that therefore this, not being an action for any wrong disconnected with contract, must fall within the first branch of the section, providing for actions of contract. Before the section was passed, we would be entitled to our costs. The section deals only with the cases mentioned in it, and does not profess to deal with costs generally. The taxing master considered that the case of *Kerr v. The Midland Great Western Railway Company* (10 Ir. C. L. Rep. app. xlv.) applied here, and that he was bound by it. We say, first, that the case does not apply. The count there was very different. There is nothing shewn here except the retainer, and the position of the parties. *Tutton v. The Great Western Railway Company* (6 Jur. N.S., 800). In *Kerr v. The Midland Great Western Railway Company* the averment merely is, that the defendant did not deliver the goods. In *Tutton v. The Great Western Railway Company*, it is, that the parties so negligently conducted themselves, that a great part of the goods was lost. The English statute upon which that decision was made, was the 13 & 14 Vic., c. 61, s. 11. After that a subsequent statute of 19 & 20 Vic., c. 108, was passed, to s. 30, of which I refer. *Legge v. Tucker* (2 Jur. N.S. 1235.) [*Fitzgerald, J.*—I do not see in the present case that there is any duty cast upon the attorney beyond the contract, which was that he should advise as to the purchase, and then you say that he was negligent, and did not do so rightly.] There need not be any mutual contract between the parties in the case of either an attorney or a surgeon. If one or other undertakes to act gratuitously, he will be just as liable for his negligence, as if he acted for reward. [*O'Brien, J.*—You say that this is not an action of contract, that it is not either an action for a wrong disconnected with contract; that, therefore, it is unprovided for by the statute, and, therefore, that if the plaintiff even recovered one shilling, she would be entitled to full costs.] Yes: several forms of actions, as actions of trover and detinue, are not provided for. Suppose an action is brought against two, and the plaintiff proves one to be his attorney, and not the other, he could recover against one. *Keys v. The Belfast and Ballymena Railway Company* (8 Ir. C. L. Rep. 167.)

James Murphy, for the defendant, to support the taxing master's ruling.—The proposition on the other side is, that the 243rd section of the Common Law Procedure Act of 1853, does not apply in this case at all; because though the Act purports to deal with all actions, dividing them into actions of contract, and actions of wrong disconnected with contract, the plaintiff says that this is not an action of contract, and therefore not within the first part of the provision; and that it is not an action for a wrong disconnected with contract, and therefore not within the second part. If that is so, the section will have been very useless. With respect to the nature of the present case, there can be no doubt that it is an action founded on con-

tract. The observations of Cockburn, C.J., in *Tatton v. The Great Western Railway Company*, are important upon this point. It is also of importance to refer to the schedule C. of the Common Law Procedure Act of 1853. The forms of pleadings there given, are divided into statements of causes of actions, "on contracts," and "for wrongs independent of contract," and so as to pleas, shewing that the framers of the Act considered that that division embraced every class of action, St. 9 & 10 Vic. c. 95, s. 129, which was superseded by st. 13 & 14 Vict. c. 61, is important. *Boorman v. Brown* (3 Q. B., 516) cited in *Morgan v. Ravey* (6 H. and Norm. 269). If the plaintiff's contention was correct, it would be in the power of the pleader, by varying the form of the action, to get rid of the statute, and obtain full costs, even though the foundation of the action remained the same. *Kerr v. The Midland Great Western Railway Company* is decisive on the question. It is only reasonable to give the first part of the provision in the 243rd section the construction given to it by the Court of Common Pleas, where they read the words "action of contract," as "action founded on contract;" and the subsequent part of the section, providing for wrongs disconnected with contract, implies that the former part had provided for all cases of wrongs connected with contract. The division of actions under the Irish Common Law Procedure Act is different from that under the English Act, upon which the English cases cited on the other side were decided. Sec. 97 of the Common Law Procedure Act of 1856 preserves the same division of actions as the 243rd sec. of the Act of 1853, and is intended as a substitute for s. 50 of the Civil Bill Act, 14 & 15 Vic. c. 57, under which the action of detinue is classed with debt, covenant, and assumpsit.

O'Riordan replied.

June 13.—*O'BRIEN, J.*—This case was argued before my Lord Chief Justice, my brother Fitzgerald, and myself. My Lord Chief Justice heard the argument, and though he is not able to be present now, he has intimated to us his opinion on the matter, which concurs with that at which my brother Fitzgerald and myself have arrived. The application is for the purpose of having the taxation of Master Colles reviewed. The action is one brought by a client against an attorney for alleged negligence with respect to a purchase and conveyance of certain lands made by and to her. The title of the lands was defective, the purchase was lost, and she has brought her action. In the summons and plaint she claims a rather considerable sum for damages, but Monahan, C.J., before whom the case was tried, confined her claim, at the trial, to the actual money which she was out of pocket by the conveyance, and she recovered a verdict for £10. The taxing officer considered that this was a case in which, under the 243rd section of the Common Law Procedure Act of 1853, she was only entitled to half costs. The provisions of the section are these: "Provided always, that in case the plaintiff in any action of contract (except for breach of promise of marriage) shall recover, exclusive of costs, less than twenty pounds, or in any action for any wrong or injury disconnected with contract (except replevin, or for slander, libel, malicious prosecution, seduction, or criminal

conversation) a sum not exceeding five pounds, the plaintiff, in any such action, shall be entitled to no more than one-half of the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for." Now the defendant here contends, and the master acted on that proposition, that this was an action within the first part of this provision, namely, an action of contract, and that it was not an action for any wrong disconnected with contract. The action is brought, certainly, for negligence; and it was at one time perfectly open to the party, before the Common Law Procedure Act, to have framed his action either in assumpsit or in case; but the Common Law Procedure Act abolishes forms of action, and enables the party to frame his summons and plaint as he may be advised. Now the argument here is this: I may refer to the summons and plaint which states a retainer by the plaintiff of the defendant for certain fees, and that certainly does imply and maintain the statement that there was a contract between them, that in consideration of fees paid, the defendant consented to act as the plaintiff's solicitor. The first argument then of Mr. O'Riordan is, admitting that this is an action for a wrong connected with contract, that such a case as this is not within the 243rd section at all, because the section only provides for two classes of actions, namely, actions of contract, and actions for wrongs disconnected with contract. He admits that it does not come within the latter clause, and he insists it does not come within the former. On this construction, while the section professes to provide for all classes of actions, it would leave out of consideration a very numerous class of cases. But the manifest meaning of the Legislature in this section is, that by the words "actions of contract," which it uses, it means to include all actions which, though brought for wrongs, are brought for wrongs arising out of contract. That seems to me to be the fair construction of the Act. We have been referred to several cases. Many of them do not apply, as, for instance, *Tatton v. The Great Western Railway Company*; for the section of the Act on which that case was decided, did not deal with the cause of action, but with the form of action: for the Statute 13 & 14 Vict., c. 61, s. 11, within the latter part of which the case was held to fall, says, that if in any action "in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding £20;" or if in any action in a superior Court "in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding £5, the plaintiff shall have judgment to recover that sum only, and no costs . . . except in the case of a judgment by default." The statute dealt with the cases in that way in England, dealing, not with the substance of the action, but, with the form. But in this country, forms of action have been abolished; and what the Legislature provides for, is the foundation of the cause of action. And it would be a very inconvenient construction to hold, that a party having a right of action, and establishing by it that a certain sum was due to him, should have it in

his power to get rid of the provisions of the 243rd section, and to throw on the defendant a larger proportion of costs, merely by varying the form of his cause of action, and adopting one instead of another. Besides, the words of the provision in the Irish Act are totally different from those in the English Act, which deal with the forms of action. Well, now, this case is not without authority, because we have the decision of the Court of Common Pleas in this country in *Kerr v. The Midland Great Western Railway Company*, (10 Ir. C. L. Rep., app. xlv.) The case there was one arising out of contract; and Mr. Pales in support of the application to review the taxation, contended that the action was one of tort, and he relied on some of the English cases; but Chief Justice Monahan says: "We are of opinion that, in order to arrive at the true construction of either of the clauses of this section, referring to contract, we must have regard to the entire section; and, accordingly we conceive that the Legislature intended to include in this section all cases in which a contract subsisted between the parties. It is therefore necessary, as forms of action have been abolished in this country, that we should consider what is the substantial cause of action between the plaintiff and defendants here; and, although if forms of action still subsisted, this first count might be regarded as a count in case, still we cannot hold that it sets forth a cause of action 'disconnected with contract,' for a contract is stated, although an express promise is not absolutely alleged." It appears to me that on that, and the construction of the Acts of Parliament, and the distinction between the legislation here and in England, this application cannot be sustained.

FITZGERALD, J.—I concur. The summons and plaint in this case states a contract, and it alleges a duty co-extensive with the contract. That appears to me to be an action of contract. If Mr. O'Riordan had shewn us that there was any duty larger than the contract, I might have altered my opinion.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SHEE v. GRAY.—April 16, 18, 23; May 9.

Covenant—Possession—Proof of title—Pleading in abatement—Tenancy in common.

The summons and plaint in an action brought for the breach of a covenant in a lease contained two counts. The first stated that the estate and interest of the lessee in the lease came to the defendant by assignment. The second set out the title of the defendant, stating that the lessee had left his widow and three daughters (one of whom was the defendant) him surviving, and by his will devised his property to his widow for life, and after her death share and share alike between the three daughters in such manner as the widow should divide; and that the widow did divide the property, and gave the premises demised by the lease to the defendant.

The defendant traversed the assignment, and traversed the division by the widow. The plaintiff proved at the trial that the defendant had occupied the premises with her husband, had redeemed them when an ejectment was brought against her, had asked from the plaintiff a renewal of the lease as representative of the lessee, and that, subsequently to her husband's death, her agent and solicitor had managed the property. He also proved the lease, the lessee's will, the lessee's death and the death of the lessee's widow; but he gave no evidence of any provision having been made for the two sisters, nor any evidence of the execution by the widow of her power of division. The judge directed a verdict for the defendant, reserving liberty to have it changed into one for the plaintiff, the Court to be at liberty to draw the same inferences from the evidence, which the jury could have done.

Held, 1. that though the two counts made the case differently, the plaintiff was not precluded from relying upon the first.—*Christian, J.*, dissentiente. 2. That there would have been evidence to go to the jury that the defendant was the owner of the whole of the premises (*Christian, J.*, dissentiente.) 3. That the defendant's case being that she was a tenant in common, there was no question for the jury as she ought to have pleaded in abatement, and not in bar (*Christian, J.*, dissentiente). 4. That the verdict ought to be entered for the plaintiff (*Christian, J.*, dissentiente).

And, per *Christian, J.*, that the object of the rule which enables a landlord to rely on the possession of the defendant is to relieve the landlord from ignorance, and not to relieve him from the necessity of proving a title, every step of which he knows.

And, that if everything be as consistent with a positive as a negative, it is the duty of the judge to interfere. And that the plaintiff could not succeed unless he proved two things—first, that there was other property for the sisters, and secondly, that the power was executed by the widow.

And that to presume the execution of a power from four years' possession would be opening a new chapter in the law of evidence.

And that the acts deposed to were the acts which a tenant in common had a right to perform.

THIS was an action of covenant. The first count stated that by an indenture of lease, the plaintiff, Sir George Shee, demised the house and lands of Prospect and Fairy-hill to one Bernard Daly, the father of the defendant, for one life or twenty-one years, and that the said lease contained a covenant to repair. It then stated that after the making of the said indenture, and during the demise thereby granted, to wit, on the 10th day of March, 1859, all the estate, right, title, interest, term of years then to come and unexpired, property, profit, claim, and demand whatsoever of him the said Bernard Daly of and in the said demised premises, by assignment thereof then made, legally came to and vested in the defendant. It then stated the entry of the defendant, the breach of covenant, and the claim for damages. The second count stated the demise as in the first, and that the life in the lease was still in existence, and then it proceeded to state the title of

the defendant. That the said Bernard Daly died in the month of October, 1852, seised or possessed of the said premises under and by virtue of the said indenture of lease, leaving his wife, Julia Daly, and three daughters, Anna Maria Daly, Julia Daly (the defendant), and Jane Daly, his co-heiresses at law, him surviving. That the said children were still living. That by his will the said Bernard Daly, after bequeathing certain pecuniary legacies, devised and bequeathed the remainder of all the property which he should die worth (including the said demised premises), and all other his freehold and personal property, to his wife, Julia Daly, during her natural life, and from and after her death share and share alike between his said three daughters in such manner as the said testator's wife, Julia Daly should divide the same. The count then stated the grant of probate of the will to Julia Daly, the widow, the marriage of Julia Gray, otherwise Daly, to Joseph Burton Gray, and the death of Julia Daly, the widow, and proceeded—That the said Julia Daly, the widow, in pursuance of the said will, divided the property of the said testator among his said daughters, and gave to the said Julia Gray, otherwise Daly, the lands and premises demised by the said lease of the 9th July, 1846, and the estate and interest thereby created as and for her share of the property of the said testator, and gave to the said Anna Maria Daly and Jane Daly other portions of the property of the said testator as and for their shares. It then stated the entry of the widow, after the death of the testator, the entry of Joseph Burton Gray in right of his wife after the death of the widow, and the entry of Julia Gray, the defendant, after the death of her husband, and concluded as the first. The defendant pleaded to the first count—That all the estate, &c., of the said Bernard Daly in the premises in the summons and plaint mentioned did not come to or vest in the defendant, as therein mentioned. To the second count the defendant pleaded that the said Julia Daly did not divide the property of the said Bernard Daly amongst his said daughters, or give to the said defendant the said premises therein mentioned, as in the said paragraph alleged. Issues were taken upon these defences. The case was tried before Christian, J., at the Summer Assizes for the County of Galway. The lease of 1846 having been admitted, the plaintiff read in evidence the probate of the will of Bernard Daly, and proved the death of the said Bernard Daly in the year 1852, and the death of his widow in the year 1859. The plaintiff then went into evidence of the exclusive possession of the defendant of the premises in question. It was proved that after the death of her mother the defendant had resided on the premises with her husband until his death in September, 1859, and that after his death she had resided in Dublin; and evidence was given by the defendant's attorney, who was examined by the plaintiff, to the effect that after the defendant had gone to reside in Dublin he had managed the property for her up to the date of the action, and a letter from the defendant to the plaintiff was read in evidence, asking, as representative of her father, that the plaintiff should give her a renewal of the lease. The plaintiff gave no evidence of any provision having been made for the defendant's two sisters out of their father's property, or of any

enjoyment by them of any part of it. At the close of the plaintiff's case the defendant's counsel called on the learned judge to direct a verdict for the defendant on all the issues, as no evidence had been given of an execution by Julia Daly, the widow, of the power contained in Bernard Daly's will. The plaintiff's counsel required his Lordship to leave it to the jury on the evidence to presume an appointment or other form of assignment to the defendant. The judge declined to comply with the plaintiff's requisition, because as the plaintiff did not rest only upon evidence of possession, but went into proof of the actual state of the title by proving the lessee's will and his death; and as under that will the lessee's widow was assignee of the interest down to her death in 1859, and after her death her three daughters became assignees as tenants in common, unless she had executed her power of division, or they had, after her death, made partition amongst themselves, the plaintiff was bound to give some proof of the execution of the power, or of such partition having been made, and the judge stated in his report that the acts of defendant relied upon by the plaintiff did not constitute a case on which a jury ought to be allowed to found such a presumption as the plaintiff contended they should be allowed to make having regard to the shortness of the period (four years) over which these acts ranged, and to the circumstance that they were all more or less capable of being accounted for by the defendant's position as one of three tenants in common. His Lordship accordingly directed a verdict for the defendant on all the issues, and reserved liberty to the plaintiff to move to change that verdict into one for him for the amount of the dilapidations, if the Court above should be of opinion that he should have left the issues to the jury, and that they ought, if left to them, to have found them for the plaintiff, the Court to be at liberty to draw the same inferences from the evidence, which the jury could have done. The jury accordingly found for the defendant, and assessed the damages, contingent upon the verdict being changed into one for the plaintiff, at £75.

Blake, Q.C. on the 5th November, 1863, obtained a conditional order that the verdict had for the defendant should be set aside, and a verdict entered for the plaintiff for the sum of £75, pursuant to the leave reserved, or that the said verdict should be set aside and a new trial granted on the grounds of misdirection of the learned judge, and of the verdict being against the weight of evidence. Against this,

Bourke, Q.C., (with him *Quin*) now showed cause. —[*Monahan, C.J.*—The question is, if the possession is not some evidence of title.] The defendant goes on to allege a particular title. I could not find any case in Sugden on Powers showing that there is a presumption that a power was exercised in favour of a party, because there is such possession as would have followed if the power had been exercised. [*Christian, J.*—The evidence was that the husband and wife resided on the lands until the death of the widow, and that they resided there afterwards.] *Doe v. Williams*, (6 B. & Cr. 41.)

Blake, Q.C., and *Concannon*, contra.—There was evidence on the first issue which was uncontradicted. There was a letter from the defendant to the plaintiff, calling herself her father's representative, and asking

for a renewal of the lease. There was possession reluctantly deposed to by Mr. O'Loughlen, the defendant's attorney. There was an ejectment and redemption of the premises by the defendant. Mere naked possession or the payment of rent is sufficient. It was the defendant's duty to go into evidence, and give such further facts as would displace our *prima facie* case. The defendant gave no evidence. It was argued that if her two sisters were nuns, she was dealing as owner, though it was intended she should be trustee. We ought not to be the worse for a speculation which was not proved. It is open to us to argue this on the first count, as if the second did not exist, and as if we had not given the evidence we did upon the second. In *Doe dem Batten v. Murless* (6 M. & S., 110) the decision goes on the ground that the vesting must be legal or tortious, and the Court would presume it was legal, particularly where the defendant had the means of showing what it was. Bayley, J., says, "If this possession were referable to some other title, it was for them to show it, for this must be a matter lying within their knowledge." Holroyd, J., was of the same opinion. The will does not specify these premises at all—it is a general bequest of all the testator's property. [Christian, J.—The will was relied on by you both in statement and proof, and it is new to hear it suggested that you might rely on an assignment of the testator's interest *inter vivos*. When the will was put in evidence, is not the case the same under the first and under the second count?] Assuming the lady's title was under the will, she was tenant in common, and should have pleaded in abatement.—*Merceron v. Dowson* (5 B. & C., 479); *Curtis v. Spitty* (1 Bingham, N. C., 756); *Heap v. Livingston* (11 M. & W., 896). [Christian, J.—Have you a right to ask for a new trial upon a point which you did not make at the trial? Suppose you fail in that, can you go on and say there is another direction you might have asked for?] If the Court be dissatisfied on a new trial motion, they will grant a new trial. [Monahan, C. J.—There are some cases raising the distinction that the Court will not listen to an objection not taken at the trial, but that if a point of law was passed over by judge and counsel which could not be answered, a new trial might be granted?] *Curtis v. Spitty* has been reviewed, and the distinction taken that the plaintiff must succeed if it be an undivided part. [Christian, J.—The plea in *Merceron v. Dowson* was bad, because it purported to be a plea to the entire action. That case would have been an authority for you if you had demurred to the plea traversing the power, but instead of that you took an issue. As to *Heap v. Livingston*, I have been unable to discover any dictum of Holroyd, J., of the kind attributed to him by Parke, B. Monahan, C. J.—The question, I think, here is, is the issue supported by proof that all the estate and interest did come to the defendant and others? Christian, J.—How in this case, any more than in *Curtis v. Spitty*, can it be shown that the whole estate came to a party who is only possessed of an interest in an undivided share? Monahan, C. J.—The question in this case must be decided ultimately on principle. The question really will be, what is the meaning of the allegation that all the interest came to the defendant? Is

it supported by showing it came jointly to her and others, so that all could be sued together. Assuming we conclude there was evidence by the letter, we would hold the judge ought to have left the question to the jury, and suppose we are not prepared to decide by *Merceron v. Dowson* in your favour, is it a case which we ought to send to a new trial, in order that a jury may draw their own conclusions, or are we to draw conclusions in your favour? A judge taking the view he did, the effect may be the defendant did not give the evidence he might. Here he might have called the sisters, or offered himself. Christian, J.—The defendant ought not, in that case, to have concurred in my reserving a point, with liberty to the Court to draw inferences. Monahan, C. J.—There is often great deference to the opinion of the judge, and particularly where that opinion is in a party's favour. Christian, J.—I do not see why the Court should not now draw inferences themselves, supposing the Court think I was wrong in not leaving the question to the jury.] It is easy to assume a letter which would be an execution of this power. Where there is no deed required or specific form, letters operate as an execution of a power.—Sugden on Powers, pp. 203, 421. On any one of these grounds, the presumption of a grant *inter vivos*, or a title derived under the will, or a tenancy in common, the plaintiff is entitled to succeed. As to the second count it is a mere question of evidence. We served a notice requiring production of the title deeds. [Christian, J.—That is one of the difficulties in your case: that notice is not on my notes, nor anything to show you called on the opposite side to produce title deeds. If you rely on acts of ownership, that makes the *prima facie* case, and does not want such a notice, but puts the proof on the other side; but it is another thing if you are not content with that, but go on to rely on assignments by instruments which prove the title up to a certain instrument which is wanted.]

Quin in reply.—The most the Court will do will be to send the case down again, and not draw an inference from so meagre evidence as presumption. They will not affirmatively find a fact from what they admit is only what a jury might presume from. As to the first count—in *Hare v. Cator* (Cowp. 766) the evidence was that the defendant was assignee of part only, and that is the evidence here. If there never was a case, it is agreeable to common sense that this was the view the judge should have taken. Our defence was, that all the estate, right, and title, did not come to us. The plaintiff proves our traverse. He supports the negative of the issue. The decision in *Merceron v. Dowson* does not apply, because there was neither a traverse nor a confession and avoidance, but a plea which was not a plea answering the whole cause of action. Ours is a plea answering the whole cause of action. As to the second count. [Monahan, C. J.—In this part of the case, since the defendant is charged as assignee and since they have proved steps bringing the property down to the tenant for life, will not evidence proving possession prove title? Christian, J.—A landlord suing an assignee of his tenant may make out his case in one of two ways—1. By throwing on the apparent tenant the burden of showing he is not the tenant, if he be not. Another is by assuming on himself to prove the par-

ticulars of the title. I am of opinion the plaintiff took the latter course, both in pleading and in the course he took at the trial. Has he a right, having gone so far, to fall back from his undertaking? *Monahan, C. J.*—Supposing the plaintiff merely gave *prima facie* evidence, and that your client produced a will and proved it, and proved possession in the tenant for life, but did not account for how possession got into Mrs. Gray, and stopped there? *Christian, J.*—The Court would struggle against that because the plaintiff would thereby be taken by surprise: he knows nothing of the title.] The execution of a power will not be presumed from possession. [*Monahan, C. J.*—Why not? What charm is there in an execution of a power? *Christian, J.*—Once a landlord has undertaken to prove the case, is he entitled to any of the exemptions of proof?] *Doe v. Reed* (5 B. & Ald. 232) In the present case the possession was for four years only, and *Christian, J.*, says in his report that the possession was consistent with the power not being executed. There should be stronger evidence to presume the execution of this power. *Skipwith v. Shirley* (11 Vesey Junior, 64) shows the class of evidence from which a power is presumed. A charge was made in the books of a solicitor, that was held evidence of the execution of the power, but the inference was irresistible. [*Keogh, J.*—If you go to that, that was evidence to go to the jury.] As to the letter the word "Representative" is used in a popular sense. As to the variance, I refer to *Savage v. Smith* (2 Blackstone, 1101). If the commencement of an Act of Parliament is set forth it must be proved.—*Bristow v. Wright* (2 Douglas, 665). Lord Mansfield said the judgment might have been omitted, but when averred should have been proved, and the variance was fatal; so here, when the power was pleaded and not proved the variance is fatal.

Cur. adv. vult.

May 9.—*MONAHAN, C. J.*—I am delivering the judgment of the majority of the Court. This was an action brought by Sir George Shee against the defendant, Julia Gray, for breach of covenant in a lease made in 1846. There are two counts in the summons and plaint. The first states the making of this lease, and the covenant by Bernard Daly to keep in repair. The lease was for one life, or twenty-one years. The life is in being. The statement is, that all the estate came to the defendant, Julia Gray. The plaint seeks damages for the breach. The defence is, that all the estate and interest did not come, &c., and that is one of the issues. The second count states the lease—states that Mr. Bernard Daly made a will by which he devised to his widow for life the remainder of all his property, and after her death share and share alike between his three daughters, in such manner as she should divide the same; and then the allegation is that the widow entered into possession, and gave this particular portion to Julia Gray. There were three issues—1. Whether the estate of Bernard Daly came to the defendant. 2. Whether the widow divided the property among the daughters. 3. Did she give to the defendant the property comprised in the lease? The circumstances were these: The lease was handed in, and was as stated. A pro-

bate copy of the will was admitted, and was substantially as stated in the second count. The parties also gave in evidence that Bernard Daly left his widow and three daughters him surviving; that his widow continued in possession and paid rent; further that Mr. Gray and Mrs. Gray, his wife, one of the daughters, resided with the widow during her lifetime, and after the death of Mrs. Bernard Daly they continued to occupy. Further, that shortly after her death an ejectment was brought and the premises were redeemed. Another ejectment, it appears, was brought against Julia Gray as tenant of the premises, and several other parties named as under-tenants, but who were no parties to that ejectment. It further appeared that since the death of Mr. Gray the property had been managed by one M'Donnell. It appeared that in the ejectment the rent due was paid on behalf of Mrs. Gray either by M'Donnell or by Mr. O'Loughlen. They were both examined to show that Mrs. Gray, and nobody else, exercised ownership. The result of the evidence is correctly stated by *Christian, J.* It was evident that O'Loughlen was a very unwilling witness; but notwithstanding that, neither the judge nor any of the jury had any doubt but that he managed and acted on the part of this lady, but being her attorney he would not give any evidence he could avoid giving against her. We must take it, therefore, that from the death of Mr. Gray, Mrs. Gray was alone in possession of this property, has paid, and has received the rents. It did not appear what had become of the other daughters. On the evidence nobody knows anything about them. It is said they were nuns in a convent in Sligo, but no evidence was given of it, and it is natural for counsel on one side to draw one inference, and the other another. But from 1859 up to this action this lady was in possession, paid the rent, and was treated as tenant by the landlord. A document was given in evidence, a letter of 14th Jan. 1860, written by the lady to Sir George Shee—"Sir,—As representative of my father, &c., unless you give me a longer lease, I regret that my circumstances will not allow me to act as I would." She makes no allusion to her sisters as being joint tenants. She asks for herself, and says her circumstances are such, &c. It may be worth while to refer to the recent change of the law—I mean that made by the Statute of Limitations. Formerly the possession of one joint tenant, or of one co-parcener was the possession of the other. But as we had to remark in a recent case,* it is no longer so. Therefore, we have this person solely in possession representing herself as the owner, paying the rent, and treated as the tenant in bringing this ejectment against her alone. The case made at the trial was this. It is not controverted that if there was only one count, the first, the facts I have stated would be ample evidence, and unexplained would be conclusive. But the allegation was this—Since you have not contented yourself with that, but in the second count declare that this lady derived by an appointment under the will, you are bound to show that the mother gave the premises as stated. No authority has been cited for that that I am aware of, viz., that because two counts make the case dif-

* *Murphy v. Murphy, infra.*

ferently, the party is precluded from relying on one. The majority of the Court think the second count makes no difference in the efficacy of the first. We were referred to a case showing that very little evidence is sufficient. — *Doe v. Williams* (6 B. & C., 41). The facts of that case were, the defendant had been tenant from year to year of the plaintiff. In the year 1819 the defendant ceased to occupy; he put his son-in-law into possession. The son in law occupied, and the ejectment was brought some five or six years afterwards, during which no rent had been paid by anybody. Notice was served. The former tenant applied for leave under the ordinary rule to defend. There was no evidence that the landlord ever recognised Williams, or that Williams recognised him as landlord. The Court refused the rule, on the ground that it was for the person in possession to show the relation of landlord and under-tenant existed. They held the mere possession was ample evidence on which the jury might act. A case in 6 Maule & Selwyn, 110, is there referred to. A stronger case, it appears to me, in the view we take of the present, because it appears there, as here, the plaintiff did not rest on possession, but went on to prove deeds and documents to show the defendant was assignee of the term; and because he proved some of the steps, though not all, the Court held possession sufficient. An ejectment was brought by a party who had purchased under an execution. The plaintiff showed first that the lease was made to the defendant's father. He showed the father made a will, and by it the property was vested in an elder brother of the defendant; but he was unable to show how the title went to the party in possession. He did produce some document relating to other property, in which this man recited he was representative of the one, but not of the other. The Court held (and it was a case in which the plaintiff was making title to the leasehold) that having shown the existence of the term and this party in possession, it was the duty of the Court as against him to assume that his possession was lawful as assignee of the term, and though he described himself as representative of the one, the Court would presume in addition that he was administrator *de bonis non* of the other, or had acquired some interest making his possession legal. The principle of that is applicable to the present. In the present case the letter and the possession and the payment of the rent were ample to supply what was required, notwithstanding a title was derived under the will; and notwithstanding that under the will some title might exist in the sisters. A case I found only on Saturday is *Dowell v. Dignan*, (Batty's Reports, 698.) That was an action of covenant for non payment of rent. As here, the allegation was that all the estate of the deceased tenant came to the defendant. It appears that, as here, the parties were not satisfied with that, but set to manufacturing a special count; that the tenant died seised of the premises, and left the defendant, his heir-at-law, special occupant. It then stated that he entered into possession, and being in possession he was liable to pay the rent: that is the substance of it. The traverse was as here that the estate of the lessee did not come by assignment. Another traverses that the defendant did not enter as alleged as special occupant. The case went to trial. The plaintiff, to sustain his case, gave in evidence the death of the tenant

He attempted to prove the present defendant, who was the elder brother, entered into possession. In that he failed, and as in the present case there was a period of four or five years. There were two issues. 1. If the defendant had entered into possession? It was found he had not exercised or claimed any ownership. 2. Did the plaintiff deal with the younger brother as tenant? The jury found that he did. The question was, how was the verdict to be entered above. There was a very elaborate judgment of Bushe, C.J., laying down that till he did some act showing his acceptance of what was given him, he was not special occupant, &c. If that be so, where would the plaintiff be if he brought his ejectment against the two sisters, who are said to be immured in a convent? He would give evidence he brought an ejectment against Mrs. Gray as the sole tenant; that she represented herself as such; that she asked to have the lease renewed to herself. How could he bring an action on this evidence against the three? Because in that case the decision was this, that for special occupancy no deed was necessary. It occurs to us there was not only evidence to be submitted to the jury, but of that character, clearly, I should say, convincing that this lady was the owner of the whole of this property, though it were necessary to suppose the estates of the co tenants to be extinguished. If it rested there, we think there was a miscarriage at the trial. There is another view, which for myself, and, I believe, for the other members of the Court, I may say has given us anxious consideration, viz., whether there was a question at all for the jury, and whether, if this lady said she was tenant in common, whether she should not have pleaded in abatement, and verified by affidavit. It is necessary to consider elementary principles a little. The general rule is this, that if a tenant in common sues, or is sued, or if one of several parties is sued, he cannot object that other parties ought to sue or be sued, except by plea in abatement. If you sue half a dozen, they cannot object at the trial under the plea that the half dozen did not do the things complained of. But if it be pleaded that A. B. did a thing, it is not inconsistent to show that A. B. and others did it. The same rule applies to tenants in common of landed property. There is an express decision to that effect—*Wilkinson v. Haygarth* (12 Q. B. 837). The Court held the defence was only the subject of a plea in abatement. It occurs to us that there are cases deciding the present point. I refer principally to *Merceron v. Dawson*, reported in 5 B. & C., and in 8 D. & Ry., and it will be necessary, in consequence of an observation made by Mr. Bourke, to refer to both reports. That was an action of covenant. The declaration averred that all the interest came to the defendant, and that the premises were out of repair. The same, substantially, as the present. The first plea was *non est factum*—the second, *actio non*, because before December, 1819; there were tenants in common of one-half of the premises, and the defendant, as tenant in common, was entitled only to one-sixth; at one time one-sixth, and at another time one third. The substance of the plea was, that the defendant was only in possession as tenant-in-common, and that plea was demurred to. The demurrer was argued at great length, and *Hare v. Cator* was cited. Bayley, J., says, "I have no doubt this plea is bad." Then he

goes on, "The question is, whether the defendant, under such circumstances, is liable to be charged in the manner now attempted," and then he refers to *Hare v. Cator*, and says, "He should have pointed out the other persons liable, and then the plaintiff might have been compelled to include them in his declaration." Holroyd, J., as reported in Dowl. & Ry. p. 268, says, "He might, no doubt, have pleaded that there were other persons who were by assignment jointly with himself in the possession of other parts; but then, such a plea must be in abatement and not in bar." The words in Barnewall and Creswell are substantially the same, but not so precisely. *Curtis v. Spitty* was this. The plea was similar to that in this case, and in the case in Barnewall and Creswell. The Court distinguished the case, and brought it within the authority of *Hare v. Cator*, on the ground the party had an undivided interest in the entire. I confess I think even there the judges seemed to entertain some little doubt as to the propriety of their decision; though I should follow it, but they say the question may be put by either party on the record if brought on again. The question is, how have these cases been acted on? What rule is established in England as to the course to be taken where one of several joint tenants or tenants in common is sued, leaving out the others? We were referred to *Heap v. Livingston* (11 M. & W., 896). That was an action of covenant. The defendant pleaded there were joint tenants, that the estate of the said J. S. vested in, &c., who became and continued to be, &c. There was a demurrer to the form of the plea, and it was said the manner in which the joint tenancy was created ought to be set out more minutely. The Court said, (in other words,) it could not be a plea in bar; it is properly a plea in abatement, and being so, there is an informality in it for which we give judgment against it. There was some antiquarian research, some clever person having discovered the meaning of *per my et per tout*. There is another matter—the opinion of the Bar in England. The result of the cases, and how they are understood in England, will be found in 2 Wms. Saund. 181, note. Therefore, in the present case, if the matter rested merely on this, that this lady should be assignee of the whole interest in consequence of the matter not being submitted to the jury, and notwithstanding that leave has been reserved to us to draw inferences, and that the jury would have drawn inferences if I thought that material, personally I would think it hard not to give this lady the opportunity of going back to the jury. But if I take the right view of that case in Meeson and Welsby, there was no question, for that should have been pleaded in abatement and not in bar. The plea might have been demurred to. We do not say it would benefit this lady, and with respect to merits and justice, all is against her. What is the case? She, and she alone, is in possession; she, and she alone pays rent; and her case is, that her sisters, who do not appear to have meddled with the property, should be joined.

CHRISTIAN, J.—It would have been very agreeable to me to have left the disposing of this case to the Lord Chief Justice, and I thought at one time I would have been able to do so, because I thought it was argued while I was occupied elsewhere. I find

that was a mistake, and I fear judicial usage does not warrant me in so doing, which I greatly regret. Of the two questions one is the proper division of responsibility between judge and jury. That is the principal question in the case: that on which the liberty was reserved, and on which the conditional order was taken. Did the plaintiff give evidence in support of the issue, so that he had the right to have it left to the jury? I will afterwards say something on the other point, viz., admitting the defendant was only tenant in common, what would have been the plaintiff's rights. As to the first question. It was contended by the plaintiff that his position at the trial was different under the first count and under the second count. In my opinion all such difference was avoided by the course taken at the trial. When the death of the testator was proved, and the death of the widow, the plaintiff established that on the happening of the latter event the defendant became seised of an undivided third, but had no interest in the other two-thirds. He put himself out of Court on both counts, unless he showed that these two thirds came to and vested in her by proof of conveyance, or by proof of an execution of the power. The question at the trial was and now is, did the plaintiff give legal evidence of the execution of the power? When the plaintiff gave a will in evidence, he precluded himself from raising the point that the same testator, by an act *inter vivos*, had parted with the same, i.e., that the will was a nullity. He was bound to complete the chain which he proved in part.—2 Phillips on Evidence, 150, where a case in 2 Bos. & Pul. 461, is cited. Now that does not refer only to derivation of title in pleading, but also in statement and proof at the trial. The reason of the rule which *prima facie* enables a landlord to rely on the possession of the defendant is, that he may be ignorant of how the premises came to the defendant; but if the landlord knows beforehand how they did come, the reason of the rule ceases. The object of the rule is to relieve the landlord from ignorance, and not to relieve him from proving a title, every step of which he knows. No case exists, and none, I believe, could be cited, in which a landlord, having proved a title step by step up to a certain instrument, was held to be under any exemption as to that instrument. I say that, not forgetting two cases, one of which I overlooked—the other the Chief Justice was kind enough to mention to me. The former does not affect the argument. It was a case where a purchaser under a *fi. fa.* brought an ejectment. It appeared there was a hitch in the derivation of title, because though there was administration *de bonis non*, there was not an administrator of the original lessee himself. There was a defect in it then; but remember this—there was evidence the party was paying rent to the landlord. Whatever term he had, the sheriff had a right to sell, and give possession of to the purchaser; and therefore possession of some kind was sufficient to sustain the title. But where the landlord knows the title from the commencement of the action, comes prepared to prove it up to a certain point, this is not an authority that he is under any different rule from the ordinary one. As to *Dowell v. Dignan*, the difficulty I have is to perceive its bearing on the present case. The action was on a lease *pur autre vie*, suing the defendant in one count as special occupant.

There was another which charged him generally with the estate having come to him by assignment. It turned out he never went into possession, and the case in that count was put out of the case, but the argument before the Queen's Bench was, whether his possession as special occupant was not such that the law cast the estate with its responsibilities on him. Where the case touches the present, is to my mind incomprehensible. It was said the plaintiff would have failed against the three, but it is forgotten he had the will, and proved it on the trial, by which title was deduced into them, and therefore it would be as tenants in common, and not as special occupants. The plaintiff deduced the title; one step more was necessary to complete the proof—a due execution of the power. No doubt, under the will, the three became tenants in common of the testator's property, including the leasehold in question, subject to the power in the mother to alter this, and she might have given other property. There is a serious question, if the widow had not an unlimited power of expenditure during her lifetime. Two things were necessary to give the whole to Mrs. Gray—1. That there was other property for the other sisters. 2. That such a power was so exercised. There is no evidence that Bernard Daly left any property but these lands—still less that any was in existence at the widow's death. To give the whole would, I think, have been a void exercise of the power. Suppose that difficulty removed, how was the exercise to be proved? It was argued that a mere division of the property without writing would be sufficient, but that was abandoned, and it was admitted a writing of some sort would be necessary. How was he to give that? The ordinary mode was open to him; he might know where it was to be found. It was of recent existence. It must have been in the possession, power, or procurement of the defendant or her sisters. He might have served a *subpoena duces tecum*, and he might have exhibited interrogatories to her under the Common Law Procedure Act. These are the ordinary measures which a suitor must take, and if these fail, he must take his remedy against those who have disobeyed the *subpoena duces tecum*. Notice to produce was not given in evidence. Notice to produce all documents was, but that is not sufficient, and on my notes of the trial no such notice appears. Without an effort to procure the document, the plaintiff relied on a presumption to be deduced from acts of the defendant dealing with the possession for four years. Suppose they showed possession of the defendant and exclusion of the sisters, I wish to know if by the laws of evidence title can be proved in that way. The judge should tell the jury they must be satisfied such an instrument existed. It is not like a grant being presumed from twenty years' possession, though the jury think such never existed. The jury must find it as a fact. Was it ever thought of that such a presumption could be founded on four years' possession? We are opening a new chapter in the law of evidence. I know of no book in which it was ever suggested that possession for less than twenty years could presume title, especially if there was no effort to produce. The duty of determining what the character was, lay with the judge, and not with the jury. There is hardly a number in the English Reports which does not lay down that a judge

does not discharge his duty unless he judges the whole, and sees if there be a case for the jury. The safe rule is, that if all be as consistent with a positive as a negative, it is his duty to interfere. In *Wheelton v. Hardisty* (8 E. & B. 263) it is said that "modern cases have established that where the party on whom the onus lies of proving an allegation gives evidence as consistent with one view of the case as the other, he fails in his proof." The question is, what was the evidence here? Mrs. Daly was tenant for life, resided on the premises. She died in March, 1859. The defendant and her two sisters became tenants in common. The acts relied on by the plaintiff done by the defendant, were some parol, some in writing. The former amount to this, that the defendant and her husband, and then herself farmed the lands; authorized one McDonnell to collect the rents, and whatever he received he paid over to O'Loughlen. There is no evidence as to the other two tenants in common, what they were, where they were, or what other property there was. If so, are we driven to the presumption of some instrument turning the possession in common into a sole possession? Why, they are the very acts a tenant in common has a right to do. Each tenant in common is entitled to the possession of the whole. The Statute of Limitations makes not the slightest difference. It operates on nothing except the limitation of actions. It is a dead letter till twenty years have run. Only four have run. Its effect is without altering the distinction between joint tenants and tenants in common. I must say the Statute of Limitations has no bearing. How then do you advance yourself to proof? The tenancy in common is destroyed by acts which are the acts which a tenant in common has a right to do. As to the letter and the redemption. So far as these were acts, the observations I have made are applicable to them; for a tenant in common may ask for a renewal, and may redeem the premises from eviction. It is said they were admissions. This is putting them on a substantial basis of their own. Here, again, we are in danger of making formidable invasions on the established rules of proof. Is this document an admission by which this missing deed may be dispensed with? *Slatterie v. Pooley* (6 M. & W. 699) was strongly disapproved of in 8 Ir. Law R. 385, and is severely criticized in Taylor on Evidence. But it would be going beyond that to hold that this admission is to be taken as evidence dispensing with all necessity for the slightest step in the way of proof. Turn to the documents, and see if there is anything more inconsistent with anything but a tenancy in common. She speaks in her own name; she does not mention her sisters—but these words must be taken in reference to the matter in hand—a renewal; for that each tenant represented the others. It is not till the renewal is prepared that the others need be mentioned at all. With perfect propriety she may say she does represent the lessee, for she does it for that purpose. As to the plaint in the ejectment, it is futile to found anything on that. Mrs. Gray and some other thirty persons are named. Defendant or defendants are named promiscuously: it may be an error. But she never saw this, she is not connected with that. We may assume O'Loughlen by her authority redeemed the premises. Thus stands the evidence. Mrs. Gray

farmed the land, applied for a renewal, and redeemed the premises from eviction. How can these things found a presumption that she ceased to be tenant in common? This will be a good test. Suppose the sisters brought an ejectment against her and she filed defence under the 210th section of the Common Law Procedure Act, and admitted a right to two-thirds in them. If the plaintiffs went on they should prove an actual ouster. If they only proved what is here, could that justify a judge in telling a jury there was evidence of an ouster? If not, how then here? It is said the defendant might have been examined. The answer is, the proof was on the plaintiff. He was bound to prove by the ordinary modes of evidence. 1. The power is not shown to have arisen;—there is no proof of a power properly. 2. There is no evidence of an instrument executing. 3. Four years are not in law sufficient to found a presumption of a deed. 4. The possession is as consistent with one as the other. To have left this question would have been to have shifted on the jury that which I ought to have myself decided. A question of some interest to legal minds remains. I do not think it worth while, to consider whether with regard to form and procedure, the plaintiff can be allowed to shift his ground at the last moment. There might have been a demurrer. There might have been a request for a direction. He did not do that, but on another ground asked for a direction, and failing that to have leave reserved. I know of no ground not reserved at the trial, on which a new trial ought to be granted, but I will not dwell on that. The averment of assignment was traversed, and an issue taken. The question is, if that averment was proved, by showing that all the estate in one undivided one third came to the defendant, while the rest came to two other persons. The proposition seems like a mere solecism in language. The result of the case of *Hare v. Cator* is absorbed into *Curtis v. Spitty*. *Merceron v. Dowson* is the decision on which the plaintiff rests his argument. That did not go on a variance in proof, but on a demurrer. If the case had gone to trial, this very case would have been, and the very question have arisen, if the plaintiff was not put out of Court, the moment the defendant was proved to be assignee only of an undivided part. But he pleaded a third plea. [His Lordship stated it.] It was demurred to, and the demurrer was allowed by the Court, on the obvious ground, that the plea was pleaded to the whole action, and was no answer to it. The defendant should have pleaded in abatement the non-joinder, and then the landlord should have amended. That special plea was plainly bad, but the decision is no authority on what would have been if the parties had gone to trial on the second plea. Therefore, *Merceron v. Dowson*, is no authority, whatever ground it may afford for inferential argument. *Curtis v. Spitty* came much nearer to this case. There was no special plea. There was a traverse, and an issue on that traverse. The case came before the Court on the ground of a variance. The argument was this: this case is the same as *Merceron v. Dowson*. The defendant cannot plead in bar at all. The Court said, we will not decide whether the facts are the same as in *Merceron v. Dowson*, because assuming that divided and undi-

vided are the same, it is the difference in pleading which makes the whole difference. I refer to the judgment of Tindal, C.J. in that case. p. 759. He considers the proposition of the plaintiff, and says it is not settled by decisions. Then he says, "if the proposition of the plaintiff be the law, then the lessor would have had a good cause of action, &c.," and the question might be raised by demurrer, just as here the objection might have been raised by demurrer, on the ground that the tenancy in common is admitted, and that all the rest is immaterial—a statement that all the estate came is immaterial, if a part is sufficient to sustain the case. The plaintiff has thought proper to take issue on what the defendant tenders, and he must stand or fall by the result. One ought to be satisfied that if the judges who decided *Merceron v. Dowson*, had before them the pleadings which were in *Curtis v. Spitty*, they would have decided the former as they did the latter, for the judge puts *Curtis v. Spitty* in the very predicament. I cannot see the possibility of holding that under the terms of this issue, the difference can be of any importance. There is only one unity between tenants in common, that of possession. That is the difference. There is unity of title and estate in joint tenants. But a tenant in common has no estate or interest in anything but his own undivided part. The only thing he has in the whole is possession. "There is only one unity between tenants in common."—2 Bla. Com. c. 12. The one is seized of nothing but of a whole. The other is seized of nothing but of a part. What then is the difference between this and *Curtis v. Spitty*? I hope I have shown that *Merceron v. Dowson* is no authority. But the *dictum* of Parke, B., in *Heap v. Livingstone*, has been referred to. Parke, B., used the language used by the counsel, "But in this case the defendant does not take part of the estate," (it is not, does not take part of the land) "he is seized *per my et per tout*" in the whole. And this, it is said, amounts to a *dictum*, that an issue such as that in *Curtis v. Spitty* could be proved by tenancy in common being proved. It would only be a *dictum* if it did mean that and would not bind this Court; but it does not mean that. It is expressly confined to the case before him. His reason for saying it would not be ruled by *Curtis v. Spitty* is, that the party is seized *per my et per tout*. I say, that in this case the defendant does take part of the estate and is not seized *per my et per tout*, and *Curtis v. Spitty* does apply. It is material to observe that when Parke, B., says *Curtis v. Spitty* is contrary to a *dictum* of Holroyd, J., he is mistaken. I have not the volume, I sent for it; I cannot find the *dictum*, and therefore I say Parke, B. was under the difficulty of accounting for the *dictum* of such a careful judge as Holroyd, J. As to the note which has been referred to, it is simply an erroneous representation. I dissent from the notion that the incorrect note of a text writer, even though he afterwards becomes a judge, is to be taken as stating the opinion of the Bar of England.

Rule absolute.

Court of Admiralty.

[Reported by William Chamney, Esq. Barrister-at-Law.]

THE SWAN.

Collision—Lights—The Merchant Shipping Act, 17 & 18 Vict., cap. 104—Appeal to Court of Delegates—Costs.

In a suit for collision to recover damages, as in the case of a total loss, the impugnant vessel will be held liable, if she ported her helm when she should, under all the circumstances, have starboarded, and if she was herself the cause of the collision, in not exhibiting coloured lights as required by the statute.

THIS was a cause of collision brought by the owners of the schooner, Sydney Jones, of Carnarvon, 79 tons register (Maurice Jones, master) against the brigantine Swan, of St. John's, Newfoundland, 170 tons burden, Jordan Pike, owner and master, under the following circumstances:—On the 10th day of November, the Sydney Jones, and four hands, sailed from Portmadoc to Limerick, with a cargo of slates, and on the 17th of the month was, in the prosecution of her voyage, about six miles off Kinsale Head, steering W.N.W., the wind blowing fresh from S.W. At half past six o'clock that evening, the wind still blowing fresh and the night dark and rainy, she descried a bright light about half a mile to westward and two points on her weather bow, being at the time close-hauled on her port tack. The light continued to approach, and in a very short time crossing the bows of the schooner she was discovered to be the Swan, of St. John's, going free on her starboard tack, and steering a course E. and by S. She was on a voyage from St. John's to Waterford, with her master and sole owner and eight hands on board, and her cargo was salt, fish and herrings. The schooner, being close-hauled, continued on her course; and the Swan, crossing it, and appearing one point and a-half on the lee bow of the steamer, put her helm hard down, and luffing up in the wind four points, was coming down so close on the schooner, that the latter vessel, seeing a collision was inevitable, in order to deaden the weight of the blow, put her helm hard a starboard. The consequence was, that immediately the jibboom and stem of the Swan struck the schooner on the starboard quarter, and did her considerable damage. The master and crew of the schooner abandoned her, and she was subsequently brought in by salvors to Cork. The damages claimed were made up of the direct damages, and the salvage and demurrage as consequential, and amounted to a sum of £566. His Lordship was assisted by nautical assessors, and the case was, by consent, heard *viva voce*. The facts appear fully in the judgment of the Court.

Doctors Townsend and Chatterton, Q.C., for the promovent.—The Swan was solely to blame for the collision in not having exhibited proper coloured lights, and should make good the loss sustained by the owners of the schooner. They cited *The Legatus*, (Swa. 168).

Doctors Gibbon and Elrington for the impugnant.

—The schooner was herself the entire cause of the collision in not putting her helm to port, and the want of coloured lights in the brigantine had nothing whatever to do with it. They cited *The Linda*, (Swa. 306); and *The Cleopatra*, (Swa. 135).

JUDGE KELLY, addressing the assessors, said—It will now be my duty briefly to direct your attention to those points of the case, upon which an issue has been knit, as the consideration of them will be necessary, in order to enable you to draw the proper conclusion, namely, as to which of those parties is in default; or whether both or neither is in default, for under any one of those shapes the result may present itself. The main facts of the case are stated without contradiction by either sides. The party promovent was steering W.N.W., and the impugnant E. by S., courses which are one point distant from each other. The wind was S.W., by S. The defendants going at a rate of 6 or 6½ knots an hour, and the promovents about 4 knots an hour. The tonnage of the two vessels are also beyond dispute, the promovent vessel being 79 tons; and the defendant about 168 tons; and there were four hands in the former, the smaller vessel, and eight hands in the latter. These two actors in the scene are going on opposite courses, a point asunder, one vessel about double the size of the other, and one crew about double the number of the other; the wind being in this position, that the larger vessel was going what must be considered free; and the smaller vessel close hauled on the port tack; in fact, one was close hauled on the port tack, and the other free on the starboard tack. The point of distance from the land, was about six miles from the old head of Kinsale; and the time of the collision is also pretty well ascertained. It was about six o'clock in the evening, upon a dark night, with small rain; but both sides agree that lights would be seen at a certain distance, and both vessels had lights. The party promovent had lights according to the present statutable regulations, namely, a green one on the starboard, and a red light on the port side. The other vessel which is a colonial ship, had one light at the end of the bowsprit, a clear bright light, and it is in evidence in regard to this clear bright light, that it was lighted early in the evening. Regarding the coloured lights, there is strong evidence that they were lighted at half-past five o'clock, but on the other hand there is some evidence given of a contrary nature, to induce the Court to suppose that these coloured lights were not lighted until immediately before the collision. However, it is not very material to come to any conclusion on that point, for the evidence is this, that a few minutes before the collision, the coloured lights were seen by the people of the "Swan." The case as to the lights pretty well comes to this, that about ten minutes before the collision, the people of the "Sydney Jones," saw the light of the "Swan," and by the admission of the captain of the "Sydney Jones," his own coloured lights were not seen by the "Swan" for four or five minutes after. The mate of the "Sydney Jones" states, that it was four or five minutes before the collision, that the white light of the "Swan" passed the bow of the "Sydney Jones," which bears out the evidence of the captain, who says, that four or five minutes passed before he saw the lights; we have

therefore this remarkable fact put forward by the people of the "Sydney Jones," that four minutes elapsed between the time they saw the "Swan" approaching, and the people of the "Swan" saw her—the "Sydney Jones" lights. We have the plaintiff's vessel in this precise condition. She is on the port tack, close hauled, and going about four knots an hour, W.N.W., and seeing, according to the mate's evidence, about half to the quarter of a mile off a white light on her port bow. We have her in the condition of having seen the light ten minutes before the collision. She continues to see that light until in about four minutes when she sees it crossing her bow. We have it in evidence, that she bore on her course, close hauled, going at that rate, and doing it for the four minutes, in other words it may be said, she sees a vessel unmistakably approaching towards her, and unmistakably on the opposite course to that which she was on herself, and we have it in evidence, that from the first moment she saw her crossing her bow, she continued on her original course. Seeing her approaching thus, and there can be no reasonable doubt entertained that she must have seen her course, what did she do under the circumstances? It appears on the evidence, that she simply did nothing but hold on her course. The question then, at this first stage of the case, in which the "Sydney Jones" saw the "Swan" fast approaching, the latter not having seen her, is, what ought the "Sydney Jones" to have done? It appears on the pleadings and proofs on her part, and was also relied on by her people, that under the circumstances, the old rule of the sea, namely—that a vessel going free should give way to a vessel close hauled, the latter continuing her course, should be held to apply. This rule of the sea was relied on by the captain of the "Sydney Jones," for we have it in evidence that he twice stated it to the master of the "Swan," and that he considered himself justified in relying on that rule of seamanship. The question now is, under the circumstances, was it applicable, seeing a vessel approaching so that she was evidently nearing him and crossing his path more and more. Was it right that he should hold on, justifying himself by that rule, from any consequences which might arise or be legally upheld in holding on that course? It becomes my special duty to state when any such question of law arises, what the law is. That that had been the rule there can be no doubt, but from time to time that rule has been modified, and what has now become the law, is to be found in the "296th section" of "The Merchant Shipping Act, 1854" (17 & 18 Vic. cap., 104.) That section is as follows.—"Whenever any ship, whether a steam or sailing ship, proceeding in one direction meets another ship, whether a steam or sailing ship proceeding in another direction, so that if both ships were to continue their respective courses, they would pass so near as to involve any risk of collision; the helms of both ships shall be put to port, so as to pass on the port side of each other, and this rule shall be obeyed by all steam-ships, and by all sailing ships, whether on the port or starboard tack, and whether close hauled or not, unless the circumstances of the case are such as to render a departure from that rule necessary, in order to avoid immediate danger; and subject also to the proviso that due re-

gard be had to the dangers of navigation; and as regards sailing-ships on the starboard tack, close hauled, to the keeping such ships under command." It is not denied, that if the circumstances of the present case established this as a fact, that the "Sydney Jones," steering W.N.W., saw the "Swan," approaching her, steering E. by S., and that those two vessels moving towards each other and continuing in this opposite direction, by so continuing would be so near as to risk a collision, that then this law must apply. That being the very class of case for which the law was made, it is binding under all such circumstances, save only one, and that is this, where a departure from it is necessary in order to avoid immediate danger, for then the law of self preservation, or doing the best under the circumstances is to be the course followed, and therefore I shall put it to you to say on the evidence, would these vessels have passed so near each other, as the law of this recent statute contemplated? In the history of such cases in the Court of Admiralty, frequent attempts have been made to get out of the binding effects of the rule, and to shew that ships did their best; but the firmness of the judges were called on to back the policy of the law, for the preservation of life and property, and they persevered in holding that, except under circumstances of immediate danger there should be an implicit obedience to the law, which ought to be well known, and which I have no doubt is well known among seamen. If then under the circumstances in which the ships were placed, these vessels were bound to pass each other on the port side, you have it in evidence and in pleading, and not denied but justified, that the "Sydney Jones" did not comply with this rule. The statute regulates the conduct of each vessel, and according to the statute it was the duty of the "Sydney Jones" to port, unless justified in not doing so by some immediate danger. Now, were there circumstances of such immediate danger, to justify a non-compliance with this rule? You will consider the case from the evidence, and answer that question, and if you consider there were such circumstances of danger, we then have a justifiable departure from the rule resting on those circumstances. I am bound to state, that, if you conceive nautically that these two vessels approaching so that they would meet, and have come into collision, should both have ported; such condition will involve a heavy penalty on the "Sydney Jones," as it would non-suit her in this Court, for that is one effect of a non-compliance with the statute. That will be your first and most serious question, and it is a question of large moment, and goes to the whole of the case before the Court, and involves the consideration, whether without the statutory cause, so wise a rule as this, so much observed upon by me, should be put aside. I am addressing gentlemen of long experience, in a perilous profession, who are to assist me with their opinions upon this point to keep me from going wrong, and enable me to give such a judgment, that while it satisfies the rights of the parties will keep the law inviolate. Then comes the second part of the case, which belongs more peculiarly to the defendant. The case of the defendant is this, that about four or five minutes before the collision she was right a-head of the "Sydney

Jones," and saw her red light and green light, saw her close-hauled, and crossed her course W.N.W. No ignorance is pleaded for her crossing, or of her position, and it is stated that she was but a cables length off in the pleadings, and from 50 to 60 fathoms in the evidence. The difference between the witnesses on this part of the case is very little indeed. The evidence of the captain of the "Sydney Jones" and the witnesses on the other side made only a difference of 40 or 50 yards in their respective accounts of the distance. Here the questions of the look-out becomes material. There is but a minute's difference in point of time as to the seeing of the colored lights. Jones said that they could not be seen for four or five minutes, and the other witnesses said about four minutes. There is but a minute of difference, and it may be concluded that the ships were about 50 or 60 fathoms assunder, at the time they both saw each other. At this the second stage of the case, where the "Sydney Jones" and the "Swan" saw each other, it will be for you to say on the evidence, whether each vessel did that which was usual and proper. The "Swan's" evidence is this—that the look-out reported the colored light of the "Sydney Jones," and the distance of the two vessels; and the captain of the "Swan" who had just gone below, hearing the confusion and order to starboard given, ran up and ordered the helm to port, and that although the boy at the wheel answered "starboard," he did not obey that order, but obeyed the order of the captain only. Now this evidence shows, that immediately the "Sydney Jones" was seen, the rule of the road was complied with by the "Swan." Her evidence further states, that before that time, the look-out of the "Swan" saw no light ahead of her or round her. The man that was on the look-out said he saw nothing, and the captain and his son, and the second mate, say that they saw nothing until the moment those lights appeared, and that then the order was given by the man on deck. Immediately they see the light, the captain made his appearance on deck, and gave the order to port, and that order alone is complied with. It will be for you to say, whether that was a seaman-like and proper act under the circumstances. That that act was done, and done in that way, there is no evidence to contradict. The evidence of the "Sydney Jones" takes 10 or 12 yards from the alleged distance, but differs nothing upon the question of time; and it will be for you to consider, and not for me to tell you, which way you should lean; and it will be a very difficult matter, under the circumstances where the two vessels were coming so close to each other to do otherwise than suppose that the time given was upon the average the correct time, and that the correct distance was also given. All this time on board the "Sydney Jones," it is clear that nothing was done but to alter her helm, then when the "Swan," was seen luffing up, it is beyond doubt that the helm of the "Sydney Jones" was put hard to starboard; it is admitted and justified, and said it was done to soften the blow, and prevent the mischief that was then inevitable, as much as possible. That the collision took place is beyond doubt, but whether from the "Swan's" stern or starboard bow or how is not of much consequence. The

question for you is—was the act of the "Sydney Jones" at that moment, a necessary and seaman-like act? It was contended by the captain of the "Swan," that if she held on, and had not starboarded, she would have gone clear, as he had ported. You will be the best judges of that, and should you be of opinion with Captain Pike, you will tell me so; but on that I must leave the conclusion altogether in your hands. You will be able from the distance to say, whether, if she continued her course after the "Swan" ported, she would have gone clear. It was pressed by one of yourselves on the captain, that if both vessels held their courses, they would have cleared. The question was put more than once, and he negatived it more than once, and said that nothing could have prevented a collision. An answer of that kind is for you, and my judgment must be in your hands. I cannot form so strong an opinion in my own mind, as to say, that I should rely on that statement, and I therefore leave it with you. There is other evidence in the case, with which you have nothing to do. On the subject of abandonment, I was referred to a case full of good sense, which I will read shortly for you. It is the case of the "*Linda*," reported in Swabey's Admiralty Reports, 306. In that case, just as in this, a vessel having suffered damages by collision, was abandoned by master and crew, and a question of the amount of salvage in consequence of that abandonment having arisen, the question also arose, was that abandonment justifiable. The learned judge is reported in that case as follows:—"He said he would require to be satisfied, that the master had wilfully abandoned his vessel, when he might have saved her; or that he had abandoned her through the want of ordinary nautical skill and resolution; but if there were extraordinary risk of life in remaining by her, or if it turned out to be a question in the want of judgment of the master, as to whether it was expedient to act in this way or that way; he should consider the collision to be the cause of the whole damage and expence incurred." And in the same case he says, "I consider the master and crew after the collision, are not bound to incur extraordinary risk of life by remaining on board the vessel." You have it strongly urged at the bar, that risk of life would have been incurred if they had remained. Now by the evidence it was a lee shore, and all the spars were overboard, and it appears that the vessel was in such a position that he could not handle her; and it might be that he was exercising under the circumstances, a very wise and humane precaution, to save the lives of his men, by taking them on board the Swan, even although there might be a want of judgment in it. It is also in evidence against that, that he was offered help. The captain of the Swan offered to lie by him, and it was said it was suggested to him to rig up a jury mast, but there does not appear to have been any very substantial offer, and you will consider under what head you will class this fact, and I will be guided by your opinion. The whole of the case comes to this, that on the evidence, you will say—First, Whether you consider these two vessels had been so meeting each other, as to come within the construction of the statute? Secondly, Whether, as the Sydney Jones did not comply with the statute by porting her helm; there

were any and what circumstances in the case, to justify her departure from the rule? Thirdly, What, under the circumstances of the case, was the duty of the Sydney Jones? Fourthly, After the Swan first sighted the Sydney Jones, was the porting her helm a proper and seamanlike act? Fifthly, To what cause do you attribute the collision? Sixthly and lastly, Was the master of the Sydney Jones, justified in abandoning his vessel?

JUDGE KELLY and his assessors then retired to his Lordship's chamber, and after a deliberation of upwards of two hours returned into Court, when the learned judge read the several questions, and the answers given to them as follows:—

To first question.—Yes. To second question.—Yes. The bright light shewn by the Swan, and seen by the Sydney Jones, was no indication whatever in itself, of the course pursued by the Swan. The Sydney Jones could only surmise the course of the Swan by the alteration in the bearings of the light. That light indicated the passage of a vessel, across the path of the Sydney Jones; and had the Sydney Jones borne away as the Act directs, she would have placed herself in the way of a vessel that was fast getting out of her way. It was not possible for the Sydney Jones to ascertain, certainly, the course actually pursued by the Swan, until it was too late for the Sydney Jones to comply with the rule. To third question.—Under the circumstances, it was the duty of the Sydney Jones to put her helm hard a starboard, and thus by deadening the vessel's way, diminish the consequences of inevitable collision. To fourth question.—No. We believe, that if the first order of starboard given by the officers in charge of the deck had been complied with, the Swan would have passed to leeward clear of the Sydney Jones. To fifth question.—The absence of colored lights on board the Swan, and their porting their helm when too late. To last question.—Certainly not. We feel bound to remark, that all hands were on the deck of the Sydney Jones at the time of the collision; all had equal opportunity of deserting their vessel, and the master was the first and only one to do so; and as he never returned on board his vessel, although offered assistance, and assured that she was not leaky, we do not consider that he was justified in abandoning her without a single effort.

JUDGE KELLY.—Having received the answers I have read, I pronounce the party of the Swan to be to blame in the collision and decree accordingly, reserving the question of costs and damages for further information, disallowing so much of the damages in accordance with the finding, that the master of the Sydney Jones was not justified in abandoning his vessel, as were the result of that abandonment.

[There was an appeal to the Court of Delegates in this case, and the decision of the Court of Admiralty was affirmed, but without costs.]

Proctor for Promovants.—Mr. R. C. Lee.

Proctor for Impugnant.—Mr. J. T. Hamerton.

NOTE.—Since the judgment in this case was delivered, the statute law as to the rules for sailing has been altered by "The Merchant Shipping Acts Amendment," (35 & 36 Vict. cap. 63.) It is, nevertheless, considered of sufficient general importance in other respects to render its publication desirable.

House of Lords.

[Reported by James Paterson, Esq., of the Middle Temple, Barrister-at-law.]

CHINNERY v. EVANS.—July 28.*

Mortgage—Payment of interest—Several estates in one mortgage—Limitation—Arrears of interest—3 & 4 Will. 4, c. 27, ss. 40, 42.

The payment of money to the mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its integrity and force with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent. Therefore, if estates A., B., and C. are included in one mortgage, and the owner of A. pay the interest, the mortgage is not barred by 3 & 4 Will. 4, c. 27, s. 40, and 7 Will. 4 & 1 Vict. c. 28, from his remedy against B. & C.

A receiver of the rents of a mortgaged estate is the receiver of the mortgagor, and any payment made by such receiver, by order of the Court, is payment in law by the legal agent of the person liable to pay within the meaning of 3 & 4 Will. 4, c. 27, s. 40.

The assignment by a mortgagor of outstanding terms to a trustee for the purchaser is not a possession of a prior incumbrancer within the meaning of 3 & 4 Will. 4, c. 27, s. 42, so as to entitle the mortgagee to more than six years' arrears of interest.

Quære, whether the payment of interest on a mortgage by a mere stranger would be a payment within 3 & 4 Will. 4, c. 27, ss. 40, 42.

THE appeal in this case was brought to reverse two decretal orders of the Court of Appeal in Chancery in Ireland, bearing date respectively 16th December, 1858, and 18th November, 1859, affirming orders of the Incumbered (now Landed) Estates Court in Ireland, dated 14th July, 1858, and of the Landed Estates Court in Ireland, dated 13th May, 1859. By these orders certain lands and premises situate in the County of Cork, called Stonefield and Crinallow, and in which the appellant was interested, were declared, with other lands in the Counties of Limerick and Kerry, liable to pay to the respondent the amount due for principal and interest on foot of a mortgage dated 1st January, 1776, and a sale ordered to be had of the lands for such purpose. in case the lands in the County of Limerick should prove insufficient; and it was declared that the demand of the representatives of the mortgagee was not barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, as against the said County of Cork lands. The facts of the case which gave rise to the questions involved were as follows:—Sir Robert Tilson Deane, afterwards Lord Muskerry, and father of the present Lord Muskerry, being in the year 1776 seised in fee of the lands of Clydaghmore, in the County of Kerry, Stonefield, and Crinallow, in the County of Cork, and of Gormanstown, and others, in the County of Limerick (and which several lands are hereinafter called the Kerry, Cork, and Limerick estates), by deed of mortgage of 1st January, 1776, mortgaged all said estates to the Hon. Grace Freke,

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in fee, to secure the payment of a sum of £8,000 of the then currency of Ireland, with interest, and the usual collateral judgment was confessed by said Sir Robert Tilson Deane to the said mortgagee. The sum due on foot of said mortgage was claimed by the respondent, and the interest of Sir Robert Tilson Deane in the Cork and Kerry estates, subject to the mortgage, if the same should be declared subject thereto, was claimed by the appellant, and the equity of redemption in the Limerick estate remained in the present Lord Muskerry, who succeeded to the said estate on the death of his father, in or about the year 1818. Grace Freke having died in 1782, her right to the mortgage-money became vested in William Putland and Dominick Burke, who were her executors, and who duly proved her will and codicil, and obtained probate thereof on the 13th of November, 1782. In 1784, an arrear of more than a year and a half's interest having become due to the executors of Grace Freke, the mortgagee, on foot of said mortgage, they presented a petition under the provisions of the statute of 11 & 12 Geo. 3, c. 10, to the Court of Equity Exchequer in Ireland (to which Lord Muskerry, the mortgagor, was sole respondent), for a receiver, and obtained an order therefor, to be appointed over all the estates comprised in said mortgage, being the Kerry, Cork, and Limerick estates. The receiver, however, was never made available over the Kerry or Cork estates; but the receiver then appointed, and the succession of receivers afterwards nominated by the Court, had been in the receipt of the rents of the Limerick estate from the year 1784 to the present time, for the purpose of paying the interest on the mortgage, pursuant to the said statute. The rents of the Limerick estate were, however, wholly insufficient for that purpose. In the year 1811 an order was made by the Court of Exchequer directing the receiver to pay the rents and profits of the lands to the parties who were then beneficially interested in the mortgage. The several estates comprised in the mortgage were, at its date, subject to several outstanding judgment-debts of Sir R. T. Deane. The Kerry and Cork estates were also subject to a heavy jointure, payable to Charlotte Lady Deane, the mother of Sir Robert Tilson Deane, and on which large arrears were due in the year 1784. The mortgagor was greatly embarrassed, and unable to pay off the said judgments, or mortgages, or arrears of jointure, and had recourse to every means of raising money. Two of the parties to whom he applied were Crosbie Morgell and Broderick Chinnery, both attorneys, with whom he had many money dealings of many years' standing prior to the year 1790. In the year 1783 Sir Robert Tilson Deane sold the Kerry estate included in the mortgage to Crosbie Morgell, who afterwards conveyed same to said Broderick Chinnery (who was afterwards created a baronet); and, in the year 1790, he sold the Cork estate to the said Broderick Chinnery, who had, in the year 1789, contrived to get a fee-farm lease or grant from the said Sir Robert Tilson Deane, at a low rent. The consideration recited in said purchase-deed of the Cork estate was the amount of the several judgment-debts before stated, on which elegits had issued, and findings had been obtained, and haberes executed of said Cork estate (and which judgments

and elegits were assigned to a trustee for the said Broderick Chinnery). The arrears of the prior jointure then vested in said Broderick Chinnery which he had purchased, and other securities claimed by Chinnery against said Sir Robert Tilson Deane's estates. Thus Broderick Chinnery, having obtained, by means of the early securities vested in him or his trustee, a title prior to that of the mortgage of 1776 to the Cork estate, the receiver could not be made available against said Chinnery claiming those early securities as long as they were unsatisfied, and he and those claiming the Cork estate since his death thus continued in the possession obtained under those securities. There was no distinct evidence that the Kerry estate was extended under elegits on foot of judgments prior to the mortgage of 1776, though it appeared probable that such was the case. Sir Broderick Chinnery died in the year 1808, having made his will, dated the 20th July, 1807, whereby he devised the said Cork and Kerry estates to Richard Boyle Chinnery, his second son, for life, with remainders over, and under the limitations thereof the appellant claims to be entitled to those estates for life, and her committee, the Rev. Sir Nicholas Chinnery, claims to be entitled to the reversion in fee. The interest in the money secured by the mortgage having become vested in Anna Dorothea Putland, who became personal representative of Grace Freke, and was also beneficially entitled to a portion of the money due thereon, she presented a petition to the Commissioners of the Court of Incumbered Estates in Ireland, on the 22nd July, 1853, for a sale of all the estates included in the mortgage. By an error in this petition, the sum of £5,000 only was stated to be due for principal money on foot of the said mortgage. Subsequently, the solicitor having obtained more accurate information, and ascertained that the Cork and Kerry estates were not in the hands of the receiver appointed in the mortgage matter, presented a supplemental petition to the Court, pursuant to leave granted on a statement of facts, and therein was claimed the entire principal sum of £8,000 Irish, and a large arrear of interest due thereon; and Richard Boyle Chinnery, who then represented the interest of Sir Broderick Chinnery in the Cork and Kerry estates, was named as owner, the said Richard Boyle Chinnery being a lunatic. The committee of his fortune endeavoured to show cause why these lands should not be sold for payment of the mortgage, and relied upon the Statute of Limitations, 3 & 4 Will. 4, c. 27, as barring the demand of the mortgagee against the Cork and Kerry estates, and also insisted that those estates should not be sold unless the representatives of the mortgagee first redeemed the early securities before mentioned, which were then claimed on the part of the said Richard Boyle Chinnery. The order for sale was made absolute, the Court being of opinion that there was no defence to the claims of the mortgagee. Richard Boyle Chinnery died, and on his death the Rev. Sir Nicholas Chinnery, on behalf of Maria Chinnery, who was also a lunatic, and who claimed to be entitled for life to the said Cork and Kerry estates, under the will of the said Sir Broderick Chinnery, obtained permission from the Court of the Commissioners for sale of Incumbered Estates in Ireland to rehear the case, and at the re-hearing he relied

upon the same grounds as were previously brought forward on the part of the said Richard Boyle Chinnery; but the Court decided that the mortgagees were not barred by the Statute of Limitations, or bound before a sale to pay off any incumbrances vested in the said lunatic, and refused with costs the application to alter the order for sale of those estates made against the said Richard Boyle Chinnery. From this order a petition of appeal was presented on behalf of the said Maria Chinnery to the Court of Appeal in Chancery in Ireland, when said Court coincided with the commissioners, and decided that the payments made to the mortgagees from time to time by the receivers under the proceedings hereinbefore mentioned and continued, from the year 1784 to the present time, took the case out of the Statute of Limitations as against all the estates included in the mortgage, and dismissed the appeal with costs. From the last-mentioned order, bearing date the 16th December, 1858, the present appeal was brought. Nothing was decided either in the Court below or in the Appeal Court as to the incumbrances claimed by the Chinnerys, the Court being of opinion that the proper time to provide for them was when the funds to arise from the sale of the lands came to be distributed. Before any rehearing of the order made by the Commissioners of the Incumbered Estates Court, or appeal brought therefrom, an order of reference, bearing date the 22nd July, July, 1856, was made by Commissioner Hargreave, in whose office the matter was pending, to the then officer of that Court (Master Flanagan), to ascertain the amount due to the representatives of the mortgagee on foot of the mortgage of 1776. A change of parties took place before the account was taken, the petitioner (Mrs. Putland) having died in Oct., 1856, and the matter was continued in the name of Kyre Evans, the respondent herein, and who obtained administration *de bonis non* of Grace Freke, and obtained probate as executor to the will of Mrs. Putland. The order of reference was then proceeded with, the appellant, by her committee, the Rev. Sir Nicholas Chinnery, intervening in the office. The respondent, by his charge filed on the 7th February, 1857, claimed the full amount of the principal money secured by the mortgage, viz. £8,000, late currency of Ireland, to be due, together with interest on same from the time of the appointment of the receiver in 1784, after giving credit for the amounts from time to time paid thereout by the various receivers pursuant to the orders of the Court. The appellant by her discharge contended, that no more than six years' interest calculated from the time the supplemental petition was presented to the Commissioners of Incumbered Estates Court, could be recovered as against the Cork and Kerry estates, and also insisted, that at the furthest the account should be taken on the supposition that no further interest was due in 1832 than was stated in the petition of Hassell and wife in that year, verified by Mr. Butler as their solicitor. This order of reference, not having been prosecuted to a conclusion while the Commissioners of Incumbered Estates Court held their office, was acted upon and carried out before Hargreave, J., in the Landed Estates Court, to which Court the jurisdiction in all matters pending before the Commissioners of Incumbered Es-

tates Court was transferred, and the learned judge, after hearing the parol evidence of Mr. Robert Butler (who had verified the petition in 1832), and considering the documentary evidence produced, and the notices of the appellant claiming the charges vested in her or her trustees affecting the said estates, and which they insisted should be redeemed by the respondent before the said Cork and Kerry estates should be sold, held that respondent was entitled to recover the entire of the principal and interest due on foot of the mortgage from the year 1784, after crediting the payments made by the receiver, first, by a sale of the Limerick estate, and secondly, for the deficiency, if any, though exceeding six years before the supplemental petition and going behind 1832, by a sale of the Cork estate; and thirdly, if any deficiency after the sale of the Limerick and Cork estates, by a sale of the Kerry estate, but so as not to levy out of said last-mentioned estate more than six years' interest prior to the supplemental petition. This distinction as to the liability of the Kerry estate the judge founded upon two grounds: first, that that estate had been sold to Crosbie Morgel in the year 1783, before the appointment of the receiver in the mortgage matter, and said Morgel had not been made a party thereto; and second, that it had not been clearly shown, although it was probable, that the receiver had not been made available over said estates by reason of there being outstanding prior incumbrances vested in the purchaser. It appeared from the documentary evidence produced before the learned judge on that occasion by Mr. Robert Butler, that after he was appointed receiver under the order made upon said petition so presented in said year 1832, some of the parties beneficially interested in the amount due on foot of said mortgage wrote to the said Butler, informing him as such receiver, as the fact was, that there was an enormous arrear of interest due on foot of said mortgage, and that the said mortgage-debt was secured on other lands besides said Limerick estate, and calling on him as receiver to take steps to get into possession of said other lands, in order to get payment of said arrear of interest, and pointing out the annual deficiency in moneys mentioned, by which the payments made out of that part of the mortgage lands in the County of Limerick fell short of the interest properly payable on the mortgage. And it was then shown to the judge that Robert Lord Muskerry was, from the year 1780 down, in embarrassed circumstances, with receivers over the entire of his estates. There was no suggestion on the part of the appellant that there was any other fund out of which any payment was or could have been made on foot of the interest which accrued on said mortgage, beyond the several sums set forth in the schedule to the charge so filed on the part of the respondent under said order of reference of the 22nd July, 1856. From the order of Judge Hargreave, bearing date 13th May, 1859, Maria Chinnery appealed to the Court of Appeal in Chancery in Ireland, when the order was, on the 18th November, 1859, affirmed with costs. The 3 & 4 Will. 4, c. 27, s. 40, enacts that "No action, or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged, &c., but within

twenty years, &c., unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." Section 42—"No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, &c., shall be recovered by any distress, action, or suit, but within six years next after the same shall have become due, &c.: provided nevertheless that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years." The 7 William 4 and 1 Vict., c. 28, enacts that "It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the 1st section of 3 & 4 Will. 4, c. 27, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time when the right to make such entry or bring such action or suit in equity may have first accrued."

The Attorney-General (Palmer) and Hobhouse, Q.C., for the appellants, contended that, as regarded the Cork and Kerry lands, the claims of the mortgagee were barred by the Statute of Limitations; or, at all events, that the Court ought to presume a release. As to the other point, no more interest than for the six years prior to 1856, the filing of the petition, was due out of any of the lands; that the lands in Kerry and Cork were by the order deprived of the benefit of the Statutes of Limitations as to interest by allocating the produce of the Limerick lands first to the earlier interest claimed by the charge, thus indirectly taking away the benefit of the bar of the statute as to interest, to the benefit of which as to the Kerry lands the order declared the appellant entitled.

Rolt, Q.C., Cairns, Q.C., and Graydon, for the respondent, contended that the payments made on account of the mortgage through the receivers out of the rents of the Limerick estate were payments made within the meaning of the statute 7 Will. 4 & 1 Vict. c. 28, and excluded the operation of the 3 & 4 Will. 4, c. 27. As to the Cork estate, the respondent was now entitled to recover against the same the full amount of the mortgage-debt and arrears of interest, inasmuch as R. B. Chinnery was an incumbrancer in possession of the estate at time the proceedings were commenced in the Incumbered Estates Court within the meaning of 3 & 4 Will. 4, c. 27, s. 42.

The following authorities were referred to:—*Roddam v. Morley* (1 De G. & J. 6); *Toft v. Stephenson*

(1 De G. M. & G. 28); *Bolding v. Lane* (1 De G. M. & G. 122); *Doe v. Williams* (5 A. & E., 291); *Homan v. Andrews* (1 Ir. Ch. R. 106); *Brocklehurst v. Jessop* (7 Sim. 433); *Yates v. Hambly* (2 Atk. 360); *Price v. Varney* (3 B. & Cr. 733); *Underhill v. Devereux*, (2 W. Saund. 68); *Hyder v. Dallanay* (2 Hare, 528); *Toulmin v. Steere* (3 Mer. 210); *Parry v. Wright* (1 S. & St. 369).

Cur. adv. vult.

THE LORD CHANCELLOR.—The first question which is raised by the present appeal relates to the construction of the 40th section of the statute 3 & 4 Will. 4, c. 27, and also to the true construction of the statute of the 7 Will. 4 & 1 Vict. c. 28. The facts that give rise to the present question, so far as I have stated it, may be expressed in substance in the following way. A mortgage was made a great many years ago, in the year 1776, of estates in Ireland of three denominations, the estates being situated in three several counties—the County of Cork, the County of Limerick, and the County of Kerry. After that mortgage had been made, the mortgagee presented a petition under the Irish Act of the 11 & 12 Geo. 3, for the appointment of a receiver of the rents of the mortgaged premises, and accordingly a receiver was appointed by virtue of the provisions of that statute. That receiver entered into possession and into the receipt of the Limerick estates alone, and from the rents so received by him the interest was kept down and paid upon the mortgage. The equity of redemption of the estates situated in the Counties of Cork and Kerry has been sold and conveyed by the mortgagor to different persons, the interest continuing to be paid on the mortgage out of the Limerick estates exclusively. And the question is, whether the mortgage still continues to attach to the Cork and Kerry estates. Now, my Lords, first, by the 40th section of the 3 & 4 Will. 4, it is enacted that no section or suit or other proceeding (I read the statute shortly) shall be brought to recover any sum of money secured by any mortgage, but within twenty years next after the present right to receive the same shall have accrued to some person capable of giving a discharge for, or a release of, the same, unless in the meantime some part of the principal money, or some interest upon the mortgage, shall have been paid, or some acknowledgment of the right given in writing signed by the person to whom the same shall be paid, or his agent, to the person entitled thereto, or his agent. The words of this section, upon which the present question turns, are, "unless in the meantime some part of the principal money, or some interest thereon, shall have been paid." It is contended, on the one side, that very great inconvenience indeed would arise if the mortgagee—the existence of whose incumbrance might actually be unknown—should be at liberty, after sixty or seventy years, to make a demand upon the proprietor of the estate originally comprised in the mortgage, but which has been aliened and sold by the mortgagor perhaps fifty or sixty years ago. On the other hand, it is said with great force, that the inconvenience and injustice to the mortgagee would be very great indeed if, while continuing to receive from the person liable to pay the interest due upon his mortgage, he was to be de-

prived by the act of the parties entitled to the equity of redemption only, of the estate comprised in his mortgage. And, my Lords, I think it plain that considerations of justice and of general convenience and expediency prevail in favour of the latter view. If an estate comprised in a mortgage be sold and conveyed by the mortgagor, whatever may be the form of the conveyance, it must be sold and conveyed in reality subject to the mortgage. If the mortgagee has the legal estate, and has the title-deeds (which in ordinary cases is the fact), no alienation can be made by a purchaser except that purchaser has notice of the mortgage, without great laches or neglect on the part of the purchaser, and great fraud on the part of the mortgagor. I think, therefore, that it is impossible to deprive the mortgagee of the right to resort to any estate which he has not released or given up, being an estate originally comprised in his mortgage, so long as that mortgage is legally and regularly kept alive, as it is undoubtedly is kept alive, by the payment of interest on that mortgage by the person who is liable to pay it. It was said in argument that if such interpretation be given of the statute, it would be possible for a stranger to pay the interest to the mortgagee, and thereby to keep alive the mortgage. It is hardly necessary to deal with such an improbable case as that, but the answer to it I think would be this, that money paid—that is, money handed over by a stranger to the contract under which it was paid to the individual entitled to receive it—would not have the characteristics and the legal quality of payment. It would be a voluntary render, a gift or donation being made by a party not in any respect subject to liability, to the individual who would not be entitled to receive from the person so rendering any part of the money which it is supposed would be so paid. I think, therefore, that upon the first and general question it is quite clear that the payment of money to the mortgagee by the person liable to pay in respect of the interest on the mortgage continues the mortgage in all its original integrity and force with respect to the estates properly comprised in the mortgage and which had not been aliened or conveyed away by the mortgagee, or with his assent. I should have stated that the other section of the Act of the 7 Will. 4 & 1 Vict. was passed for the purpose of preserving in the mortgagee the right to make entry and bring an ejectment to recover the lands. The language of the 4th section being confined to cases of recovery of the money, the same principle is applicable to both, and the same *ratio decidendi* will apply to both sections. The next point raised in argument was this, whether payment made by the receiver appointed under the statute can be considered as payment made by the person liable to pay, or his agent, upon the hypothesis that those words in the 40th section of chapter 27 of the 3 & 4 Will. 4, namely, the words “by the person by whom the same shall be payable, or his agent,” apply to both cases, that is to say, to the case of payments of interest as well as the case of acknowledgments, which I think they certainly do. Upon that point, I think no reasonable doubt can be entertained that, under the statute, the receiver in receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the

mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order is payment in law by the legal agent of the person liable to pay. I have no doubt, therefore, and submit to your Lordships that no reasonable doubt can be entertained as to the mortgagee's security affecting all the lands originally comprised in it in those three separate Counties of Cork, Kerry, and Limerick. My Lords, it was proposed in argument, that this view of the statute would interfere with the view taken of the 42nd clause of the statute in *Bolding v. Lane*, which was decided by me in the Court of Chancery. But, my Lords, that arises upon a different section, and in reference to a different matter. The case of *Bolding v. Lane* decided this, that if there were several incumbrances upon the same land, ranking in a series one after another, payment made by the mortgagor would not keep alive the right of the first mortgagee to arrears of interest as against the second mortgagee. I think that does not at all interfere with, but is in perfect harmony with the view which I now suggest to your Lordships to adopt of the 42nd section. What was decided in *Bolding v. Lane* was this, that the words, “the person by whom the same is payable, or his agents,” were words of such large import and meaning that they would not only comprehend the mortgagor and his personal representatives upon whom the contract would be personally binding, but would also include the second or the third mortgagee by whom the principal and interest due to the first mortgagee might with propriety be said to be payable, inasmuch as the estate and right of the second mortgagee was subject and posterior to that of the first mortgagee, and he would be entitled to redeem the first mortgagee upon the payment of the principal and interest. Accordingly, the effect of that acknowledgment in writing given under the 42nd section was confined by that judgment, and, I think correctly, to the interest of the individual giving that acknowledgment. That, however, refers to a totally different matter from that which is now before your Lordships, and which arises upon the 40th section of the 3 & 4 Will. 4, and on the other statute to which I have already called your attention. The remaining part of the order appealed from raises a question of quite a different character. It appears that when a part of the estate was sold and conveyed away by the mortgagor, namely, the estates in Cork and Kerry, the mortgagee being in possession by the receiver of the Limerick estate alone, or rather of a sufficient part of the rents of the Limerick estate to keep down the interest, there were certain outstanding charges and incumbrances, a transfer of which was taken by the purchaser from the mortgagor, with a view to protect his title and interest in the legal estate, in the ordinary manner in which outstanding legal estate, or legal charges, are transferred in order to protect the title of the individual beneficially interested; and it was contended that, having regard to the language of the 42nd sec. of 3 & 4 W. 4, it would not be possible to confine the claim of the mortgagee to six years' interest alone, in consequence of the rents being received and possessed by persons entitled to the prior charges and incumbrances, and which might therefore be set up as a

reason for holding that the mortgagee was not confined to six years' arrears of interest. The section in question provides that the mortgagee shall only recover arrears of interest for six years, except in a case where a prior mortgagee, or other incumbrancer, shall have been in possession of the land, or in the receipt of the profits thereof. Then, inasmuch as no laches can be imputed to the mortgagee, who was unable to get possession by reason of a prior incumbrancer being in possession, it was thought unjust to limit such mortgagee to six years of arrears, and he was enabled therefore to recover all the arrears which became due during the time that possession of the land charged was held by the prior mortgagees. No doubt the exception is a very just one; but the reason for that exception is this, that when a prior mortgagee was *bona fide* in possession, then that possession excluded the subsequent mortgagee from being able to recover rents, or to recover lands, or to enter into possession. But it would be gross misapprehension of that section if we were to apply it to a case where the legal holder, of a defunct or satisfied charge or incumbrance, or of an existing charge or incumbrance, is not himself actually in possession, or in the receipt of the rents and profits, but where an individual is in that possession, or in that actual receipt, who is entitled, by a trust declared in equity, to the benefit of that outstanding charge or incumbrance. Your Lordships are all aware of the various expedients which the unfortunate state of the law with regard to real property has compelled purchasers and mortgagees to resort to in order to obtain protection in an indirect manner where that protection ought to be given in a direct manner, and some of those expedients have been the taking of transfers of outstanding satisfied legal estates, or outstanding charges, with a view to protect the interest of the party in possession, but when that is done the individual who is actually and *bona fide* in possession, holding under the shelter and cover of the outstanding estate, is, of course, not entitled to say that his trustee, the owner of the mortgage or incumbrance, is the person in possession, and not himself. In this particular case, therefore, it was not the holder of the charge who was in possession, but it was the individual for whom the holder of that charge was made trustee by that species of artificial arrangement to which I have already referred. Therefore, I must submit to your Lordships that it was quite an unfounded thing to hold, as was done in the Court below, that this land was actually in the possession of a *bona fide* incumbrancer prior to the mortgage of the principal respondent, and that consequently the present respondent was entitled to an unlimited extent of interest, and was not to be confined to six years. I think your Lordships will agree with me that it was not a case of *bona fide* possession by the incumbrancer within the true meaning and interpretation of the statute, and that therefore both with regard to the Cork estate and with regard to the Kerry estate, the mortgagee is not entitled to more than six years' arrears of interest. Therefore the order will be partially affirmed and partially reversed, as I submit to your Lordships, to the extent which I have already stated.

LORD CRANWORTH.—In this case the first question is, whether the mortgagees have now a right to bring

an action to recover the lands in the counties of Cork and Kerry included in their mortgage of the 1st of January, 1776, or rather whether they would have had such a right if no order for sale had been made by the Incumbered Estates Court. I think it clear that they would ever since July, 1784. They have been in possession by a receiver under the statute of that part of the lands comprised in their mortgage which is situate in the county of Limerick. The rents of those lands have been regularly applied by successive receivers towards liquidation of their interest, and by the express provisions of 7 Wm. 4, and 1 Vict. c. 28, any person claiming land as mortgagee may bring an action to recover it at any time within twenty years next after payment of any part of the principal money or interest secured by the mortgage. It was argued that a payment to be brought within this statute must be a payment by the mortgagor, not by a receiver, who is an officer of the court. But for this argument there is no warrant. The statute says nothing as to the person by whom the payment is to be made. It is not necessary to say what would be the effect if such an extraordinary case can be imagined of a mere stranger without authority from or communication with the mortgagor regularly paying to the mortgagee his interest for twenty years. It may be that this would not be a payment within the statute. In truth it could hardly be treated as payment at all; it would be so many gifts regularly made from time to time by a stranger equal in amount to the payments which the mortgagor ought to have made. That which is a mere gift cannot with accuracy be called a payment. But the payments in that case were not payments by a stranger, for though a receiver appointed under the Irish statute, 11 & 12 Geo. 3, c. 10, is an officer of the court, yet he is certainly no stranger to the mortgagor, but a person paying for him and on his account what he is bound to pay. I think, therefore, that when the petition was presented to the Incumbered Estates Court, the mortgagees had a clear right to recover possession of the land. This state of the law was calculated, it was said, to occasion great hardships to those who have become purchasers without notice of a mortgage. In this case I may observe that it seems very doubtful to me upon the evidence whether there was not distinct notice, but I take the case as if there were no notice. No doubt this is so; but the cases in which such hardship can arise are likely to be very rare, and can only happen in consequence of a purchaser having unfortunately accepted a bad title, of his having been unaware that his vendor was the owner only of an equity of redemption and not an unincumbered fee simple in possession. The purchaser in such a case suffers from his not having sufficiently ascertained the state of the vendor's title. That a contrary doctrine would be very alarming to mortgagees is obvious, for so long as a mortgagee receives his interest regularly, he does not feel himself under any obligation to inquire how his debtor is dealing with the equity of redemption—a matter in which he has no concern. But on the other question raised by this appeal, I cannot concur with the judgment which has been given below. The judge of the Landed Estates Court decided that, as to the lands in the county of Cork, the mortgagees were entitled to

an account of what was due for interest from the date of the mortgage. The question as to how far back a mortgagee is entitled to recover arrears of interest depends upon the 42nd section of 3 & 4 Wm. 4, c. 27. It is there enacted that no arrears of interest in respect of any sum of money payable out of land shall be recovered but within six years next after it shall have become due, but with a proviso that where any prior incumbrancer shall have been in possession within one year next before any action or suit brought by a subsequent incumbrancer, he may recover all arrears accrued during the possession of the prior incumbrancer. The Landed Estates Court decided, and the Court of Chancery concurred in the decision, that, inasmuch as when Chinnery purchased the Cork lands in 1790, various old incumbrances were assigned to a trustee for him to protect him and his heirs in their title and possession, therefore the case was brought within the proviso in the 42nd section of the statute. With all deference, I do not concur in this view of the law. What the statute contemplated was, the case of an actual possession by an incumbrancer. Now here, so far from there having been possession by an incumbrancer, there has all along been a purchaser in possession, and the most that can be contended for the purchaser is, that there has been an incumbrancer out of possession, but holding his security for the express purpose of protecting the possession of the purchaser. I may observe that the language of the conveyance to Chinnery is this. After assigning the incumbrances, he says, that "it is agreed that it shall be lawful to continue and keep on foot and unsatisfied the said mortgage, and the said four several judgments hereinbefore mentioned, and all proceedings on them respectively had as aforesaid, in order to protect the said Sir James Lawrence Cotter and Broderick Chinnery respectively in their title and possession of all and singular the said hereinbefore granted and released towns, lands," and so on: showing clearly that the possession was contemplated to be in point of law, as it was in point of fact, the possession of the purchaser. To hold that Chinnery and those who have succeeded him are incumbrancers, would be tantamount to treating a large portion of the owners of land as mere incumbrancers; for, in a great proportion of purchases, a part of the purchase-money is applied in satisfying some existing incumbrance which, as in the case now before us, is assigned to protect the inheritance. I concur, therefore, with my noble and learned friend in thinking that the decree is wrong in giving interest for more than six years before the filing of the supplemental petition in the Incumbered Estates Court. The case must therefore be remitted to the Court of Chancery, in Ireland, with a declaration to that effect.

LORD WENSLEYDALE.—My Lords, when this case was argued before your Lordships, I had a strong impression that the mortgage on the lands in the counties of Cork and Kerry of the 1st January, 1776, was barred by the Act of Limitations, 3 & 4 Wm. 4, c. 27, s. 40, and that the receipt of a portion of the interest enforced through the medium of a receiver of the rents of the Limerick lands, did not answer the description of a payment so as to prevent the Statute of Limitations running. Undoubtedly the payment mentioned

in Lord Tentarden's Act, (9 Geo. 4, c. 14) which is made to supersede the necessity of a written memorandum to take the case out of the Statute of Limitations, is a voluntary payment on account of a larger sum than due, so as to be on a different footing from a mere parol promise—a promise vouched by an actual payment on account. But subsequent consideration, confirmed by the opinions of my two noble and learned friends, the Lord Chancellor and Lord Cranworth, has satisfied me that my first impression was incorrect—a receipt of interest of mortgage. Simple possession of the subject-matter by an act of ownership is enough, and the receipt of the interest out of an estate, subject to three different mortgages, is enough to keep it alive as to all. The receipt by an officer, by order of the Court as receiver of the rents of the Limerick estate, operates as a part payment of the interest on all the three mortgages in Cork and Kerry as well as Limerick. In that respect, therefore, I agree with my noble and learned friends and the Court below. I agree also in the view that they have taken of the other important question. I think this is not the case of a mortgagee in possession, but of a purchaser. The case does not fall within the principle which allows a subsequent mortgagee who has been prevented receiving any interest by the prior mortgagee, receiving the whole. Here the proper interest is only for six years past. I agree, therefore, entirely in the views which have been so clearly and distinctly expressed by my two noble and learned friends.

Decree partly reversed.

Appellant's agent—T. Baker.

Respondent's agent—Holmes, Anton, Turnbull, and Sharkey.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

[BEFORE O'BRIEN AND FITZGERALD, JJ.]

TOTTENHAM v. MCGUINNEY.—June 13.

Practice—Countermand of notice of trial—Costs of the day.

Where countermand of notice of trial was served by the plaintiff a day late, and, notwithstanding the countermand, the defendant went on to incur expense in preparing for trial, and appeared in Court, Held, (he having entered a rule for costs of the day for not countermanding in sufficient time) that he was entitled only to the costs incurred up to the service of the countermand, and not to the costs subsequently incurred.

THIS was a motion on behalf of the defendant to have the costs referred back to the taxing officer for further consideration. The action was one of ejectment. The plaintiff served notice of trial on the 10th February, for the last Spring Assizes for the county of Leitrim, which took place on the 22nd of the same month; and on the 19th he served a notice countermanding the notice of trial, the last day for so doing being the

18th. On the 20th the defendant served a notice on the plaintiff's attorney, apprising him that the notice of countermand was late, and went on to get ready for a trial, prepared briefs and sent them out to counsel, issued subpoenas and paid *vaticums* to witnesses. He appeared before the judge at the assizes and had his appearance taken down, and, afterwards, within a month entered a rule for the costs of the day under the 105th section of the Common Law Procedure Act, 1853, for not countermanding in sufficient time. On the costs coming on for taxation, the taxing master allowed him the costs actually incurred by him up to the service of the notice countermanding the notice of trial; but refused to allow him the costs subsequently incurred by him as above stated. From this the defendant appealed.

Malley and Robinson, Q.C., for the appeal.—We are to have all the costs incurred by us up to the day on which the trial ought to have taken place. The costs given by the statute are "the costs of the day." [*Fitzgerald, J.*—That must be taken to mean the costs of the day properly incurred. The costs here were most improperly incurred. Surely the withdrawal of the notice of trial on the 19th was a good withdrawal. *O'Brien, J.*—The meaning of the Act is merely to give such costs as had been incurred up to the time of the withdrawal of notice of trial. Thus if, previously to the service of notice of withdrawal, briefs had been given out in consequence of the notice of trial, you would have been entitled to the costs of them; but the section gives no right to the party to go on heaping up costs.]—*Newton v. Chaplin*, (7 C. B. 774). [*O'Brien, J.*—There was no notice served in that case countermanding the notice of trial. *Fitzgerald, J.*—Your appearing at the trial was for the purpose of getting costs, not one penny of which had been incurred at the time of the withdrawal of notice of trial.] There is but one class of costs given in the Act for not proceeding to trial and for not countermanding in sufficient time. The penalty is the same in both cases. [*O'Brien, J.*—Then suppose it was necessary to bring down an officer of the Probate Court or of the registry office at an expense of £10 or £15, would you be entitled to do that, notwithstanding the countermand?] Certainly; sections 104 and 105 of the Common Law Procedure Act are to be read together. The meaning of the words "costs of the day" will be found in *Cole on Ejectment*, p. 339.

Samuel Walker, (with him *Heron, Q.C.*, who was not called on) contra, referred to *Archbold's Practice*, (10th Edition) p. 296; *Lush's Practice*, p. 350; *Day's Common Law Procedure Acts*, p. 80; *Gray on Costs*, p. 371; *Chitty's Forms*, p. 837; *Doncaster v. Cardwell* (2 M. & W. 390.)

O'Brien, J.—We think that this application must be refused, and that, if the Act of Parliament bore the construction contended for by the defendant, it would work great injustice. It is pushed to this: the party does not go to trial, and does not serve a notice of countermand in sufficient time. If he had done so, he need not have paid any costs. The Legislature has fixed four days as the period when a plaintiff may withdraw notice of trial without expense; but, with regard to the service of notice of withdrawal here, it

took place a day too late, and we are told that, although the plaintiff could not go to trial, and the defendant knew that, yet the defendant was entitled to make these charges for briefs and fees, &c., which he knew to be unnecessary when he sent them out. It would be most unjust to put that interpretation on the Act, unless we were obliged to do so. But are we obliged so to? What is the meaning of the term "costs of the day?" In the explanation of it given in *Cole on Ejectment*, there are two words which are decisive against the application, namely, "properly incurred." Can it be said that costs are properly incurred after the notice of trial has been withdrawn? It is almost enough to state that, to see that the application cannot be sustained. The text writers cited shew it also, as well as the observation of *Parka, B.*, in the case last referred to.

Fitzgerald, J.—I quite concur that the application should be refused. The Act is capable of the plainest interpretation: the defendant gets his costs of the day, if the plaintiff does not go to trial pursuant to notice; and on the other hand, if the plaintiff does countermand, but not in time, the defendant is entitled to such costs as he has incurred up to the service of notice of countermand. *Mr. Malley's* argument is, that if notice of trial is not withdrawn in time, the plaintiff is bound, and the defendant may go on incurring costs which, in some cases, may be serious. If we were coerced to accede to the motion, we should of course do so, but I think we are not obliged to do so, and we must refuse the motion with costs.

Motion refused with costs.

WHITE v. HILL, June 13.

Practice—Substitution of Service—Amendment—Cause of action arising within the jurisdiction—Affidavit.

An action was brought in Ireland against a defendant residing out of the jurisdiction, upon an English judgment. Portion only of the original consideration for the judgment, being money paid by the plaintiff for the defendant in the defence of an action here, arose in this country. Upon a motion being made for an order to substitute service of the summons and plaint grounded upon an affidavit stating that a great part of the cause of action arose within the jurisdiction, the judge gave liberty to amend the summons and plaint by adding paragraphs on the original considerations for the English judgment, and made a conditional order for substitution of service of the summons and plaint so amended. The summons and plaint was accordingly amended as directed, and several new paragraphs were added, one only, founded on the money paid as above stated, being for a cause of action which arose within the jurisdiction. Upon motion to make absolute the conditional order for substitution of service, the Court held that the affidavit above mentioned did not disclose the true state of facts, and discharged the conditional order.

Quære, Whether the Court can direct substitution of service of a writ of summons and plaint containing paragraphs upon several distinct causes of action of which one only has arisen within the jurisdiction, and all the others have arisen out of it.

MOTION to make absolute a conditional order for substitution of service, notwithstanding cause shown. The action was originally brought solely upon an English judgment for £300 recovered by the plaintiff against the defendant. The summons and plaint standing thus, an application before Hayes, J., was made for liberty to substitute service by serving a Mr. Guinness, who it was not disputed was a proper person upon whom service should be substituted. The affidavit upon which the motion was grounded stated that "a great part of the cause of action arose in this country." In point of fact, the only part of the original consideration of the judgment which arose in this country was a sum of £56 expended by the plaintiff in the defence of an action brought here against the defendant. All the other portions of the original consideration were causes of action which arose altogether in England. When the motion to substitute service was made, the learned judge gave liberty to the plaintiff to amend his summons and plaint by adding paragraphs upon the various original considerations for the English judgment; and further made a conditional order for substitution of service of the summons and plaint, when so amended, upon Mr. Guinness. In pursuance of the liberty thus given, the plaintiff, to the paragraph upon the English judgment, added paragraphs on a bill of exchange, a promissory note, and for work and labour, money paid, money lent, and on an account stated. Of these paragraphs, that for £56 money paid, being the amount expended in the defence of an action in this country as above stated, was the only one based upon a cause of action which arose within the jurisdiction of the Irish Courts. Substituted service of the summons and plaint thus amended, having been effected upon Mr. Guinness, the plaintiff now came to make absolute the conditional order for so doing.

Tandy appeared for the plaintiff.

Samuel Ferguson, Q.C., to oppose the motion.—The Courts have never decided that if the cause of action contained in one of several counts arose in this country, they would direct substitution of service of a summons and plaint containing a number of counts on causes of action arising out of the jurisdiction. If that was done, a party having a cause of action *ex contractu*, arising in this country, might join a cause of action for a tort arising in England or elsewhere, bring his action in this country and have a substitution of service. The matter is regulated by section 34 of the Common Law Procedure Act, 1853. Then as to the amendment, there was no jurisdiction, properly speaking, to amend in this case. The sections of the Act relating to amendments are the 16th, which applies only in cases of verbal and technical errors and omissions, the 87th & 89th which relate to cases of non-joinder of parties, and the 231st which seems to contemplate the existence of a controversy between parties to let in the power of amendment there given. Here there was no controversy, as there was no appearance by

the defendant when the amendment was made. The Court had no jurisdiction to substitute service as the writ stood originally, as the cause of action arose out of the jurisdiction.—*Collins v. Lord Frankford de Montmorency* (3 Ir. C. L. Rep. 473). The plaintiff then not having been able to substitute service in respect of the original cause of action, can service be substituted after an amendment, adding six new causes of action, of which only one arose in this country?

Tandy in reply.—The Court will order substitution of service where any part of the cause of action arose within the jurisdiction. In *Kisbey v. The Chester and Holyhead Railway Company* (6 Ir. C. L. Rep. 393), the contract to carry the goods was entered into in England, but there was a detention of a trunk here, and it was held that an action might be brought in the Irish Courts, and that substitution of service might be granted.—*Baham v. Fernie* (4 Ir. C. L. Rep. 92.) This being a foreign judgment, there is not a merger of the original causes of action; and the judgment is evidence of the original consideration. Other cases upon the question of substitution of service where part only of the cause of action arises within the jurisdiction are *Powell v. The Atlantic Steam Navigation Company* (10 Ir. C. L. Rep., app. xlvii); *Rilly v. White* (6 Ir. Jur. N.S., 87.)

O'BRIEN, J.—The general question arising in this case, is one which would require very serious consideration. My present impression is that where causes of action are in their origin wholly distinct, and without any connection between them, that is not a case for substituting service as contemplated by the statute. The cases to which we have been referred—and this applies to them all—do not in any respect decide the point. In all of them there was one contract, and in respect of that contract there were various breaches, some in this country, some out of the jurisdiction. Where that took place, of course the decision was that the fact of the cause of action arising partly in England, did not prevent the party from suing here, where it was grounded on a contract in this country, in respect of which he had also a right of action. But those cases do not touch the present one. I for one should be very slow to lay down the principle that a man by including in his summons and plaint, a claim for £5, which arose here, could join with that a claim of very considerable magnitude which arose in England, obtain a substitution of service, and have it tried here. There is another way also in which this might be used. A man may file a summons and plaint containing a cause of action arising here, in respect of which he does not recover anything, and he may include, with that, a claim arising in England, in respect of which he does recover. It is really enough to state these two consequences, to shew that we should be clearly satisfied that the case was within the Act, to substitute service. But, as I have said, this is a question which would require serious consideration if it arose in a manner in which we could decide it. But there are other objections to the order here. The order was obtained after the summons and plaint was issued, and at a time when, as it then stood, the action was grounded only on the English judgment. An order was then made that the summons and plaint should be amended by stating the original consideration for

the judgment, and the plaintiff amended accordingly. But the affidavit on which the order was obtained, does not disclose the true state of facts, namely, that one cause of action, out of several, arose in this country; but it states that a great portion of the cause of action arose within the jurisdiction, and was occasioned by defending an action here. Well that was not such a statement as should have been made; and if such a statement had been made to me, I am bound to say that on the statement, I would have been disposed to consider the case as belonging to that class where there was one contract, and some breaches here, and some in England. The affidavit should have gone on to state that there were distinct causes of action. It is very questionable, whether, if that had been done, the order would have been made. On these grounds, without deciding the general question, I think we ought to discharge the conditional order.

FITZGERALD, J.—I concur. It appears to me that there is great difficulty in exercising this jurisdiction of making orders on *ex parte* applications, and that there must be the most perfect good faith on the part of the party moving in them. I think there was not that here. Looking at the indorsement on the summons and plaint, I find that it shews a sum of £300, consisting of twelve different items, of which one only is for a cause of action, which arose in this jurisdiction. That is the whole allegation in the writ, whereas the language of the affidavit is, that a great portion of the cause of action arose within the jurisdiction. I do not think that the statement should have been made, and if the real facts had been brought before my brother Hayes, I do not think he would have made the order. In addition, it seems to me that the whole case is beset with irregularity. This order to amend was obtained in place of issuing a new writ. There was a great deal in what Mr. Ferguson said about the way in which this latitude of using different counts might be abused. It might be used to get rid of the Statute of Limitations. Then it does not appear when the writ was amended; there is a mere memorandum of the officer, stating that it was amended, pursuant to order of such a date. I must say, I do not understand the foundation of the jurisdiction, which enables a judge to make an order, amending a writ, which, as it stood, gave no jurisdiction to him to make the order to substitute service. I think, therefore, that the conditional order should be discharged with costs. As to the main question, it is not necessary to dispose of it. Very likely, if it was necessary to do so, we should let the case stand for authorities. My impression is, that the only case where the Court has jurisdiction to order a substitution of service of the summons and plaint is where, in the language of the Common Law Procedure Act, the cause of action, in respect of which the summons and plaint has issued, has arisen within the jurisdiction. It is a very different thing, because one small cause of action has arisen within the jurisdiction, to make an order substituting service of eleven others, which have not so arisen. But I base the present order altogether upon the other ground.

Conditional order discharged with costs.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

MURPHY v. MURPHY.—April 29; May 2, 6.

Effect of exclusive possession by joint tenants—Statute of Limitations, 3 & 4 W. 4, c. 27, s. 12.

Upon the trial of an ejectment brought by the surviving joint tenant under a freehold lease, it was proved that many years previously the plaintiff and the co-tenant had made a division of the lands, the subject of the lease, by parol. The co-tenant continued in exclusive possession of his portion until his death, when he devised it to his son, and the possession of the co-tenant, together with the possession of his son, extended over a longer period than twenty years. Held, that the defendant, who derived by assignment from the son of the co-tenant, was entitled to a direction for a verdict by virtue of the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 12.

THIS was an action of ejectment on the title, brought to recover a portion of the lands of Killeenleigh, in the County of Cork, and was tried before Monahan, C. J., at the Cork Spring Assizes, 1864. The plaintiff, James Murphy, claimed as surviving joint tenant under a lease made by Lord Ennismore to himself and his brother Denis for the life of James Murphy, or twenty-one years. The action was commenced in December, 1863. It appeared that about the year 1837, the plaintiff and the co-tenant, Denis Murphy, had made a division of the lands by parol, and gone each into exclusive possession of divided moieties. Denis Murphy died in 1854, having devised the portion of the lands he had so occupied to his son, who remained in possession until 1863, when he assigned to one Callaghan, who assigned to the defendant. The defendant's counsel insisted at the trial that the plaintiff's right to recover was barred by the Statute of Limitations, in consequence of the exclusive possession of Denis Murphy and his son for a period of more than twenty years, and relied on the case of *Tidball v. James* (29 L. J., Ex., 91). The Chief Justice directed a verdict for the defendant, and reserved leave for the plaintiff to apply to have it changed into one for him. The question was left to the jury, whether any deed of partition had been executed between James Murphy and Denis Murphy, and the jury found there had not. A conditional order was obtained pursuant to the leave reserved, against which—

April 29—*Clark, Q.C.*, (with him *Jellett*) showed cause.—The defendant has a good title against the plaintiff—3 & 4 Wm. 4, c. 27, s. 2. As soon as the parties went into separate occupation, the right to bring the action accrued. The 12th section is peculiarly applicable to joint tenants, co-parceners, &c. [*Christian, J.*—Supposing the 12th section was not passed, could you bring the case within the second? because in the absence of that I think the ordinary rule would apply, that the possession of one joint tenant is the possession of the other.] There is an error in the way Blackstone translates the section of Littleton as to joint tenants, the words *per my et per tout*. These are two French words, one of which means "nothing," the other means "half." The first

was what Littleton meant—the other what Blackstone thought it was.—7 C. B., 455, note. As to the right of occupation, there is no difference between joint-tenants and tenants in common. *Keeffe v. Kirby* (6 Ir. C. L. R., 691) is a clear authority that the statute applies in the case of persons having limited interests. It was in this Court, and the only distinction between it and this present case is, that there was a memorandum on the back of the lease that the parties agreed to hold separately. [*Christian, J.*—Did the judge in that case leave the presumption of a deed to the jury, because the case for it was much stronger than this?] No. The particular question we have here does not appear in the report of *Keeffe v. Kirby*, but it must have arisen. There seems to be some mistake in the report of *Tidball v. James* (29 L. J. Ex., 91) as to the manner in which the lease was reserved. It must have been the other way. Either the rule was discharged, or the verdict had been taken for the opposite party. The father of James Tidball died in possession of four acres of land. The widow allowed the two children to occupy two acres each, as if she were dead. The case is badly reported. Here we would have a case under the 2nd section, even if it were not within the 12th section.

Chatterton, Q.C., and *Collins*, in support of the rule.—This case is devoid of authority. *Keeffe v. Kirby* is out of the case. The possession had gone on adversely. The widow died less than twenty years before the action was brought. The children's rights did not accrue until the death of the widow, but by arrangement she put them into possession; and on that possession the case was defended, an actual ouster not being proved. A joint tenancy or tenancy in common did not arise till 1845. [*Christian, J.*—How did the question of the Statute of Limitations come into that case at all if the facts be as you state? *Monahan, C. J.*—Could it be that the giving up by the wife was considered a surrender?] The correctness of the new version of *per my et per tout* is very doubtful. In the absence of a deed, separate enjoyment cannot have any effect in a Court of Law. The 12th section applies only to possession of an entirety.

Jellott in reply.—Either on the 12th section or the antecedent sections the defendant is entitled to succeed. The 12th section deals with every class of cases, even the case where each party has held his portion by metes and bounds. We say so, because the right of the joint tenant is co-extensive with the nature of the estate: therefore, as soon as there is a division, and *pro tanto* an end of his right to the divided portion, the Act applies. The construction of the other side leaves unprovided the case of equal portions and of a lesser portion. If a divided share pass, how is it to be determined? Is it with reference to the acreable contents or the value? But upon our construction of the receipt of the rents, that difficulty is got over. [*Christian, J.*—You read “more” as “other.”] I do. It has been argued on the other side as in the case of lands of one denomination; but suppose a case like *Fitzgerald v. Massy*, where there were 5,000 acres of different denominations in the County of Clare. *Tidball v. James* does decide this. *Martin, B.*, meets the objection about ouster. It is not unimportant that *Watson, B.*, who tried the case,

and must have known the facts, was present, and concurred in the judgment. [*Christian, J.*—The report may be inaccurate.] Dealing with the case outside the section, twenty-seven years ago a division was made by parol, each party agreeing that the other should be put in possession of a certain portion by metes and bounds. Either that getting of possession amounted to an ouster, or the partition had the effect of making the purchaser a tenant at will. [*Christian, J.*—The question of ouster was a question for the jury]—*Doe dem. Tomes v. Chamberlaine* (5 M. & W. 14); *Doe dem. Gray v. Stanion* (1 M. & W., 695); *Coke Littleton*, 243, b. [*Christian, J.*—The objection, it appears to me, is this: was it the intention that each should hold under the other, was it not the intention that both should hold of their common landlord?] Where the purchaser went into possession, it was not intended, but the law permitted it. The moment the parties go into a separate possession, it is a negation of the original right of the joint tenants which extends over the whole of the lands. *Doe v. Prosser* (Cowper, 217) shows that if the possession be not referable to the original possession as joint tenants, then even under the old law it was not such as would have prevented the right being barred. [*Keogh, J.*—You say that “more than” means “other than,” and if so your case is a very easy one.]

Cur. adv. vult.

May 6.—*MONAHAN, C. J.*—The first question which naturally suggests itself is the true construction of the Act. [His Lordship read the 2nd and 3rd sections.] If the matter rested on the earlier sections, we should hold that the plaintiff never was out of possession till the death of his brother. He would have been so then perhaps, because a person entered who had no title. But then comes the 12th section, which was enacted precisely and in terms to provide for this identical case, because it enacts—(his Lordship read the 12th section.) What was the evil, then, that this section, coupled with the previous ones, was intended to apply to? This, that the result had been that the one joint tenant holding his own part, the claim of his adversary was not barred by the Statute of Limitations. It was argued that it applied to the case of an entirety, and that this man was not in possession of an entirety. That is a great mistake; he was and has continued to be in possession of the entirety of the thing in dispute. What matter whether he was in possession of the entirety of a whole farm or half a farm? The argument suggested was, that the entirety was the entirety of the property, and received some countenance from the words, “more than his undivided share.” Where the thing enjoyed is not a rent, but the *corpus* of the land, he is in possession of the entirety of what was in dispute. In the present case I left it to the jury to presume a conveyance. The surviving joint tenant was the man to make it, and of course he swore there was no such thing, and Mr. Clarke was bound to put the case on the Statute of Limitations. Were there no authority, I think that this is the true construction. Mr. Clarke referred me to *Tidball v. James*, reported only in the *Law Journal*. I said during the argument I would communicate with *Martin, B.* I did so, and he has written to me, and given me the particulars, and he says that the case was as reported, with this difference, that the

words should be "Rule discharged," instead of "Rule absolute." The facts were, that more than 20 years before, the father was in possession: he devised four acres. It appeared the widow did not enter into possession, but permitted the son and daughter to occupy; but the mode was precisely as in the case before us, each occupying two acres. A will was made just as the will was made here. The daughter continued in possession, and died; and her husband continued in possession. An ejectment was brought, and the case made was, that by the severance and the Statute of Limitations the joint tenancy was destroyed. The case was argued precisely as argued here, and the question was, if the Statute of Limitations did apply. It was said that she did not die till 1845. and it was suggested that there might be some mistake in the report. Martin, B., says that is quite true if you read the report; but there is a rule in England that where the case comes for trial, and there are no questions submitted to the jury, but the judge directs a verdict with leave reserved, it is understood that the Court may draw inferences such as the jury might have done. That is here made an express condition, but there it is implied. The Court would presume a surrender, and accordingly he says they did presume it. That being so, and there being a possession of joint tenancy, and one being out of possession, then the case came precisely within the provision of the Act. I may mention that this 12th section puts an end to an old question which may be a matter of curiosity to inquirers, viz., the meaning of *per my et per tout*. Some learned commentator has of late discovered that it does not mean what was supposed, but that is of no consequence now. I would not have said so much, but that it was said that the report of the case in England was inaccurate; but the decision came to there is precisely the same as that come to here. If two joint tenants are each in possession of distinct portions of the lands, then the right is barred, and therefore the judgment of the Court will be to allow the cause shown.

Rule discharged.

WOODS AND OTHERS v. ARMSTRONG.—June 2, 3, 13.

Construction of Guaranty—Custom of the wholesale grocery trade of the city of Dublin.

The defendant gave to the plaintiffs the following guaranty—"10th April, 1863—Gentlemen,—I beg leave to inform you that at the request of Mr. John Ferguson, of Upper George's-street, Kingstown, who has lately opened an establishment of general merchant and dealer in groceries of all kinds, that I have consented to give you a general guaranty for a sum not exceeding £200 for any orders he may give you for the carrying on of his house of business at Kingstown, and for the goods you may supply him under this letter of agreement. This guaranty to be in force against me till recalled, reserving the right to do so when occasion shall require, and on notice to you." Held, in an action

brought to recover the price of goods supplied to Ferguson by the plaintiffs, that the defendant was not discharged by the plaintiffs having taken bills from Ferguson for the amount due to them, in accordance with what was proved to be the custom of the wholesale grocery trade of the city of Dublin, he being under an obligation, if he did not know, to inquire as to the usage upon which the trade was carried on.

Held, also, as to a portion of the plaintiffs' demand, which consisted of duty on tea, advanced by the plaintiffs, that the same was a part of the price of the tea.

THE first count of the summons and plaint complained that the plaintiffs, at the time of the promise herein-after mentioned, were merchants, trading under the style and firm of Adam Woods & Co.; and one John Ferguson was a general merchant and dealer in groceries, having an establishment at Upper George's st., Kingstown, in the County of Dublin; and the defendant, by a certain promise in writing, signed by defendant and addressed to plaintiffs, promised the plaintiffs in the words and figures following, that is to say: "10th April, 1863. Gentlemen (meaning the plaintiffs),—I (meaning the defendant) beg leave to inform you (meaning the plaintiffs) that at the request of Mr. John Ferguson, of Upper George's-street, Kingstown, who has lately opened an establishment of general merchant and dealer in groceries of all kinds, that I (meaning defendant) have consented to give you (meaning plaintiffs) a general guaranty for a sum not exceeding £200 for any orders he (meaning said John Ferguson) may give you for the carrying on of his (meaning said John Ferguson's) house of business at Kingstown, and for the goods you (meaning the plaintiffs) may supply him (meaning said John Ferguson) under this letter of agreement. This guaranty to be in force against me (meaning the defendant) till recalled, reserving the right to do so when occasion shall require, and on notice to you (meaning plaintiffs). I remain, Gentlemen, your very obedient servant—John Tew Armstrong. Messrs. A. Woods & Co., Temple-lane, Dublin." And that after said promise the said John Ferguson, for the carrying on of his aforesaid house of business at Kingstown, gave orders to the plaintiffs to supply to him certain goods for his said house of business—that is to say, certain teas, grocery, and other goods, at certain prices, amounting in the whole to £190 1s 9d. (to be paid at the expiration of the period of credit usual in the trade in respect of such goods, and according to the usual course of such trade and such payments till the expiration of such periods of credit to be secured by such bills of exchange or promissory notes as in such trade usual in respect of such goods), and afterwards, whilst the said guaranty and promise was in force against defendant, and before the same was recalled, the plaintiffs, under the aforesaid promise, supplied the said goods to the said John Ferguson upon the aforesaid terms, and although the aforesaid periods of credit had expired, and although all things had happened, times elapsed, and conditions been performed necessary to entitle the plaintiffs to payment for the said goods, and to maintain this action for the

breach hereinafter alleged, yet the said John Ferguson had not, nor had the defendant (although requested) paid the said sum, or any part thereof, to the plaintiffs, and same remained due and unpaid to them. The second count complained that the defendant promised the plaintiffs, as in first count stated, and that afterwards the said John Ferguson, for the carrying on of his said house of business at Kingstown, gave orders to the plaintiffs to supply to him, said John Ferguson, certain goods for his said house of business at certain prices, and afterwards, and whilst the said guaranty and promise was in force against defendant, and before the same was recalled, the plaintiffs, on the faith of the said promise of the defendant, supplied the said goods to the said John Ferguson, and although all things happened, times elapsed, and conditions were performed necessary to entitle the plaintiffs to payment of the price of the said goods, and to maintain this action for the breach herein-after alleged, yet neither the said John Ferguson nor the defendant, (although requested) paid the said price to the plaintiffs, but on the contrary £190 1s. 9d., part thereof, still remained due to plaintiffs. The third count complained that the defendant, in consideration that the plaintiffs would sell and deliver goods to one John Ferguson, guaranteed and promised the plaintiffs to be responsible to the plaintiffs for the due payment of the price of the said goods to the extent of £200, and the plaintiffs accordingly sold and delivered goods to the said John Ferguson at and for certain prices, amounting in the whole to £190 1s. 9d., and all conditions were performed, times elapsed, and things happened necessary to entitle the plaintiffs to be paid the said sum of £190 1s. 9d., and to maintain this action, yet neither the said John Ferguson nor the defendant had paid the said sum of £190 1s. 9d., and the same remained due and owing to the plaintiffs. The defendant pleaded to the first of these three counts—1. That he did not make the promise and guaranty as in said paragraph alleged. 2. That the said John Ferguson gave no such orders as it is in said paragraph alleged. 3. That under the said promise of defendant no goods were supplied as alleged. 4. That no period of credit is usual in the trade in said first paragraph mentioned in respect of the goods therein referred to. 5. That after such goods were supplied respectively as alleged, it was agreed by and between said plaintiffs and said John Ferguson, without the consent or knowledge of the defendant, for good and valuable consideration to the plaintiffs in that behalf, that the plaintiffs should give time to the said John Ferguson for payment of the prices thereof respectively, and forbore to sue him for the said prices and each of them for a certain time in respect of each of them respectively agreed on between them, such time of forbearance in respect of each of them being longer than the plaintiffs ought to have given the said John Ferguson for the payment of said prices respectively, according to the meaning of defendant's alleged promise and guaranty, and in pursuance of the said agreement, and without the consent or knowledge of the defendant the plaintiffs gave time to the said John Ferguson, and forbore to sue him for the prices of said goods, or any of them, during the times respectively so agreed on as aforesaid. To the second and third

counts the defendant pleaded—1. That he did not promise or guarantee as therein respectively it is alleged. 2. That no goods were supplied, or sold and delivered according to the guaranty and promise of defendant in said paragraphs respectively alleged, or either of them. The third defence to the second and third counts was similar to the 5th defence pleaded to the first count. The following were the issues:—1. Did the defendant make the promise or guaranty in first paragraph of summons and plaint mentioned as therein alleged? 2. Did the said John Ferguson order the goods in said paragraph mentioned as therein alleged, upon the terms that the prices thereof should be paid at the expiration of the periods of credit usual in the trade in respect of such goods, and according to the usual course of such trade and such payment till the expiration of such periods of credit to be secured by such bills of exchange or promissory notes as in such trade usual in respect of such goods? 3. Were any goods supplied under the said promise of defendant as in said paragraph alleged? 4. Is there any period of credit usual in the trade mentioned in the said paragraph in respect of the goods therein referred to as in said paragraph alleged? 5. Is the fifth defence true in substance and in fact? 6. Did the defendant promise or guarantee as in the second and third paragraphs, or either of them, alleged? 7. Were any goods supplied, or sold and delivered according to the guaranty and promise in second and third paragraphs, or either of them, mentioned as in said paragraphs respectively alleged? 8. Is the third defence to the second and third counts true in substance and in fact? From the notes of the learned judge, Monahan, O. J., it appeared that as he understood the pleadings at the trial, the principal, if not the only question raised, was whether the plaintiffs, by taking from Mr. Ferguson bills of exchange for the amount of the debt due by him, had discharged the surety, Mr. Armstrong. The guaranty was given by Mr. Armstrong to the plaintiffs on the 10th April, 1863, and was to the effect that if plaintiffs would from time to time supply goods to Mr. Ferguson in the way of his business, he, Mr. Armstrong, would be responsible to the amount of £200. The document did not state what credit was to be given to Ferguson, nor did it contain any express reference to any custom of trade. Mr. Phoenix, one of the plaintiffs, and first witness, stated that Mr. Ferguson, who had been in the employment of Messrs. Findlater, commenced business on his own account in January, 1863, and plaintiffs executed an order for him exceeding £200. £80, part of this, was paid by Mr. Armstrong's cheque to pay duty on tea. Witness, by Ferguson's directions, called on Mr. Armstrong on the subject of the account, when Mr. Armstrong objected to being a party to a bill for the amount. Witness informed him that plaintiffs would draw a bill on Ferguson for the amount, and it was then arranged that Mr. Armstrong should give a guaranty for the future dealings, amount £200. This occurred on the 4th of April. Mr. Armstrong called on plaintiffs on the 10th, and brought with him the guaranty the subject of the action, which he gave to the plaintiffs. The bill passed for the goods previously supplied was regularly paid by Mr. Ferguson, and the present action was for goods subsequently sup-

plied. Witness stated that on the faith of defendant's guaranty, plaintiffs had supplied goods to Mr. Ferguson to the amount of £190; that the amount was still due, Ferguson having become bankrupt. After several witnesses were examined, it was admitted that the general usage in the city of Dublin in the wholesale grocery trade, not including tea, is, that the merchant, as soon as convenient after the 1st of January, 1st of April, 1st of July, and 1st of October, in each year, furnishes his account up to that day; that a reasonable time is allowed the customer for examining the account so furnished, and having any errors corrected, and in about one, two, three, four, or five weeks after the account is furnished, a settlement is required, and the merchant has a right to insist that the settlement should be in cash, in which case the customer is entitled to 2½ per cent. discount, but though this is the merchant's right, except in exceptional or suspicious cases, the usage and custom is for the merchant to take the customer's acceptance at three months for the amount of the account furnished, and if the giving of the bill were delayed an additional month, the bill would be drawn at two months, so as to be payable about three months from the time the settlement is called for or something more than four months from the time the account is furnished. There was no similar consent or admission as to the custom as to the wholesale tea trade, but it was proved, and not controverted, that the usage was that the customer got four months' credit from the time of sale, for which he gave his acceptance dated from the day of sale, though not accepted till afterwards, save as to the duty, which was paid in cash shortly after the sale, the merchant advancing it in the first instance. Plaintiffs proved the goods supplied to Mr. Ferguson, and the accounts furnished and claimed altogether £190 *ls. 9d.* It appeared that of this sum a small amount was for goods supplied between the 4th and 10th of April, and therefore not within the guarantee, and the judge excluded them. For another small portion, £7 *13s. 8d.*, a renewed bill had been taken from Ferguson: this also was excluded, as also was a sum of £8 or £10 for soap ordered by the plaintiffs for Mr. Ferguson from an English merchant, plaintiffs not having it in stock when required by Ferguson. This reduced the plaintiff's demand to £169 *8s. 1d.* Of this sum there were two sums, £17 *3s.* for goods supplied, and £14 *1s. 9d.*, money advanced for duty on tea, making together £31 *4s. 9d.*, for which no acceptance had been taken by plaintiffs from Ferguson. With respect to the balance, £128 *3s. 4d.*, bills had been taken from Ferguson, as also for the small sums due by Ferguson, which the judge held not recoverable from the defendant under the guaranty, and as he collected from the accounts and bills they were taken in conformity with the custom, both as to the tea and the general goods. At the close of the case on both sides, defendant's counsel declined having any question left to the jury, but required the judge to inform them that so far as related to the sum of £128 *3s. 4d.*, for which bills had been taken from Mr. Ferguson by the plaintiffs, the defendant was discharged by the taking of the bills, and with respect to the sums of £14 *1s. 9d.* and £17 *3s.*, he submitted that the £14 *1s. 9d.* being money lent or

paid on account of Ferguson, was not within the guaranty. The Chief Justice thought it was part of the price of the tea. The defendant's counsel declined taking the opinion of the jury on the subject, and with respect to the sum of £17 *3s.*, insisted that as plaintiffs had taken bills of exchange for other sums for which Ferguson was liable, that defendant was therefore discharged from this sum also. He also suggested that there were some points of variance between the pleadings and the evidence; but as the Chief Justice stated that he thought the case a proper one to amend the pleadings so as to get rid of any objection on the ground of variance, the defendant did not press the objection founded on any variance. The Chief Justice directed a verdict for the plaintiffs for £169 *8s. 1d.*, reserving liberty for the defendant to apply to have the verdict entered for him if he should have so directed, or to be reduced to the sum of £31 *4s. 9d.*, or such other sum as the Court should think fit, reserving liberty to the Court to order the pleadings to be amended in any way that might be necessary to raise the real question between the parties as to the liability of the defendant on the facts proved in the case. A conditional order was accordingly obtained, against which—

June 2—Hemphill, Q.C., (with whom was Dowse, Q.C.) showed cause.—He cited Samuel v. Howarth (3 Mer. 272), and Stewart v. McKeen (10 Ex. 675).

Macdonogh, Q.C., and McMechan, in support of the order, cited the observations of Story, J., in Dowling's case (2 Sumner, 568). The Court will not vary a contract confined by its terms to goods delivered under the agreement. If there was any agreement after the guaranty, though it was not to give an extension of time, it would discharge the surety. Bingham v. Corbitt (11 W. R., 232) was tried as this case ought to have been, without a jury. Can it be doubted that these goods were supplied under a new contract? [Monahan, C. J.—That is the question.] A custom must be certain and enforceable. The plaintiffs should make out this case to be an exception to the principle in Fraser v. Jordan (8 El. & Bl., 303). [Monahan, C. J.—If your argument be right, it may be that the surety was discharged the moment the goods were sold. He was discharged if the goods were given on a week's or a month's credit.] The plaintiffs seek to make Armstrong liable on customs he never heard of. It follows from Hutton v. Warren (1 M. & W., 466) that the custom cannot be applied to any case where there was not some intention to be bound by it. Therefore, the Court would determine here that Armstrong knew what he was doing, and intended to be bound. An agent may do many things to bind his principal, which a principal cannot do to bind his surety. This guaranty must be read—"I guarantee that any goods Ferguson may order shall be paid for by me if he does not pay for them," for as it stands it is inensible. The Court will regard a surety with protection. To hold the defendant bound here would be tantamount to repealing the Statute of Frauds.—Read v. Rann (10 B. & C., 438). The cases cited from 3 Mer and 10 Exchequer, decide no more than that a party going security for an agent must account to his principal. With regard to the items uncovered by bills, the

plaintiffs have estopped themselves by their course of dealing. If the principal be not liable, the surety is not. The time for suing has not arrived. [*Monahan, C. J.*—If your argument be right, it may turn out that the goods supplied immediately before this man stopped are discharged too.] Then as to amendments, no amendment can be made, but such as should have been made at the trial. [*Monahan, C. J.*—Any amendment at all. You will find cases in England where it is said if any amendment should be made, it will.] *Martyn v. Williams* (1 H. & N. 817). The costs should be paid by the plaintiff—*Skinner v. The London, Brighton, and South-Coast Railway Company* (4 Ex. 885). Great injustice would be done if an amendment were made without payment of costs.

Dowse, Q.C., in reply.—The plaintiffs are entitled to maintain the verdict *in omnibus*. There is a want of authority. The Court will decide the point irrespective of the pleadings if the law be in the plaintiffs' favour. The main question is, if the plaintiffs have discharged the surety by giving time to the debtor. Did the plaintiffs give time, by a new and valid contract between themselves and Ferguson, to which Armstrong did not assent; and was the result of that an extension of time beyond what was contemplated?—*Chitty on Contracts*, 483. Credit, I admit, may have two meanings; it may be binding or not. But what would be the use of giving a man credit if he could be called on to pay the next day? A reasonable credit must be meant. If one went to a money lender to borrow money to buy an estate in the Landed Estates Court, and the lender said he should have security, the credit would be a reasonable credit. Irrespectively of the general principle, when one deals with a mercantile man, it is upon the terms usual in the trade. No time being mentioned in this guaranty, it was given on the understanding that the credit usual in the trade was to be given. The goods were to be given for the purpose of carrying on Ferguson's trade, and as no time was mentioned the usual time was to be understood. 1. This does not contemplate cash. 2. It contemplates credit. 3. It contemplates the credit usual in the trade. [*Christian, J.*—The whole question is, what was the meaning of the guaranty.] This must be admissible, though it may be another thing whether it must be shown to be within the knowledge of the party. [*Christian, J.*—The argument on the other side is, that it is the very thing that it be within the knowledge of the party that makes it legally admissible.] That is not the law. The construction must be pressed to this to mean, "I will see you, Adam Woods, paid, provided you do not give the goods till you get the money." [*Christian, J.*—Suppose a week after the guaranty was given, the surety discovered the principal was in failing circumstances, and went and paid so much, and then said, "I insist you bring an action immediately."] *Simpson v. Manley* (2 Cr. & Jerv. 12) shows that credit means the fair and usual credit between the parties. *Howell v. Jones* (1 Cr. M. & R. 97) was a case in which it was very difficult to contend the party was not discharged. *Non constat* but the giving of the bill was not a part of the original contract at all. But here there was no extension—no new binding contract. *Rees v. Berrington* (2 White & Tudor, 822) refers to

Samuell v. Howarth. The taking of the original bill was valid, but the taking of the renewal was not. The general custom is applicable and admissible in evidence, and does not differ from what was proved to be the special custom. [*Monahan, C. J.*—Admissible to regulate the contract, but the first question is, were the plaintiffs justified in giving any binding credit at all, for if the Court come to the conclusion they were justified in giving some credit, then it must be either a usual credit, or a credit sanctioned by the custom of the trade.] If this contract be governed by the custom, the collateral parts of it are law, and this is only collateral as regards Armstrong. Abstract propositions, like Justice Story's, are of very little value. [*Christian, J.*—Do you not think they are of some in a case where you admit you have no authority?] I do not admit it upon this branch of the case—1 Smith's L. C. 530, 5th ed. The building trade has its customs. There is a custom here. The jury have found its existence, and the only question is, if it is applicable to this contract. Who is to complain? The defendant might have asked what credit was to be given, and he might have refused; he might have said, "You must sell him the goods, and put yourselves in a position in which you may sue him to-morrow." If he had said that, they would have gone elsewhere. [*Christian, J.*—Throwing out the usage of trade and of this establishment, do you contend that in every case some amount of credit is implied from the bare giving?] Yes. [*Monahan, C. J.*—It may not be necessary to go that length.] I do go that length, some binding credit must have been given here. [*Christian, J.*—It seems not unreasonable that the party should inform himself of the usages of the trade, and if he refrain from doing so, there is no hardship in supposing him to know them. *Monahan, C. J.*—Assuming the custom to be as in the words of the witnesses, inasmuch as it did not render it obligatory to take the bills at all, is that a good custom, leaving it optional? Does that discharge the surety when you might have taken cash?] The custom is good. [*Monahan, C. J.*—Were you justified in giving credit without concurrence, when you might have taken cash?] The custom is for the merchant to take the acceptance at three months, unless there be reason for not doing so, and nothing of that sort is shown here. [*Monahan, C. J.*—The jury said the custom was perfectly well known in Dublin. *Christian, J.*—What is the meaning of a custom that a person may give credit or may not? *Monahan, C. J.*—Supposing Armstrong wrote in terms "You are to give credit according to usage, and get cash or give credit," there is no doubt if that were in the contract, it would be binding.] That is what it means—it is what credit means. Usage of the trade is more exact than custom. As to the duty on the tea, it was not money lent. Being part of the price of the tea, the custom was that it should not be under any custom.—*Cuthbert v. Cumming* (11 Ex., 405).

Cur. adv. vult.

June 13.—*MONAHAN, C. J.*—This was an action on a guaranty given by Mr. Armstrong. The summons and plaint contained several counts, which it is not very material to consider. [His Lordship stated the

guaranty.] The substance of the pleas was, that by reason of the time given to the principal, the surety was discharged. At the trial, one of the plaintiffs was examined. He stated he was a wholesale merchant. The principal, Mr. Ferguson was an acquaintance of his, who had been previously in the employment of Mr. Findlater. He set up business in Kingstown, and the plaintiffs gave him credit to the extent of £200. It seemed the custom was this; general groceries were sold as required by the shopkeeper; every quarter accounts were furnished. A short time after furnishing a settlement was required; the customer either gave cash *minus* discount of $2\frac{1}{2}$ per cent. or he gave a three months' acceptance from the time. It appeared that if any suspicious circumstances intervened, the merchant was not bound to take the bill. Ferguson being indebted in the £200, Armstrong called, and requested they would deal with him, and he would give a guaranty. It was arranged that £80 should be paid for duty, and a bill was taken which was regularly paid, and which is no part of the present suit. The other evidence was this, that there was a difference between the dealings for tea, and the other groceries. Tea was proved to be dealt with in this way; it was sold on credit, the price to be secured by an acceptance of the party. The substance of the usage was four months' credit covered by the acceptance of the customer. There was this exception to that, that where the merchant advanced the duty, it should be repaid in cash within a reasonable time, and no credit was given. There being some little difference, by consent it was ultimately arranged that I should take the result of the evidence to be that the custom in Dublin was as I have stated: the merchant having the option of insisting on cash, but usually taking a bill of exchange, but if there were suspicious circumstances he was not bound to do so. The account here consisted of several items, which passed within the terms of the proved usage, but, as I said, not a usage binding on the wholesale merchant. With respect to other portions of it, there was a bill of exchange taken for the price of the tea within the usage. With respect to the remaining portion, there was some question as to whether the action was not commenced too soon, but it appeared it was not till more than a month after the quarter day, and that the item of £13 or £14 was for duty, for which no delay is allowed. At the close of the case, Mr. Armstrong's counsel declined to leave the case to the jury, virtually admitting anything they might find would be against him, and that any chance he had would be with what I might make of it. He cited cases to show that he was not obliged to enter into any binding contract to give credit, therefore that the surety was discharged except as to the small portion advanced for duty, and Mr. Macdonogh submitted that that would not come within the guaranty at all. The view that struck me was, that though it was duty it was a portion of the price of the tea, and I was willing to take the opinion of the jury, but the defendant would not take it, but would have mine, and mine was that it was part of the price of the tea. During the argument it occurred to some of us that there might have been a better ground than that put forward, viz., that these goods, like the others, were sold

on credit, and that if Mr. Macdonogh were right on the other portion of the case, he would be right on this. The action was not commenced too soon, and the only question is, were these parties justified as against Mr. Armstrong in giving the time they did, viz., the current quarter and the time covered by the bills of exchange? Numbers of cases have been referred to, and they establish this; whatever doubt there might have been sixty or eighty years ago, it is now settled that if a principal gets time not stipulated for the surety is discharged; but it is worthy of observation that in all the decided cases the giving of the time always was over and above the time originally given to a principal by the merchant. It is not for me to decide that that is the abstract rule of law; but the question we are called to decide is, what is the true construction of this document; whether this document (having regard to the evidence) authorizes the giving the time Ferguson obtained in the present instance. First, this is the case of a wholesale merchant, and one dealing with a retail merchant. It is not the case of a person not in trade, but it is the case of two persons in trade—one requiring to be supplied with goods, and for that purpose requiring a guaranty. It appeared upon the document itself that this gentleman had opened a general establishment, and that Armstrong agreed to give a security for any orders he would give for the purpose of carrying on his establishment. We must bear in mind the evidence of the usage (I do not inquire as to the binding nature of the usage), that merchants who get credit at all get it on the understanding that accounts are not to be looked for till the end of the quarter. A bill may be taken, but the merchant has his option to insist on cash. We are of opinion that Armstrong, whether he knew this usage to exist or not, when he entered into this engagement, was obliged to inquire and know what was the usage upon which this trade was carried on. On principle we think this was so, but having regard to the cases, we think there is not any doubt on the matter. I will refer only to those bearing on this particular question. In *Samuell v. Howarth* (3 Merivale, 272), the guaranty was in these words: "We engage to guarantee to you the payment of any goods you may supply," &c. It appears from the statement of the case that both parties were merchants, i.e., the principal and the person dealing, and the plaintiff who filed the bill is not stated to have been a merchant, but he may have been one. The bill was filed, stating the goods were sold at six and nine months' credit, and that was the agreement, but the bills were renewed, and the plaintiff claimed to be released in consequence of the renewal. He did not claim any relief on the ground that the credit originally contracted for was given, but on the ground that other bills were taken as renewals; and it was held that this discharged that surety. But it is material to see what the case made was on the pleadings. The defendant alleged it was agreed between the plaintiff and him that he might from time to time renew any bills without prejudice, and in consequence that his renewing the bills did not discharge the surety. Lord Eldon continued the injunction, notwithstanding that statement, but it is necessary to see the grounds on which he did so. He did not go on

the swearing of the parties at all, but went on the written instrument, according to its legal effect. Putting aside the swearing of the parties—putting aside the statement of the defendant of an agreement contrary to the written instrument, Lord Eldon held he should construe the written instrument itself, and seeing on the face of it that the credit which should be given should be according to the usage of the trade, on the ground it had been exceeded he continued the injunction. In *Combe v. Woolf* (8 Bing. 156) as in the case before Lord Eldon and in this case, there is no allusion to any credit. The facts were these: The plaintiff gave six and two months' credit, but after the two months' acceptances would have been due, none ought to have been passed. Tindal, C. J., thought that the sale on credit was on the usual credit, and that the taking of the subsequent bills had the effect of discharging the surety. The case in 1 Crompton Mees. & Rosc., 97, was most relied on. Let us see what the facts were. The person who gave the guaranty was the solicitor, and accordingly was engaged professionally. The defendant was an attorney; and for the amount a bill of exchange was drawn, which was accepted, but was dishonoured at the Exchange. The argument of counsel was what it always was. There was no doubt of the general rule. [His Lordship quoted a portion of the judgment of the Court in that case.] In the case in 2 Cr. & Jervis, the Court held that the agreement was for such reasonable credit as was agreed upon. Therefore, we are of opinion, without doubt, that the view taken at the trial was the right one, and allow the cause shown against this conditional order. My Brother Christian mentions to me that there was a credit given prior to Armstrong giving this guaranty, of which Armstrong was aware. As to the variance between the evidence and the pleadings, I said I would make any amendments that might be necessary. The question would be, whether, having regard to usage, and having regard to the guaranty, this gentleman is liable, and I will afford any assistance by way of amendment that, if the defendant thinks it necessary, the case may go to another Court.

Rule discharged.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE BERWICK, J.]

RE F. & W. OLDEN, BANKRUPTS.

Covenant to charge future acquired lands—The Registration Acts, 6 Anne, c. 2; 2 & 3 W. 4, c. 87.

Where a settlement contains a covenant that all the real and personal estate of the settlor whereof he then was, or should at any time thereafter be possessed or entitled unto, should stand charged with the payment of a certain sum of money for the

trusts in the settlement mentioned, such covenant to charge after acquired property is not capable of registration under the Registry Acts, so as to give the settlement priority over subsequent purchasers for value without notice of the after-acquired lands. Gubbins v. Gubbins (1 Drury & Walsh) considered, and held not to be a decision to the contrary.

THIS case came before the Court upon charge and discharge. The charge was filed by the trustees of the marriage settlement of Andrew William Olden, one of the bankrupts; and the discharge was filed by a mortgagee of certain lands and tenements acquired by the bankrupt subsequent to the settlement.

Cathrew was in support of the charge, and *Purcell* for the discharge.

They cited *Gubbins v. Gubbins* (1 Drury & Walsh, 160); *Ennis v. Smith* (Jones & Carey, 400); *Creed v. Carey* (7 Ir. Chan. Rep. 295); *Gardiner v. Blesington* (1 Ir. Chan. Rep., 79); *Warburton v. Loveland* (6 Bligh. 13).

The facts are fully stated in the judgment.

BERWICK, J.—In this case a charge has been filed by the trustees of the marriage settlement of Andrew W. Olden, one of the bankrupts, claiming to be entitled to a sum of £500 as charged on certain properties of the bankrupt mentioned therein, in priority to the mortgage debt of Mrs. Sarah Lunham, a mortgagee, who by her discharge claims the first charge thereon. By the settlement, which is dated the 30th June, 1852, the said Andrew W. Olden, in consideration of the marriage, and to secure £500 as a provision for his wife in the event of her surviving him, or of his becoming bankrupt, insolvent, or compounding with his creditors, and for making a provision for the issue of the marriage, covenanted with the said trustees that all such real and personal estate whereof he then was or should at any time thereafter be possessed, seised, or entitled unto, should stand and be charged with the payment of the said sum of £500, and that it should be lawful for the trustees to raise and levy the same out of all such real and personal estate as the said A. W. Olden then was or should be possessed of as aforesaid, whenever the said trustees should see fit or think necessary; and the said A. W. Olden did thereby expressly charge and encumber a certain property therein described as the building, stores and tenements used for the manufacture of soap, candles, and chandlery, situate in Duncan-street, in the parish of St. Peter's, in the city of Cork, with said sum of £500. The trusts declared were to pay the interest of said sum to the said A. W. Olden for his life, or till he should become bankrupt or insolvent, and from and immediately after his death, bankruptcy, or insolvency, then to pay the interest to Mrs. Roberts, freed from all the debts, liabilities, and charges of her said husband. This settlement was duly registered on the 10th July, 1852, and the memorial sets forth the covenant that all such real and personal estate as the said Andrew W. Olden then was or should at any time during his life be seised of or entitled unto, should stand charged with the said sum of £500 upon the trusts of said settlement. The marriage took place, Mrs. Olden is alive, and there are several children issue of the marriage. In the year 1859 the

bankrupts purchased certain premises situate in the North Main-street, Skiddy's, Castle Lane, and Cross Gun Lane, in the city of Cork, and subsequently mortgaged them to Mrs. Sarah Lunham, the dischargeant, in consideration of £2,000, and by the deed of mortgage dated 18th September, 1861, these premises were specifically assigned to her to secure the debt, and this deed was duly registered on the 26th day of September, 1861, and the memorial contains a full description of the premises, fulfilling all the requirements of the Irish Registry Act. It is admitted that Mrs. Lunham had no notice of the settlements, and the registry search discloses no incumbrance affecting the mortgaged lands. No question has been raised as to the priority of the settlement so far as the property in Duncan-street specifically mentioned therein is concerned, and the only question to be decided by me is, whether the subsequently-acquired property is subject to the charge of £500 secured by the settlement in priority to the mortgage debt by virtue of the prior registration of the settlement. For the mortgagee it is contended that having acquired the legal estate in the mortgaged premises by deed duly registered for valuable consideration without notice of the prior charge, and inasmuch as there is no other prior registered deed, conveyance, or disposition of the lands comprised or contained in the memorial of her mortgage deed, she is entitled to her charge thereon in priority to any equitable claim of the trustees of the settlement of 1852; whereas on the part of the trustees it is insisted that inasmuch as the memorial of the settlement is duly registered before the mortgage, and the memorial follows the terms of the deed itself, and as the tenements are not described therein, it is not necessary that they should be described in the memorial, and that the registration of a deed of covenant purporting to charge after acquired lands is valid and effectual to secure priority to the covenantees over all other charges or conveyances of the lands when so acquired, although the lands are not mentioned or contained in the deed or memorial thereof under which their rights are created, and though the settlor had then no estate in a title thereto, and it is insisted on their part that this question is closed by authority, and I admit that if there be any case in which this exact point has been solemnly decided by the Court of Chancery, more particularly if, as is alleged, that decision has been adopted and acted upon in this country as law, I am bound to follow it, so long as it remains unreversed. Now the only case to which I have been referred as establishing this abstract principle, that a deed purporting to charge future acquired lands will, by registration acquire priority over the legal conveyance of those lands by the owner when acquired to a purchaser for value without notice, whose deed is duly registered, is the case of *Gubbins v. Gubbins*, reported in a note to *Lyter v. Burroughs* (1 Drury & Walsh's Reports, p. 160), in which this point is stated to have been decided by Lord Mannors, but when I look to that case, the meagre and unsatisfactory report thereof, more particularly when I read the observations of Baron Richards in *Ennis v. Smith* (Jones & Carey, p. 400), and the doubts still further raised as to the existence or nature of such decision by the present Lord Chancellor in *Creed v. Carey* (7 Irish Chan R.,

295), I cannot consider myself bound by so blind an authority. In the first place, there is no regular report of the case at all. The only notice of it is the meagre note alleged to have been supplied by one of the counsel engaged therein upwards of twelve years after it professes to have been pronounced. Whatever the decision was, whether made in the Master's Office alone, whether the attention of the Chancellor was ever called to the point, whether it was ever argued, whether the party sought to be affected may not have had notice of the prior charge, which would completely alter the question, are all left in obscurity, and when it is known that the primary fund in that case was fully sufficient to meet the prior charges, and therefore that as a matter of fact the assignee of the future acquired lands had no interest in disputing the decision, whatever it was, as he appears to have got his costs out of the general fund, it is idle to say that the question is not still fully open to consideration, or that there is any binding decision therein. In further proof thereof I find the present Lord Chancellor, in *Creed v. Carey*, declining to express any opinion on the question, and the present Master of the Rolls putting on the face of his order his opinion that if such decision were made, it was not in accordance with the Acts then in force for the registration of deeds in Ireland. Besides, the case of *Gubbins v. Gubbins* occurred before the passing of the 2 & 3 Wm. 4, c. 87, which was intended to give by a stricter form of registration increased facilities for discovering the lands affected by registered deeds, and thereby in accordance with the original objects of this code of laws, protecting and securing purchasers. I have been also referred to the case of *Gardiner v. Blesington*, in 1 Ir. Chan. R., p. 79, but the question in that case was totally different from that involved in the present case, and consistently therewith I am at liberty to deal with the present case as not governed thereby. The question is, therefore, open to be determined on principle, and not upon any decided case, and bearing in mind that unless the registration of the deed gives to it an efficacy which it had not otherwise, a covenant such as this would not be enforced against a purchaser for valuable consideration without notice, as laid down by Baron Pennefather in *Ennis v. Smith*, and also that the trustees of the marriage settlement never took any step till now to enforce this covenant against the specific lands under the provision by the settlement. I have to look at the Acts which apply to the registration of deeds, and, considering the object which the Legislature had in view, and the just construction of the language of these statutes, according to the principles on which statutes are construed, to see how far the question between the parties in this case is affected or governed thereby. Now, the object of these Acts appears to have been twofold—first, to secure purchasers of land, by providing, in place of the ancient and more public and notorious mode of transferring landed property, the means of discovering all transfers with equal or greater certainty, by referring to a public registry, upon the face of which it was intended they should all be bound; these are the words of the unanimous judgment of the judges, delivered in the House of Lords in the case of *Warburton v. Loveland* (6 Bligh's New Rep. at p. 23); and secondly, to prevent

forgeries and fraudulent gifts and conveyances of lands, tenements, and hereditaments, by having the memorial of the deed placed in the registry, and its execution attested by at least one of the attesting witnesses. To carry out these objects the Act of 6 Ann, chap. 2, was passed, and the third section of the Act provides for the registration of all deeds and conveyances which shall be made for or concerning, and whereby any honours, manors, lands, tenements, or hereditaments, may be any ways affected, leaving it open to the discretion of the parties to whom conveyances are made to avail themselves of the protection of the Act, or to incur the consequences of their neglect of its provisions; and by the fourth section, which is the one, if any, applicable to this case, it is declared what shall be the benefit to be derived from the registration of such deeds, and to what deeds it shall extend. By that section it is declared that every such deed or conveyance, a memorial whereof shall be duly registered, shall be deemed as good and effectual, both in law and equity, according to the priority of time of registering such memorial, according to the right, title, and interest of the person so conveying such honours, manors, lands, &c., against all and every other deed, conveyance, or disposition of the honours, &c., comprised or contained in any such memorial; and by the 5th section it is enacted that every deed which shall be unregistered of all or any of the honours, manors, lands, and tenements, comprised or contained in a deed or conveyance which shall be registered, shall be deemed fraudulent or void. It appears to be, therefore, plain, that to bring a case within these provisions of the Act there must be two deeds or conveyances between which there is a conflict of title, in each of which the honours, manors, lands, &c., sought to be affected are comprised or contained, and according as I think to all reasonable intendments, by some description which will enable them to be placed on a public registry, so that upon the face of it they shall be found, and that to entitle a party who has registered a deed of or concerning honours, &c., to claim for it the protection of the 4th section of the statute, it must be shewn that the deed is a conveyance or disposition of the honours, lands, tenements, &c., to which title is sought to be made, and that the same are comprised or contained therein, as also in the memorial thereof, through the registration of which priority of title is sought to be established. If, as the judges in *Warburton v. Loveland* have stated, the object of the Legislature was to substitute a public registry as the means of discovering all transfers of land with greater certainty than by the ancient and more public and notorious mode of transferring landed property, in other words, the old system of livery of seisin, or actual or symbolical tradition of the land itself, it would appear as if they considered that the registration, which is substituted for the more public and notorious mode of transfer, must comprise or contain the honours, lands, &c., respecting which the contest of priority has arisen, in such manner as to give the information thereof with greater certainty than before, by placing them on the registry, so that, to use the words of the judges, they should be found on the face of it—in other words, that instead of the ancient and notorious modes of giving title there should be open to all a more certain

and secure means of publishing the knowledge of the title to the world by a register easy of access to all, in which the lands the subject of the conveyance are recorded, and the nature of the conveyance in which they are contained, and by which they are affected, is set forth. If the object of the Act is to protect purchasers of manors, lands, &c., against previous secret conveyance of the same lands, by giving them an opportunity to discover, by a search in the registry, whether any previous deed or conveyance has been executed, in which the lands about to be purchased are comprised or contained, and the means provided for effecting that object are by requiring certain books to be kept in which by name the manors, lands, &c., with the parishes, townlands, or counties, or some adequate description, are to be found, and the protection afforded is to secure him, by the registration of his own conveyance, against all other deeds or conveyance of the same lands, not to be found on such registers, it follows that such object would be entirely defeated, and the Act made the means of perpetrating fraud and encouraging secret conveyances, if a party can gain priority by the mere registration of a deed in which the manors, lands, &c., are not designated or comprised, and which was executed at a time when the conveying party was not himself the owner of the lands, or had any title thereto. I think the 4th sect. contains within itself evidence of what the Legislature intended, by defining the classes of deeds which shall be preferred or postponed, the registered deed which is to be preferred being thereby declared to be good and effectual, according to the right, title, and interest of the party so conveying such honours, &c., shewing that the priority meant to be secured was confined to a deed which shall convey in terms honours, manors, lands, &c., in which the person so conveying the same shall at the time have a right, title, or interest; and the deed, conveyance, or disposition which is postponed is one which contains and disposes of the honours, manors, lands, &c., comprised or contained in the memorial of the former deed; and therefore it would follow that there cannot be a deed to be preferred of which there is not a memorial which comprises or contains, by some description as specified in the statute, the same honours, &c., which are comprised or contained in the deed sought to be postponed. All the other sections of the Act, and all succeeding legislation on the subject, seem to point to the same object. By the 7th section the memorial is required, among other particulars, to express or mention not merely the honours, &c., contained in such deed, but also the names of the counties, baronies, &c., where such honours, &c., are lying and being, that are given, granted, or any way affected or charged by the deed, and although it is added, "in such manner as the same are expressed or mentioned in such deed," yet I cannot but think these latter words neither do or are intended to mean that the registration of a deed will be effectual to bind lands not expressed or mentioned therein, provided the deed itself does not express or mention any particular honours, lands, &c., as intended to be affected thereby. Such an interpretation is not necessary for the literal construction of the enactment, and is totally destructive of the avowed object and principle of the Act. It would, I think, be more in

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

CROWN SIDE.

THE QUEEN v. THE RATHMINES AND RATHGAR IMPROVEMENT COMMISSIONERS.

Public highway—Mandamus—Stat. 11 & 12 G. 3 (Ir.), c. 31—10 & 11 Vict., c. 34—10 & 11 Vict., c. ccliii. (loc. and pers.)

The trackway along the Grand Canal, vested in the Grand Canal Company by stat. 11 & 12 Geo. 3 (Ir.) c. 31, is a public highway, and since the passing of the Rathmines Improvement Act is to be repaired by the Rathmines Improvement Commissioners, in whose district it is. So Held, by O'Brien, J., and Hayes, J., dissentientibus Lefroy, C. J., and Fitzgerald, J.

The proper remedy to compel the Commissioners to repair is by mandamus. So Held, by O'Brien J., and Hayes, J., dubitante Lefroy, C. J., and dissentiente Fitzgerald, J.

THIS case came on upon demurrers to the pleas put in to the return to a writ of mandamus, and also to certain rejoinders filed to the replications to those pleas. The mandamus was as follows:—Victoria, &c., to the Rathmines and Rathgar Improvement Commissioners greeting:—Whereas by an Act of Parliament made and passed in the 11th year of our reign, cited as the Rathmines Improvement Act, 1847, certain lands and tenements situate in the barony of Uppercross, in the county of Dublin, were declared to be a district for the purposes of the said Act; and certain commissioners were thereby nominated and appointed, and it was thereby enacted that the said commissioners and their successors should be a body corporate by the name of "The Rathmines Improvement Commissioners," and by that name should have perpetual succession, and a common seal; and it was thereby further enacted, that all actions and suits by the said commissioners should be brought and maintained in the name of their secretary; and that all actions and suits brought against them should be commenced and maintained in like manner, and it was thereby further enacted that the Act of Parliament called the Towns Improvement Clauses Act, 1847, should, save so far as it was expressly varied or excepted by or inconsistent with the said Rathmines Improvement Act, 1847, be incorporated with and form part of the said last mentioned Act, and be applicable to the works thereby authorized to be carried on. And whereas the road which runs along the south side of the Grand Canal, from La Touche's bridge to Clanbrasill-bridge, in front of, and close to the Portobello barracks, is a public highway and thoroughfare, and was so at and long before the passing of the said Rathmines Improvement Act, 1847; and as such continues and is situate within the limits of the Rathmines district, and is much used by the troops in the barracks aforesaid and the public, and the said road is much out of repair. And whereas by the said Rathmines Improvement Act, 1847, it was

enacted that from and after the passing of the same Act, it should not be lawful for the grand jury of the county of Dublin, to make any presentment for the making or maintaining of any road or bridge within the said district, and that in consideration of the same district being thereby made chargeable with the costs of making and maintaining the roads, bridges, and other works which the said commissioners were thereby ordered to make and maintain within such district, it should not be chargeable with the costs of making and maintaining any other like works within the said county and barony, save and except those which under the Act of the 7th & 8th years of her present Majesty's reign, were chargeable upon the county at large. And by the said Rathmines Improvement Act, 1847, power was given to the commissioners thereby appointed to levy certain rates under the name of the Rathmines Improvement Rate, and it was thereby also enacted, that all monies raised and levied under or by virtue of the said Rathmines Improvement, and certain other tolls should be applied subject to the expenses of the said Act, in payment of all costs, charges, and expenses in and incident to the execution of the said Act, or any of the powers and authorities thereby vested in the commissioners. That by the Towns Improvement Clauses Act, 1847, so incorporated in the Rathmines Improvement Act, aforesaid, it is enacted, that the management of all the roads which at the time of the special Act were public highways, should belong to the commissioners of the special Act; and that the commissioners of the special Act should be guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limit of the special Act, and further that the trustees of any turnpike road should not collect toll within the limits of the special Act, or lay out any money thereon. And whereas a certain Act of Parliament cited as the Rathmines and Rathgar Improvement Act, was made and passed in the 25th year of our reign, and the said Act recited the Rathmines Improvement Act 1847, which said last-mentioned Act is in the said Rathmines and Rathgar Improvement Act, and hereinafter called "The Recited Act;" and by the said Rathmines and Rathgar Improvement Act, certain lands including the townland of Rathgar were added to the Rathmines district, and certain other commissioners were added to the commissioners appointed under the Rathmines Improvement Act, 1847; and it was by said Rathmines and Rathgar Improvement Act enacted that the commissioners under the "Recited Act," with the addition to the number of the commissioners named in said Rathmines and Rathgar Improvement Act, and their successors should be and continue the body corporate, incorporated by the "Recited Act," but by the name of the Rathmines and Rathgar Improvement commissioners, and it was thereby further enacted, that the several provisions of the Rathmines Improvement Act, as amended by the Rathmines and Rathgar Improvement Act, should be read and have effect as one Act, and as if the district under the said recited Act, and the several purposes of the said Rathmines and Rathgar Improvement Act, had originally been purposes of "The Recited Act." And that notwithstanding the change and number of the commissioners, and except only as by the said Rathmines and

Rathgar Improvement Act expressly provided the commissioners under the last-mentioned Act, should to all intents and purposes represent the commissioners under "The Recited Act," as if the commissioners under "The Recited Act" and the commissioners under the said Rathmines and Rathgar Improvement Act, had originally been and had continued without intermission to be one and the same body corporate. And whereas we have been given to understand and be informed in our Court before us that the said road which runs along the south side of the Grand Canal, from La Touche's bridge to Clanbrasil bridge in front of and close to the said Portobello barracks is ruinous and out of repair, and that notice of such want of repair was given to the said commissioners; and the said commissioners were requested by her Majesty's principal secretary of state for the war department, on the 25th day of January, 1863, to repair the same, and put it into good condition; and the said commissioners then refused and neglected to repair the said road, and still do refuse and neglect to the great loss, damage and injury of her Majesty's troops, and other her Majesty's subjects having occasion to use the same road. Whereupon our attorney general for our kingdom of Ireland, hath himself besought us that a fit and speedy remedy may be applied in this respect, and we being willing that due and speedy justice should be done in the premises as is reasonable, do command you, the said Rathmines and Rathgar Improvement Commissioners firmly enjoining you that immediately after the receipt of this our writ, you do proceed to repair, and cause to be repaired and put under good order and condition, the said public road and thoroughfare which runs along the south side of the Grand Canal, from La Touche's bridge to Clanbrasil bridge, and in front of, and close to the Portobello barracks, and situate within the district comprised in the said Rathmines Improvement Act, 1847; and that you do every act necessary to be done in order to put the same road into good condition and repair, or that you shew us cause to the contrary thereof, but by your default, the same complaint shall be repeated by us; and how you shall have executed this our writ, make known to us, at the Queen's Courts, Dublin, on the 2nd day of Nov. next coming, there returning this our writ, and that this you are not to omit.—Witness, &c.

To this writ the following returns were made:—We, the Rathmines and Rathgar Improvement Commissioners, mentioned in the annexed writ of mandamus, do by our secretary, John Hawker Evans, humbly certify and return unto our sovereign lady, the Queen, at the day and place in the said writ mentioned, that the said road in the annexed writ, mentioned or described, or any part thereof, is not and before, or at, during any of the said several times in such writ, in that behalf mentioned, never was a public highway as alleged in and by the annexed writ. And we the said Rathmines and Rathgar Improvement Commissioners, do by our said secretary, further humbly certify and return unto our sovereign lady, the Queen, at the day and place aforesaid, that long prior to the passing into law of each and every of the several statutes, in the annexed writ mentioned, or any of them, that ever since the passing into law of the statute of the 11th and 12th of George the 3rd,

chapter 31, entitled "An Act for enabling certain persons to carry on and complete the Grand Canal," and from thence, hitherto continually, the said road way, and every part thereof, in the said writ mentioned, has been and still is in the sole and exclusive possession and enjoyment of the said Grand Canal Company, or of their tenants or lessees; and that the said road and every part thereof was before and up to the passing into law of the said last recited Act, vested in, and in the possession and enjoyment of the corporation for the promoting and carrying on an inland navigation, between the places, and, as in the said recited Act, mentioned and specified; and further, that from and since the passing into law of said above recited Act, the said road, and each and every part thereof, and the soil over upon, and through which said road, and each and every part thereof, runs, is, and always has been the sole and exclusive property of the said Grand Canal Company. And further, that such road and every part thereof, in and from the time of the passing into law of said above recited Act, always has been what is termed by the said recited Act one of the trackways made, and running along at the side of the Canal of the said Company, and in the said recited Act mentioned and referred to; and that the said road, or any part thereof, was not before, or at the time of the passing into law of such recited Act, public. And we further certify and return that subsequent to the passing into law of the said above recited Act, and long prior to the passing into law of any of the several recited Acts, in the said annexed writ, mentioned, the said Grand Canal Company, in pursuance of the provision of the said above recited Act, placed and erected across the said road; certain toll-bars and gates; and that they have ever since under and by virtue of the said above recited Act continued by themselves, or their lessees or tenants, to receive tolls for the use of the said roadway, at the rates, and in manner as provided by the said above recited Act. And we further certify, that from and ever since the passing of the above recited Act, until the said roadway became out of repair, as in said writ mentioned, same was always repaired and maintained by the said Canal Company, or their tenants or lessees thereof, and that the said Canal Company, were, and are bound by law to repair the said road. And we further return and certify that no presentment was ever made by any grand jury, for the maintaining or repairing of said road, or any part thereof, and that no grand jury by themselves, or by their surveyor, contra tor, or servants, at any time or times, ever exercised any control or right over any portion of such roadway, and that said roadway was never presented for as a public or country road. And we further certify, that no Act was ever done or suffered to be done by said Canal Company, or by any other person or persons, whereby they, the said Canal Company, in any wise forfeited or annulled, or otherwise varied their right to said roadway, and in connexion therewith, and as vested in them by said above recited Act. And we further certify and return, that said roadway, or any part thereof for the reasons aforesaid, never was or is a public highway or roadway, within the meaning of any of the statutes, in the annexed writ, mentioned; and that we have no power

or authority in law, entitling or requiring us to enter upon said highway or roadway, or any part thereof, for the purpose of repairing or maintaining same; and that subject to the right of her Majesty's troops, to the said road, and of the public, by paying the tolls, as prescribed by the above recited Act, that said road and each and every part, is, and, always, from the passing of the said recited Act, has been, and still is, the sole and exclusive property of the said Canal Company; and that they alone have the power and authority and duty of repairing and maintaining, and are by law required to repair and maintain said way; and for the causes aforesaid, we the said Rathmines and Rathgar Improvement Commissioners, have not, and cannot, and ought not to repair or cause to be repaired, or put into good order or condition, the said road, or any part thereof, as by the said annexed writ, we are commanded.

To these returns the following pleas were put in by the Crown:—First.—And the Right Honourable Thomas O'Hagan, the Attorney-General of her Majesty the Queen, who sued and prosecuted the said writ of mandamus on behalf of her said Majesty, as to so much of the return of the defendants to the said writ, wherein it is alleged that the said road in the said writ of mandamus mentioned was not then, nor before, nor during any of the several times, in said writ, in that behalf mentioned, was a public highway, for plea thereto says that the said road was at the time of passing the Rathmines Improvement Act, 1847, in the said last-mentioned, and long before, and still is a public highway, and this the said attorney prays may be enquired of by the country. Second.—And as to so much of the said return, wherein it is alleged that long prior to the passing into law of each and every of the several statutes, in the said writ, mentioned, or any of them, that, ever since the passing into law of the 11th and 12th George the 3rd, chapter 31, entitled, "An Act for enabling certain persons to carry on and complete the Grand Canal," and from thence up to the present time of making the said return, the said roadway, and every part thereof, in the said writ mentioned, had been, and then was in the sole and exclusive possession and enjoyment of the said Grand Canal Company, or of their tenants, or lessees, the said Attorney-General yet for plea thereto, says that the said roadway was not, at the time of the passing of the said Rathmines Improvement Act, 1847, nor is the same now in the sole or exclusive possession of the said Grand Canal Company, or of their tenants or lessees, but on the contrary, was at the time of the passing of the said Rathmines Improvement Act, and now is a public highway, with a turnpike and toll-gate, thereon, for the use of all persons with carriages, carts, and horses to pass and repass, thereon, paying a certain toll fixed by law, and this the Attorney-General prays may be enquired of by the country. Third.—And as to so much of the said return, wherein it is alleged that no Act was done, or suffered to be done, by the said Canal Company, or by any other person or persons, whereby the said Canal Company in anywise forfeited or annulled, or otherwise varied their rights to said roadway; and that the said roadway, or any part thereof, for the reasons in said return mentioned never was,

nor then was, a public highway or roadway, within the meaning of the statute in the said writ, the said Attorney-General, by way of plea thereto, says, that the said Grand Canal Company, in pursuance of the said statute, of the 11th and 12th George the 3rd, in the said return mentioned heretofore, that is to say, on the 1st day of January, in the year of our Lord, 1800, did erect a certain turnpike and toll-gate across the said road, then being a trackway running along the side of the said Canal; and the said road has been since that time continually used by the public as a public turnpike road and highway to wit for 63 years last past, and has been during that period open to all persons paying a certain reasonable toll fixed by law; and the said Attorney-General says, that the said Grand Canal Company did thereby annul and vary their said alleged sole and exclusive right to the said road, and did thereby dedicate the same to the public, subject to the said tolls, and that the same at the time of the passing of the said Rathmines Improvement Act a public highway within the meaning of that Act, and this the said Attorney-General is ready to verify. And as to the residue of the said return, the said Attorney-General admitting that the soil of the said road in said writ and return thereto mentioned was and is the property of the said Grand Canal Company, nevertheless, by way of plea thereto, says that the said road was at the time of the passing of the said Rathmines Improvement Act and still is a public highway within the meaning of the Act, and this the said Attorney-General prays may be enquired of by the country.

To these pleas the following replication and demurrer were filed:—And the said Rathmines and Rathgar Improvement Commissioners by their said Secretary, John Hawker Evans, as to the plea or paragraph of the said Attorney-General, by him firstly above pleaded, and as to the said several matters therein respectively pleaded and which the said Attorney-General prays may be inquired of by the country, they, the said Rathmines and Rathgar Improvement Commissioners by their said Secretary do the like. And as to the said plea or paragraph of the said Attorney-General by him secondly above pleaded, the said Rathmines and Rathgar Improvement Commissioners, by their said secretary, say that the said second plea or paragraph so pleaded by the said Attorney-General and the matters therein contained are not sufficient in law, and that they, the said commissioners, are not bound by law to answer same or to take issue thereon; and the said Rathmines and Rathgar Improvement Commissioners, by their said secretary, set down and shew to the said Court here the following causes of demurrer to the said plea or paragraph, that is to say, that the said Attorney-General by said plea or paragraph selects only a portion of the several matters alleged in said return and which matters so selected and professed thereby to be answered or traversed, even if successively answered or traversed by said Attorney-General, afford no answer sufficient in law to the said return so filed by the said Rathmines and Rathgar Improvement Commissioners, or to the several matters and facts set forth therein and not answered by said plea or paragraph or covered thereby, and which said several last-mentioned matters

and facts being admitted to be true by said plea or paragraph of themselves and irrespective of the matters in said return mentioned, and to profess to be answered by said plea or paragraph afford and give a valid and legal answer to said writ above-mentioned; and also, because the said portion of said return so pleaded to by said plea or paragraph is by itself an immaterial portion of said return and does not form the subject matter of a separate plea or answer thereto; and also, because the alleged circumstance of said road way not being during any of said times when and set forth in the exclusive possession or enjoyment of said canal company as in said plea or paragraph alleged, does not even if it were so in any wise established or proved that the said Rathmines and Rathgar Improvement Commissioners are bound or are liable or entitled to enter upon or maintain or repair said road way as by said writ they are enjoined or commanded so to do; and also because, even assuming that said roadway at the time of the passing of said Rathmines Improvement Act or at any time since was and now is a public highway with a turnpike and toll-gate thereon, for the use of all persons with carriages, carts and horses to pass and repass thereon, paying a certain toll fixed by law, nevertheless, it being admitted by said plea or paragraph (because same is not thereby denied) that such public highway and such turnpike and toll-gate thereon were erected and constructed and are and have been from thence hitherto continued and erected upon and across said roadway and that said tolls have been paid and chargeable as alleged under the circumstances and in pursuance of and in exercise of the powers and authorities vested in said canal company, under their said recited Act as in said return mentioned and set forth that such public highway or such turnpike or toll gate is not nor are same or any of them a public highway or are turnpike or toll gate within the true intent and meaning of any of the said statutes in said writ mentioned; nor is said roadway such a public highway as confers and imposes on said commissioners the rights and duties which they are by said writ enjoined or commanded to execute and perform; and, also because, even assuming but not admitting, that said roadway was not at the time of the passing of the said Rathmines Improvement Act, 1847, nor was same at any time since in the sole or exclusive possession of the said canal company or of their tenants or lessees as by said plea or paragraph alleged, nevertheless, such a circumstance or fact does not establish or tend to establish that said roadway was or is a highway within the true meaning of any of the said statutes in such writ mentioned or referred to, or that said Rathmines and Rathgar Improvement Commissioners are entitled or bound to perform the duties as by said writ they are enjoined and required to do; and also because said plea or paragraph does not traverse the part of said return to which it professes to be an answer, in a proper and legal manner, that is to say, simply and directly; and also because said plea or paragraph, and the matters therein pleaded, are at most but an argumentative traverse of the said possession and enjoyment of said roadway by said Canal Company; and also because the reasons assigned by said plea or paragraph, and as so giving such argumentative traverse to said pro-

duce of said return, are quite consistent with the matters in said return mentioned, and by said plea or paragraph proposed to be traversed or answered; and also because said plea or paragraph, as same is pleaded, neither traverses, nor denies, nor confesses and avoids the said matters and facts so pleaded in said return, and also because the matters so pleaded in said plea or paragraph afford no answer good in substance to said return; and also because if said plea or paragraph is simply a traverse of some material allegation in said return mentioned, same ought to be confined to some matter or matters of fact, or to the matter or matters of fact in said return mentioned, and to which it professes to be pleaded, and if same be so simply, and be not introductory of new matters, it ought to be so pleaded, and should not be as same has been pleaded; and if, on the contrary, said plea or paragraph introduces new matter by way of confession or avoidance, or be explanatory of what is averred in said return, or superadds thereto any averment or statement calculated argumentatively or materially to confess or avoid what is so pleaded in said return, and professed to be pleaded to by said plea or paragraph, same should not have concluded to the country, but with a verification; and also because said plea or paragraph is ambiguous, embarrassing, and uncertain in not either distinctly admitting that the said turnpike and toll gate mentioned in said plea or paragraph was the same turnpike and toll gate in said return mentioned, and if not, so by not distinctly alleging that same were otherwise or different; and also because the said plea or paragraph professes to answer or deal with the allegation in said return made, that from the time of the passing into law of the said Grand Canal Act in said return mentioned and referred to, the said roadway and every part thereof, as in the said writ mentioned, was and still is in the sole and exclusive possession and enjoyment of the said Grand Canal Company, or of their tenants or lessees, whereas said plea or paragraph in fact only gives an answer to so much of the said return as refers to or covers the period of time which has elapsed since the passing into law of the Rathmines Improvement Act, 1847; and also because said plea or paragraph should have concluded with a verification, and not to the country; and also because said plea or paragraph, and the several matters therein pleaded and set forth are in other respects bad, uncertain, and insufficient in law, and same afford no answer good in law to the said return, or to the matters professed to be answered by said plea or paragraph. And as to the said plea or paragraph of the said Attorney-General by him thirdly above pleaded, the said Rathmines and Rathgar Improvement Commissioners, by their said secretary, say that the said turnpike and toll gate so erected across the said road by said Grand Canal Company was so erected by the said company across the said road under and in pursuance of the provisions of the statute in the said return mentioned, and not otherwise, and that said turnpike and toll gate so erected hath always from thence hitherto and still is and so continues erected and being across the said road by the said company in pursuance of the said powers so vested in them for such purpose by their said recited Act as aforesaid, and

not otherwise; and the said Rathmines and Rathgar Improvement Commissioners by their said secretary further say that the user of said road by the public during the period as in said plea mentioned was a user by them of said road under the circumstances in said return mentioned, and same was so used by said public in pursuance of and in conformity with the provisions of the said recited Act in said return and plea mentioned, and not otherwise, and that said road was during all said period only open to the public, or to any person paying a certain reasonable toll fixed or allowed by law, to wit, the tolls as prescribed or allowed by the said recited Act in said return and plea respectively mentioned and referred to; and the said Rathmines and Rathgar Improvement Commissioners by their said secretary further say that the said tolls so paid and payable by the public, or by the said persons so using said road, were during all said period and still are lawfully payable to and recoverable by the said Grand Canal Company, and same have in fact always been so paid to and received by said company solely under and by virtue of the powers vested in them by their said recited Act in said return and plea mentioned and referred to, and not otherwise, and same are and always have been and still are kept and retained by the said company, and applied by them for the purpose and in manner as by their Act directed and authorised; and the said Rathmines and Rathgar Improvement Commissioners, by their said secretary, say the said Grand Canal Company did not thereby annul or vary their said sole or exclusive right to the said road, and did not thereby or at all dedicate same to the public subject to the said tolls or otherwise, or at all, and that said road, or any part thereof, was not, at the time of the passing of the said Rathmines Improvement Act, or at any time since, nor is same now a public highway within the meaning of that Act, and this the said Rathmines and Rathgar Improvement Commissioners are ready to verify. And as to the same plea or paragraph lastly above pleaded by the said Attorney-General as to the residue of the said return, and as to the several matters so therein respectively pleaded, and which the said Attorney-General prays may be enquired of by the country, they the said Rathmines and Rathgar Improvement Commissioners by their said secretary do the like.

The following rejoinder was put in by the Crown to the replications given above:—And the said Right Honourable Thomas O'Hagan, the Attorney-General of our said Lady the Queen, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes, saith as to the replication of the said defendants to the plea of him the said Attorney-General secondly above pleaded to the return of the said defendant that the said plea and the matters therein contained are good and sufficient in law to compel the said defendants to answer thereto; therefore, he the said Attorney-General of our said Lady the Queen prays judgment, and that a peremptory mandamus do issue in this behalf. And as to the replication of the said defendants to the plea of the said Attorney-General to the said return of the said defendants by him thirdly above pleaded, the said Attorney-General saith that the said Grand Canal Company did at the

time and in manner and form as in the same plea mentioned, dedicate the said road therein mentioned to the public subject to the payment of the tolls as therein mentioned, and the said road was at the time of the passing of the said Rathmines Improvement Act a public highway within the meaning of that Act, and this the said Attorney-General prays may be enquired of the country.

To this rejoinder the defendant demurred, saying, that the said rejoinder is no answer to the said plea to which same has been pleaded, nor is same good in substance, because it neither confesses and avoids, nor traverses, nor denies the matters pleaded and set forth in the replications of defendants, to which same has been so pleaded; and also because said rejoinder adduces no new matters of fact as an answer to said replication, but merely falls back upon and reiterates several matters previously above pleaded by said Attorney-General in and by his said third plea to said return, and without admitting the truth of the matter set forth in said replication, said rejoinder concludes to the country as upon the plea instead of traversing the several matters pleaded in said replication and then concluding to the country; and also for that the said Attorney-General, instead of having pleaded a rejoinder to said replication concluding to the country, should have demurred thereto in answer as said rejoinder traverses no material averments in the said replication to which same has been so pleaded; and also for that said Attorney-General, when not contesting the truth of any matter of fact set forth in said replication should not have concluded to the country; and also for that said Attorney-General, by having so concluded said rejoinder to the country, has, in fact, submitted to be tried by the country only an issue in law; and also for that said rejoinder, by admitting the several averments contained in said replication in fact admits that the said Grand Canal Company did not dedicate the said road therein mentioned to the public as alleged, and that said road was not, at the time of the passing of the said Rathmines Improvement Act, a public highway within the meaning of that act as alleged; and also because the said Attorney-General by his said rejoinder only argumentatively endeavours to traverse, or confess and avoid the legal effect of the several matters pleaded by said replication; and also because the said Attorney-General by his said rejoinder endeavours to try by the country the issue raised by him by his previous third plea to the return by the said Rathmines and Rathgar Improvement Commissioners without having any regard to the several matters pleaded by the said defendants in reply thereto; and also because if said Attorney-General by his said rejoinder intended same as introducing any new matter, he should have concluded said rejoinder with a verification, and not to the country; and also because said Attorney-General, by his said rejoinder, endeavours to introduce and to aver therein as conclusion of law from facts previously pleaded, which in fact do not warrant such a conclusion; and also because said Attorney-General has not, by his said rejoinder, disclosed any facts shewing that said road was either dedicated to the public as alleged, and that same was a public highway within the meaning of the said Act at the time of the passing of the

said Rathmines Improvement Act; and also because said rejoinder and the several matters therein pleaded and set forth are in other respects bad, uncertain, and insufficient in law, and same afford no answer good in law to the said return, or to the matter professed to be answered by the said replication.

Jellett and M'Donogh, Q.C., for the defendants.—Three questions arise in this case—1st, as to the liability of the Commissioners to keep the road in question in repair; 2nd, as to the structure of the pleadings on behalf of the Crown; 3rd, as to the applicability of the writ of mandamus in a case of this description. With respect to the first question, it is to be determined very much with reference to the condition of things antecedent to the Towns Improvement Act, 1847, and also with reference to the provisions of the Rathmines Improvement Act of 1847, and of the Rathgar Improvement Act, 1862. The allegation of the Crown is, that within the Towns Improvement Act and the Rathmines Improvement Act, this is a highway which the Commissioners are bound to repair. Sections 47, 48, and 49 of the Towns Improvement Act are relied upon by the Crown, and also s. 3, the interpretation section, by which the word "street," when used in the Act, is to mean "road;" and s. 28 of the Rathmines Act, 10 & 11 Vict., c. ccliii., is that under which the Crown says it has the right to compel the Commissioners to keep this road in repair. But this portion of the road cannot be considered a public highway in any sense. The only modes by which a highway could be created at common law were by prescription, by dedication, by Act of Parliament, or as a way of necessity. The Act under which this trackway was formed is the 11 & 12 G. 3 (Ir.) c. 31, ss. 33 and 34.—*The King v. The Inhabitants of Netherthong*. The correct way of making a turnpike road a public highway is to declare it so by Act of Parliament. There is no authority or principle to shew that under such terms as are used in s. 33 of the 11 & 12 G. 3 (Ir.) c. 31, and having regard to the circumstances, the trackway along the canal, which is private property, is to be deemed a public highway. The purpose of the Act was to carry out a private speculation. By s. 33, the clear profits of the undertaking are to be divided among the proprietors. With respect to the dedication of a road by the owners to the public, there must be two things concurrent—an intention by the owner to dedicate, and an adoption of the act by the public. If the user by the public is referable to the purpose of effecting some particular object of the owner, and not to the purpose of creating a highway, a public highway will not be created.—*Barraclough v. Johnson* (8 Ad. & Ell. 99); *The King v. Richards* (8 T. R. 634). The state of affairs established by the statutes in fact amount to an arrangement made by the township of Rathmines, the grand jury of the county, and the Corporation of Dublin; ss. 28 & 29 of the Rathmines Improvement Act.—*Blakemore v. The Glamorganshire Canal Company* (1 M. & K., 162). Sections 23 & 24 of the Rathgar Improvement Act, 1862, are very important. So also ss. 25 and 26, and st. 7 & 8 Vict. c. 106, ss. 62 to 66, exclude the power of putting a turnpike road in repair within this district. The powers of the grand jury originally were given by ss. 64

and 65 of the 6 & 7 W. 4, c. 116. The effect of s. 65 was to throw on the owners of turnpike roads the duty of keeping them in repair. This is either a turnpike road by st. 11 & 12 G. 3, or else a private road established by a mercantile company for their own purposes: in either case it does not fall within the definition of a highway. All the profits go to the Canal Company, and none to the Commissioners. Then as to the second question, upon the structure of the pleadings. Every fact stated in the return must be considered as a material element in a justification to the Commissioners in declining to do the act which they are called upon to do. It is all one return; there is no such thing as splitting up a return into several parts, as is done here. If the allegation which is traversed when taken away leaves the rest a good return, the prosecutor cannot take that allegation out of the return, and deny it to be true. The next objection is, that the plea undertakes to answer the whole of the portion of the return to which it is addressed, and that it does not do so. The plea here professes to answer the whole of the time from the 11 & 12 G. 3, by shewing it was not a highway at the time of the passing of the Rathmines Act or now, leaving the rest uncovered. Besides, either it is a direct traverse of the previous pleading, and then it should have concluded to the country, or it introduces new matter, and then it should have concluded with a verification. The third plea affords no answer to the return. The rejoinder is only a repetition of what was averred in the plea. Issue could never be arrived at if this was allowed. With respect to the third point. The remedy, if any, against the Commissioners is by indictment—s. 49 of the Towns Improvement Act. *The Queen v. The Trustees of the Oxford and Whitney Turnpike Roads* (12 Ad. & Ell. 421).

The Solicitor-General (Lawson, Q.C.) and Serjeant Sullivan (with them *Griffith*) for the Crown.—The formal objections on the other side could have been raised only by special demurrer, and by s. 81 of the Common Law Procedure Act of 1853, and s. 79 of the Act of 1856, no objection can be taken by demurrer for formal matter. If there is anything in the return left uncovered by our pleas, it is open to the defendants to mark judgment. Our traverse is proper, because the question here is, what was the condition of the road at the time of the passing of the Rathmines Improvement Act, not what it was forty years ago. It is unnecessary that the plea should conclude either with a verification or to the country, and at all events the objection is matter of special demurrer—2 Wms. Saund. 190 (n. 5). The immateriality of a traverse is only matter of special demurrer—1st Wms. Saund. 14 (n. 2). If this road was dedicated to the public one year before the passing of the Rathmines Improvement Act, it is enough. We charge that this was at the time of the passing of the act so dedicated, and then, nothing but an Act of Parliament could do away with the effect of the dedication. The trackways were not vested in the Company by the Act of 11 & 12 G. 3, c. 31; all that the act did was to give them power to erect toll-bars on the trackway. Then, as to the substantial question in the case. Are the Rathmines Commissioners bound to repair this road? We say that they are. It may

be that the Canal Company is bound to do so also, but that does not get rid of the liability of the Commissioners. The effect of the st. 11 & 12 G. 3, c. 31, is to constitute this a public highway to all intents and purposes. Any person tendering the toll is at liberty to use the road; and the Company could not exclude anyone who complied with the terms mentioned in the Act. [*Fitzgerald, J.*—Would there not spring from the statute an obligation on the Company which takes the tolls to keep the road in repair?] That may be; but the Crown is at all events entitled to make the Commissioners repair the road: the Commissioners may then recover over against the Company, and force it to keep the road in repair, and apply the tolls for that purpose. The definition of a highway will be found in *Dovaston v. Payne* (2 Sm. L. C. 94), and this comes within it. The setting up of toll bars would not destroy the liability of the inhabitants of a parish to repair a road.—*Re v. The Inhabitants of St. George's, Hanover-square* (3 Camp. 222); *The Queen v. The Inhabitants of Lordsmere* (15 Q. B. 689); *Sutcliffe v. Greenwood* (8 Price, 535); *The King v. The Inhabitants of Oxfordshire* (4 B. & Cr. 194); *The Queen v. The Inhabitants of Brightside Bierlow* (13 Q. B. 933); *The Northam Bridge Company v. The London Railway Company* (6 M. & W. 428); *The Surrey Canal Company v. Hall* (1 M. & Gr. 392). One of the objects of the Rathmines Improvement Act, incorporating the general Towns Improvement Act, is to keep the roads in repair, so that that is one of the objects to which the rate can be applied. That Act was amended by the Rathmines and Rathgar Improvement Act of 1862, s. 23 of which is important. It is a mistake to say that the grand jury have no power to repair a turnpike road; s. 50 of the general Grand Jury Act gives the largest powers of repair to the grand jury. We submit that on the authorities this is clearly a public road; that the Commissioners have power to raise rates on the district for the repairs; and that if they please they have power to compel the Canal Company to apply their tolls on the repairs. The proceeding by mandamus is correct.—*The Queen v. The Bristol Dock Company* (2 Q. B. 64); *The King v. The Severn and Wye Railway Company* (2 B. & Ald., 646). The only authority on the other side is the dictum of Lord Denman in *The Queen v. The Trustees of the Oxford and Whitney Turnpike Roads* (12 Ad. & El., 427); but he never intended to decide the general principle, and if he did, he has overruled himself in *The Queen v. The Bristol Dock Company*.

M'Donogh, Q.C., replied.

Cur. adv. vult.

June 23.—*FITZGERALD, J.*—In this case the question arises on the return to the writ of mandamus, and the subsequent pleadings. I shall advert very shortly to the mandamus. [His Lordship then shortly stated the mandamus.] The Commissioners, in their return, say first, "that the said road in the annexed writ mentioned and described, or any part thereof, is not, and before or at or during any of the said several times in such writ in that behalf mentioned, never was a public highway," and stopping there, there is a full and complete return to the writ. On that there

is a full return, and all the questions in the case could have been raised on it; but, very probably with a view to raise more completely the question of law, it goes on to state a number of matters which set up argumentatively the same proposition. [His Lordship then read the rest of the return.] That I have called an argumentative statement of certain matters which, if well-founded, would shew that the road in question was not a public highway. I do not propose to follow the pleadings further; they are very complicated, but whether in the return or traverse, the facts necessary for the decision seem to be conceded on both sides. There is no fact in controversy, and I make out that two questions of law arise—first, is the road in question a street within the meaning of the st. 10 & 11 Vict. c. 34—a street or road, which the defendants are bound to keep in repair? and secondly, is the proceeding by mandamus the proper remedy in the case? The facts appear to be, that before the st. 11 & 12 G. 3, c. 31 (Ir.), the road was one of the trackways of the Inland Navigation Corporation. By the Act of G. 3, constituting the Grand Canal Company, the property of the Corporation, including the trackways, were transferred to the Grand Canal Company, and this piece of road-way is one of the trackways which were so vested in the Commissioners of Inland Navigation, and which were so transferred. The further facts are, that subsequently to the passing of the 11 & 12 G. 3, c. 31 (Ir.) the Grand Canal Company erected a toll-bar across this trackway, and from that time to the present the public have enjoyed the privilege of passing along the trackway, and using it for all purposes, paying a toll to the Company, and that since the passing of that Act it has remained vested in the Company, and has been, subject to this user, in the possession, use, and enjoyment of the Company, and furthermore it is a road which, if repaired at all, has been so by the Company, and has not been the subject of grand jury presentment. I propose to offer an opinion on the case independent of the pleadings. I cannot understand why the parties should not have raised the question in a convenient form for the Court, as there is not a single fact in controversy between them. The first of the statutes relating to the duties of the Rathmines Commissioners is the Rathmines Improvement Act, 10 & 11 Vict. c. ccliii. (loc. and pers.) The 4th section of that Act provides that the Towns Improvement Act of 1847 shall be incorporated with it. The 25th section recites, "that by the County of Dublin Grand Jury Act, the Grand Jury of the County of Dublin are empowered to make presentment for the making and maintaining of roads and bridges within the county comprising the Rathmines district, and that the making and maintaining of such works within the district are transferred to the Commissioners, and the expenses thereof made chargeable upon the rates authorised to be levied by the Commissioners;" and it then enacts "that from and after the passing of this Act it shall not be lawful for the grand jury of the said county to make presentment for the making or maintaining of any road or bridge, or any other work within the said district, which the said commissioners are hereby authorised and empowered to make or maintain, and that in consideration of the said district

being hereby made chargeable with the cost of making and maintaining the roads, bridges, and other works which the said Commissioners are hereby authorised to make and maintain within such district, it shall not be chargeable with the cost of making or maintaining any other like works within the county or barony save and except those the cost of which under the said Act of the 7th and 8th years of her Majesty's reign are chargeable upon the county at large." And I may say generally of this Act, that in erecting Rathmines into a township, the general intention of the Act as to works or roads, was to place the Commissioners in the same position as the grand jury had previously been in, while on the other hand the district was, save for certain purposes, exempted from grand jury taxation. The question will shortly turn on the st. 10 & 11 Vict. c. 34, and some difficulty will arise from its being one of those Acts in which an attempt was made to provide in one Act for two countries having in this respect totally different institutions. The Act is one which may be incorporated with special Acts. In the interpretation clause, without which there scarcely would have been a question, it is said that the word "street" shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act. I advert specially to this, that the word "street" is to be interpreted as meaning road or thoroughfare. We now turn to the clauses of the Act under the head of paving clauses, and by the 47th section it is enacted "that the management of all the streets which at the passing of the special Act are, or which thereafter become public highways, and the pavements and other materials, as well in the footways as carriage ways of such streets, and all buildings, materials, implements, and other things provided for the purpose of the said highways, by the surveyor of highways or by the commissioners, shall belong to the commissioners." Now, we have not in this country anybody corresponding to the surveyors of highways in England, and it is on this that the difficulty arises, but I believe we never had—certainly not since the grand jury system came to be worked—any such body. It will be observed that by s. 47 it is the management of the streets which is vested in the Commissioners, but with the management were transferred to them the pavements and other materials, and the buildings, &c., provided for the purpose of the said highways. Then by section 48 the Commissioners and none others shall be the surveyors of all highways within the limits of the township, and within those limits they shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force. Again, I observe on this section that really, if it is applicable to Ireland, I do not know what its meaning is, or what the powers of the Commissioners are, they being the powers of surveyors of highways. I have already adverted to the fact of there being no such body in Ireland as that of surveyors of highways, and no laws that I am aware of applicable to Ireland vesting in surveyors of highways any powers at all. Then s. 49 enacts "that the Commissioners shall be guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the

special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act;"—that is for refusing or neglecting to resort to or put in force the powers which surveyors of highways have under the laws in being. Again I advert to this section that the misdemeanor created by it is for neglecting to exercise the powers of surveyor of highways, and that for that neglect they may be indicted for a misdemeanor. Now, it will be seen that these provisions are wholly inapplicable here, and yet they are the things that we have to deal with, there being no such law in force in Ireland as that alluded to in them, and really I do not know how this liability was to be carried out. The 50th section, which enacts that the trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon, is important. This section was not much adverted to, but it seems to me to have a very important bearing on the case, because, while on the one hand it deals with the question of ordinary turnpike roads and the trustees of those roads, who are generally acting under some Act of Parliament for the public, it leaves wholly untouched the trustees of the Grand Canal Company, who are not trustees for the public, so that while the 50th section deals with the case, if there had been one here, of a public road vested in trustees for the public, it leaves the 11 & 12 G. 3, c. 31, and the powers and rights constituted by it untouched. By section 51 "the Commissioners may from time to time cause any or all of the streets under their management, or any part thereof respectively, to be paved, flagged, or otherwise made good, and the ground or soil thereof to be raised, lowered, or altered in such manner and with such materials as they think fit; and they may also pave or make, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." These are the sections which it is important to advert to. But it will be seen that whatever rights the whole constitute, there must have been a Queen's public highway—nay, more, it must have been one under such circumstances as that the surveyors of highways, if any such, would have been bound to exercise their powers on it, and in respect of which the inhabitants would have been liable to an indictment. The Rathgar Improvement Act is also recited in the mandamus, but it has no more bearing on the case than the other. It just exempts the district provided for by it from grand jury taxation, and transfers the roads to the Commissioners; but such was the general intention of those two Acts, to create self-government, to vest powers in commissioners, and to give them, if such could be, the powers of surveyors of highways, and to declare them guilty of a misdemeanor, and subject to be indicted in case of their refusal or neglect to exercise their powers, just as the inhabitants of the parish or township would have been liable, before the passing of the special Act, to have been indicted. The question will be found to turn, not on the special construction of any one of these provisions, but on the provisions of the 11 & 12 G.

3. c. 31 (Ir.), for it appears to me that the character of this road turns very much on the provisions of that statute. That is the Act which enables the present company to carry on and complete the Grand-Canal. It will be necessary to advert to three of its sections. The first is s. 16, by which certain things there specified are transferred to the new company. But to pass from that we then come to section 33. I should say that by the sections antecedent to that one, this new company is in its character a trading company, that is, a company associated together to carry on business as water carriers, and to make profits in that way. Accordingly for the profit of their canal they are empowered by the Act of Parliament, by the sections antecedent to s. 33 to take certain tolls and rates, but as they had certain other property, s. 33 provides "that it shall and may be lawful for the said Company to erect one or more turnpikes upon and across any of the trackways which now are or shall be made on either side of the said navigation, and to take and receive the following tolls, for which they may distrain and sell, as is usual at other turnpikes." The road in question on the pleading appears to be one of the trackways mentioned in the st. 11 & 12 G. 3, c. 31. The Company are not authorised to turn these trackways into public roads, nor are the trackways turned into public roads, but they are empowered to take tolls. The section then enumerates what those tolls are to be, but those tolls are not for the public, but are the private property of the Canal Company. Section 34 provides "that such toll shall be paid only at one gate, and but once in any one day; and that no road which is now public shall be thereby obstructed." Upon referring to these sections the obvious meaning of them is, that these trackways are not public roads, and that no regulation of the Canal Company shall interfere with the public traffic. But the Act of Parliament takes a distinction itself between a public highway and a trackway for the use of which the Company is entitled to take toll. It appears from the pleadings that one of these trackways is that road from Latouche's-bridge to Clanbrasil-bridge, on which the Company have created toll-bars, and on which they have permitted the public to traffic, but they have exercised the entire control and dominion over it, and for aught that appears on the pleadings, this is still one of the other track ways used as such, or property a right to use which is vested in them by the Act of Parliament; and I am not aware of any Act which authorizes any one to take from the Company that track way. Now we will see the importance of the Towns Improvement Act. Section 51 of that Act enacts that "the Commissioners may from time to time cause all or any of the streets under their management, or any part thereof respectively to be paved, flagged, or otherwise made good, and the ground or soil thereof to be raised, lowered, or altered, in such manner and with such materials as they think fit; and they may also pave or make, with such materials as they think fit, any footways for the use of passengers in any such street, and cause such streets and footways to be repaired from time to time." That section is incorporated with the Rathmines and Rathgar Acts, but would not apply to the case of the Grand Canal Company, who are the owners of a road, in

respect of which they are entitled to take tolls, and not trustees of a public road. On these Acts the question which I propose to consider, is, whether this trackway has become a Queen's highway, so as to bring it within the meaning of the Towns Improvement Act, and transfer the liability to repair to the Rathmines Commissioners, and authorize them to go on the trackway and repair it while it remains vested in the Company. With respect to this obligation to repair, a number of cases were cited to establish, that though a road be a turnpike trust, still the common law remedy on the parish to repair would exist, and might be enforced by mandamus, though the trustees are entitled to take tolls for the purpose of repairs. I will refer to one only, *The Queen v. The Inhabitants of Lordsmere*, (15 Q. B. 689). The question there was whether the parish was bound to repair a road passing within its limits, which had been constructed by the trustees of a turnpike trust, originally created for twenty years, but still in force, and the question was, whether that was a case in which the parish was bound to repair. It was contended that, according to the common law of England, the parish was bound to repair every public highway within its limits, and that it mattered not whether that was of ancient origin or of recent origin; but that once it became a public highway by dedication, the parish was bound to repair. Such was the question raised in that case, and Lord Campbell says there: "If the township is liable at all, it can only be on the ground that the road was a common Queen's highway; and, therefore, if the township is liable, the road is properly described. The question therefore is, whether it be proved that, at the time when the grand jury found the bill, the road was a common Queen's highway? I think that it was one, for statute G. 4, c. lviii., authorized the trustees to make the road, as a turnpike road; and in the preamble the Legislature declare, that the road would be a convenience and advantage to the public at large. The Act does not in so many words say, that the road shall, when made, be a public highway; and great reliance was placed by the defendant's counsel on the absence of any such express words. I consider that, however, immaterial; for the Act gives the public a right to use the road, and makes it open to the public. Besides, if express words were necessary, the Act incorporates statute 3 G. 4, c. 126, which does contain words to that effect. Then it is argued, in effect, that the imposition of tolls on those using the road prevents it from being a public common highway. The defendant's counsel were forced to admit that, if an ancient highway were turned into a turnpike road, the imposition of tolls would not prevent its continuing to be repairable by the parish; but a distinction was made between an old and a new highway in that respect. But I am of opinion that the rule of law is, that the parish is liable to repair all highways, whether new or old. I concur in what is said on that subject by Abbot, C.J. in *Rex v. Netherthong*, 'By the general rule of law, the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway.' Where the new road has been made by private persons, dedication by the owner of the soil, and user by the public, and adoption by the

parish, are according to my notion of the law, material circumstances, as proving that an irrevocable license to use the way has been given to the public, and as being evidence that the way is a public common highway: the liability of the parish to repair is a consequence of its being a public highway. In the present case, the road has become a highway, not by the dedication of the owner of the soil, but by virtue of the Act of Parliament which gives all persons a right to use it for the purposes of traffic till the Act expires, that makes the road a public highway; and an incident to that is, that the township must repair it." He then goes on to deal with the case of *Rex v. Mellor*, where the period during which, by the Act, the road was to be a highway, had expired before the road was out of repair, and the Court determined that it had ceased to be a public highway. The distinction was taken in *The Queen v. The Inhabitants of Lordsmere*, that so long as the Act continued in force, the road was a public highway, and the parish was therefore liable. Now, I take it from that, that in reference to all roads in England, before any liability to repair can arise in the parish, they must be roads irrevocably dedicated to the public by the private owners, and accepted as public highways, or if they are made by Acts of Parliament, there must be words in the Acts which make them Queen's public highways; and as to the imposition of tolls, it appears to me, that that would scarcely make any difference as to the character of the road, once it was established to be a highway, for the trustees are trustees of the highway to maintain it. The tolls are a fund to maintain it, but if they are insufficient, their existence does not supersede the liability of the parish. In the cases which arose in reference to roads established by Act of Parliament in England, it will be found that by the Act they were made Queen's public highways; and, therefore, by that observation, I dispose of those cases. It therefore remains to be considered whether this is a Queen's public highway? and on the best consideration I can give, I think it is not so, in that sense which would transfer it to the Commissioners of the township of Rathmines, and make them liable to repair it. What I rely upon as shewing this, is, that this is still one of the trackways of the Canal, subject to be used by the Company in its whole extent, subject to their user as a trackway for the purposes of their navigation; and, from all I can see, it may be necessary now or hereafter to use the entire of it: but there it remains as their private property, though subject to any rights the public have acquired in the meantime. But has there been any dedication of this road to the public, or an acceptance of the road by it? I can find none such. It is not a dedication to say, "Upon this road, which we must retain, we give you liberty to pass, paying a toll which will go into our private funds." How have the Company dedicated this in a manner that would make it a Queen's highway, would vest it in the Rathmines Commissioners, would have formerly authorized the surveyors of highways, if any, to enter on and repair it, so as to make it more convenient for public traffic; and would now authorize the Commissioners to enter on it and repair it as they think fit? What is there either in the 11 & 12 G. 3, c. 3, to declare this to be a public highway? The distinction

is even taken in the Act between this trackway and a public road; and there is in the provision about toll-bars a declaration that they are not to interfere with the use of any public road. Well, I can find nothing in the subsequent dealings inconsistent with the position which the Legislature gave the Canal Company when it passed the 11 & 12 Geo. 3, cap. 31, and authorized them to erect a toll-bar. Now, a matter was stated in the course of the argument which we cannot take into consideration. It is said that a diversion had taken place, and that the true trackway was a path along the canal. That may be the case, but it does not appear on the pleading, and we can only take into account what there appears. On the whole, therefore, it appears to me that this, being a portion of the trackway of the canal, has not become a Queen's public highway within the meaning of the 11 & 12 Vict. c. 34, or within the meaning of the interpretation clause of that Act.

The second question was debated when the case was before us on the conditional order, namely, whether a mandamus was in this case the proper remedy, or, rather, whether it was a remedy at all. On the part of the prosecutor it was said to be the proper remedy; and authorities were cited in which it was said, that the Courts in England had granted a mandamus. On the other side authorities were cited, in which it appeared to be decided that the Courts in England never granted a mandamus to compel commissioners to repair, but left the parties to their remedy by indictment. One reason was that it was more convenient, and, also, that the fine imposed on conviction would be expended on the repairs of the road. However that may be, that is not the question I propose to consider, but the question as to whether a mandamus is the proper remedy, having regard to the fact of the liability, if any, on the Rathmines Commissioners, being imposed by the Towns Improvement Act, and the neglect to perform it being declared to be a misdemeanor and punishable by indictment by the same Act which imposes the obligation. I allude to the 40th section which says that "the Commissioners shall be deemed guilty of a misdemeanor, for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district, therein, were liable before the passing of the special Act." The question was before the Court on the conditional order, and in making absolute the order, the Court guarded itself against intimating any opinion on the question. The Lord Chief Justice in delivering judgment, expressly stated that the object in making absolute the order was, that the question might be raised more solemnly on the return, and I myself in adding an observation or two, took care to guard myself in like manner. The impression on my mind was, that it was improvident to make the order absolute, because an indictment was the true remedy. I find, from the note taken by the reporter of the Court, that in following the Lord Chief Justice, I pointed out that the insertion of the remedy in the statute not alone affects our discretion in issuing the writ, but takes away the discretion. That point appears to have

been decided in *The King v. Robinson* (2 Bur. 799) where Lord Mansfield laid down the law as follows: "The rule is certain, that where a statute creates a new offence, in prohibiting and making unlawful anything, which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other, and this is the resolution in *Castle's case*, Cro. Jac. 643," and the ruling in *Castle's case* supports Lord Mansfield. Now, the way I apply that is this. The obligation to repair, is the creature solely of statute. It could not be otherwise, as the Commissioners themselves are created only by statute, and in respect of the township, there was no obligation to repair before, as the obligation lay on the county of Dublin through the grand jury. So the same statute which creates the obligation gives the remedy by indictment, and I read it "punishable by indictment and not otherwise," unless by a class of cases on the Grand Jury Acts, where an information may be filed. No doubt has ever been cast on *The King v. Robinson*. It has been recognised in many cases, especially in *The King v. Carlile* (3rd. B. & Ald. 161) and applying that rule to the present case, it appears to me that though this is a mandamus sought for by the Attorney-General, prosecuting on the part of the Crown, this is not a question of discretion; that the discretion is taken away; and that though we made the order absolute, still it is open to us on the return to the writ, as a matter of law on which we have gone wrong. On those grounds therefore, I am of opinion that judgment should be given for the Commissioners.

HAYES, J.—When I look at this brief, and find that some twenty-seven points have been put forward to be relied on, I feel I am under a personal obligation to Mr. Jellett, for having put them under a sort of hydraulic pressure, and reduced them to three points, which I therefore take up. The first question is, whether a writ of mandamus is properly applicable to cases of this description, or whether the party should not be left to an indictment. The next is as to the structure of the pleadings. The next is the question as to the liability of the defendants to repair the road in question. As to the first, the 49th section of the Towns Improvement Act, which is incorporated with the Rathmines Improvement Act, enacts [His Lordship read the section, which has been already given] and it is contended on the authority of the case of *The King v. Robinson*, that the remedy by indictment alone is applicable; but the answer to that, I take it, is a short one. This is not the case of an offence created by statute, which while creating the offence, also appoints a specific remedy. The offence of neglecting to repair a highway, whosoever may be the party liable to it, whether parish, individual, or any other person, the offence is one at common law, and all the statute does is to transfer to the Commissioners the liability which had rested on the parish, but which in Ireland, since the grand jury system was introduced, has been discharged by presentment. The question then is, can the remedy by mandamus be resorted to as a concurrent and more efficacious remedy than that by indictment; and was the Court right in grant-

ing the mandamus as it did? It purports to be granted on the prayer of the Attorney-General. No case indeed was cited of such a grant, but if we are to be governed by the analogy of the writ of *certiorari*, the exercise of the Court's discretion is so much a matter of course that the Attorney-General might almost demand it as a matter of right. The case most strongly relied upon against the propriety of granting the mandamus was that of *The King v. The Trustees of the Oxford and Whitney Turnpike Roads*. There two parties had a contest as to the repair of a road. One of them applied for a mandamus, and the Court refused it. Though I do not altogether concur in the observations of Lord Denman, I think the Court was right. It is an abuse of the writ to make it merely ancillary to a contest between individuals. The case here is very different. The Attorney-General alleges a duty in a public body, and a neglect of that duty, and so he comes here not so much to punish, as to remedy a public mischief. I think that a case within the scope of the writ, and that the Court was right in making absolute the conditional order for the mandamus. The next question is as to the pleadings. The 79th section of the Common Law Procedure Act, 1856, is important. It enacts that "the provisions of 'The Common Law Procedure Amendment Act (Ireland) 1853,' and of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the Court of Queen's Bench, but subject to any general rules which the said Court may make, and which it is hereby empowered to make in relation thereto." This enactment seems to have been lost sight of by both sides. Neither party applied to the Court for permission to file a surrejoinder. Passing by this as a mere irregularity, let us look at the general purport of the return. It is averred that this never was a highway. If this is so, *cadit questio*. Then the defendants go on to state several matters intended to shew that the road was not such a road as the defendants are bound to repair. The return being in the nature of a plea in excuse, the defendants may set out any number of matters which are not inconsistent with each other; and the defendants having set out as many several matters as they think fit, the prosecutor is authorized to plead to, or traverse all or any of the material facts so pleaded. He is not obliged to plead to the whole return, but may select such portions as he thinks material, and make them the subject of a traverse or a plea in confession and avoidance. We now come to the third question. By the 11th and 12th G. 3, c. 31, the Grand Canal Company was incorporated for the purpose of carrying on to completion a project which had been undertaken by Commissioners, but which was then still unfinished. From the 2nd. G. I. the legislature had been engaged in a grand scheme for promoting the inland navigation of the country. Very large sums of money had from time to time been voted, but as the difficulty and expense of the undertaking seemed to increase with its progress, it was resolved in 1771 to have recourse to private enterprise, and then a joint stock company was formed. By section 16 of the 11 & 12 G. 3, all the property then vested in that inland corporation, and all moneys granted for the same purpose were

transferred to the Grand Canal Company, and full powers were given to it for completing the works; and as a remuneration for the expense to which they should be put, power was given to them by the 27th section to levy certain rates and duties, therein-mentioned, on goods and passengers carried on the canal. By section 33, the Company is entitled to take tolls on vehicles passing along its trackway, for which tolls it may distrain and sell; and section 35 enacts that the clear profits which shall arise to the Company from the several duties vested in them by the Act, or so much thereof as shall be thought proper, shall at fixed periods be paid to, and amongst the respective proprietors of the joint stock, in proportion to their shares and interests therein. Now, before, passing to a later period of legislation it may be well to notice the state of the law then as to turnpikes. In 1729 the first turnpike road Act was passed in Ireland. During the ten years then following, Acts were passed for turnpikes on twenty-nine different lines of road. Each Act begins with a recital that the road to which it relates, is out of repair and dangerous and cannot be kept in repair by the ordinary course appointed by the laws and statutes of the realm. It then constitutes a board of trustees to levy tolls from passengers, and gives the trustees powers of distress and sale. It then directs the tolls so levied to be applied first in defraying the expenses of procuring the Act, and then in defraying the expenses of repairing the road, and paying salaries, and the trustees are empowered to borrow money. By the 3 G. III., c. 11, special provisions are made as to the tolls on the trackways of the Inland Navigation Corporation. The 5th section enacts, that in order to preserve and keep in repair the several track-roads which then were or thereafter might be made along any canal or navigable river, by the direction of the said corporation, it should from and after the 1st May, 1764, be lawful for the said corporation, to erect or cause to be erected, one or more gate or gates, turnpike or turnpikes, in, upon, or across any track-road, or other road, which now is or hereafter by the direction and order of the said corporation, shall be made along or on the banks of any canal or navigable river, and also such toll-house or toll-houses as they shall judge necessary; and the corporation may from time to time appoint such toll and duties to be there demanded, received, and taken, as mentioned in the section, as they shall think fit and reasonable; and all the tolls or duties which shall be collected or received, the necessary charges of collecting the same being first deducted shall be applied to repair and keep up the said road, and if not wanted for that use, to such other use for the benefit of the works undertaken or to be undertaken by the corporation; and then it gives a power of distress and sale for levying the tolls. Now let us observe here, that the Inland Corporation was maintained not as a public body for its own advantages like the canal company. It was a great company constituted for a great public object; it was supported by taxes laid on the public, so as to create a fund to carry out the project, and therefore not a farthing was to be laid out for the benefit of the Inland Navigation Corporation, but all was to be laid out for the works themselves. Let me here mention also that this is the more important

because it appears from the pleading before us that the piece of road here was one of the very pieces of ground for which this enactment was made. This was the state of the law, previous to the passing of the Grand Canal Act, at the time these track ways were vested in the corporation for public purposes. There can be no reasonable doubt then, whether we consider the language of the statute, or the facts that the track-way was one of the highways of the kingdom, and that the erection of turnpikes was tolerated only by reason of the necessity of securing a fund for the repair of the road. I find nothing in the 11 & 12 G. III., which militates against this. Even without the aid of modern authorities, I would not hesitate to hold that as soon as the grand canal opened for traffic, and turnpikes were raised, it became at once in every part of it a public highway in dedication, over which all subjects of the king had free right of passages at all times, and it could not be said to be in the exclusive possession of the company. The acts also of the company are evidence of a dedication. Are we to hold that what till then was unquestionably a public road was by force of that Act reduced to a private road, and the public denuded of rights which they had enjoyed, and for which they had paid? It is said that the tolls here are to be for the benefit of the shareholders. But it is averred in the return that this trackway had never been repaired by grand jury presentment, and this being the ordinary course, therefore the trackway could not be a highway. This leads me to say a word as to the jurisdiction of grand juries over public roads. At common law the obligation vested in the parishes, and this continued in full force till the institution of the grand jury system, which I believe derives its origin in the 10th Car. 1. Now the object of that was not to annul, but to supersede it by providing a more effectual means of repair. But even the public roads were not exempt from grand jury supervision. Accordingly by 17 G. III., c. 50, the treasurer of the road might be summoned before the grand jury, and examined, and if money was found to be in the treasurer's hands, the grand jury was entitled to make an order to have it expended on the repair of the road. Then we have the 36th G. III., c. 55, (1r.) section 87 of which enacts that nothing in the Act contained "shall extend or be construed to extend to take away from any grand jury, the power or the obligation of repairing any turnpike-road within their counties, but that every such turnpike-road may be repaired or widened, or footpaths made thereto in like manner and under the like regulations as if that Act had not been made. It is true that that Act is not applicable to the county of Dublin, but it is a strong legislative declaration, that making a road a turnpike-road does exempt it from grand jury supervision; but this supervision is not to be exercised unless the road is in a bad state of repair. [His Lordship then referred to *The King v. Netherthong*; *the King v. Oxfordshire*; and *the Queen v. Brightside Bierlow*, and continued.] Such being the state of the law at the time of the passing of the Rathmines Improvement Act, by the incorporation of the Towns Improvement Act, the management of all streets was transferred to the Commissioners. The inhabitants of the district were exempted from grand jury cess,

and the Commissioners by section 49 were declared guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special act, and by section 50th it was enacted that the trustees of any turnpike-road should not collect any toll upon any road within the limits of the special Act, or lay out any money thereon. In consideration of the township being made chargeable with the cost of making and maintaining the roads, bridges and other works which the Commissioners were authorized to maintain and make within the district, it is enacted by section 28 of the Rathmines Improvement Act, that the district should not be chargeable with the cost of making or maintaining any other like works within the county or barony, save and except those, the cost of which under st. 7 & 8 Vic., c. 106, are chargeable upon the county at large. By the Rathgar Improvement Act of 1862, 25 Vic., c. xxv., (loc. & pers.) the Commissioners are still more sedulously invested with jurisdiction over the roads in their township. Section 23 of that Act enacts that "the grand jury of the county of Dublin, shall not have any jurisdiction, power or authority with respect to the making or maintaining of any road or bridge within the district, but all roads and bridges within the district, shall be made and maintained by the Commissioners at the cost of the district, and the grand jury shall not have any jurisdiction, power, or authority, with respect to any other works within the district, and by section 24, the Commissioners are to have the like jurisdiction, power and authority as to making and maintaining roads and bridges within the district as by statutes 6 & 7 Wm. 4, c. 116, and 7 & 8 Vict., c. 106 are vested in the grand jury. Such then being the state of the law, little more is required than a calm consideration of it to lead us to a conclusion as to the invalidity of this return. Many cases have been cited: from them all it appears to me that we must hold this to be a highway, and that not the less so because there is a turnpike on it. We need not consider whether section 50, as to the collection of tolls empowers the Commissioners to collect tolls; be that as it may, the duty of the Commissioners as it appears to me, is to repair the road.

O'BRIEN, J.—There are two principal questions in this case. It is not my intention to discuss the various matters which are stated in the pleadings. I agree with my brother Hayes's observations in respect to them, and I think, notwithstanding their complication, we are in a position to decide the questions arising in the case. One is, whether the commissioners must repair the road in question; the next is, whether the writ of *mandamus* is the proper remedy? Even if we were now to consider whether we should make the conditional order absolute, I should come to the conclusion that it was a proper case for a *mandamus*. Granting that there is another remedy, I believe the general principle will be found collected in Tapping on *Mandamus*, pages 24, 25, that though, as a general rule, a *mandamus* will not issue where there is another equally effectual remedy, yet it will issue where the remedy is not equally convenient. Now, what will be the result of the judgment on *mandamus* for the Crown? That the commissioners will be directed to do the act required. In the case of an indictment the

only result will be a fine. It is true, that the fine may be applied in the repairs. It is, therefore, to be considered that the application here is by the Crown, not by an individual, or by even a public officer; but here is an application by the Crown to compel the Commissioners to do a duty which is thrown on them by the Act of Parliament. I shall refer to a case on this very subject; I allude to *The Queen v. The Bristol Dock Company* (2 Q. B. 64.) In that case the writ issued, and a return was made to it, and upon the argument on the return, one objection taken was that the *mandamus* was not, and that an indictment was, the proper remedy in the case. Here is Lord Denman's judgment upon that particular point, "On argument, objection was taken to the writ, because it only enjoined the doing that for omitting which the company are liable to indictment. But we think, even if such an objection did not come too late after the writ has issued, that it is entitled to no weight. Those who obtain an Act of Parliament for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them." Here the commissioners assume to themselves the duty which these Acts impose. I think, therefore, that that authority, and those cited in Tapping at the page which I have mentioned, show that the objection cannot be sustained even if it were open, as to which I see great difficulty once the writ has been granted. However, the other question is one which it is perfectly open to the parties to raise here, namely, whether this is a highway, the obligation to repair which is thrown on the commissioners? Now, the first Act to which I shall refer is the General Towns Improvement Act of 1847, which is incorporated in the two special Acts. The third section of that Act contains these words: "The word 'street' shall extend to and include any road, square, court, alley, and thoroughfare within the limits of the special Act," and the 47th, 48th, and 49th, are the sections which bear more immediately on the question in the case. The 47th says that "the management of all the streets, which at the passing of the special Act are or which thereafter become public highways, and the pavements or other materials, as well in the footways as carriageways, of such streets, and all buildings, materials, implements, and other things provided for the purposes of the said highways, by the surveyors of highways, or by the Commissioners, shall belong to the Commissioners." And section 48 says that "The Commissioners and none others, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force; and the inhabitants of the district within the said limits shall not in respect of any lands situate within the said district, be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place in which the said district or any part thereof is situate."

This was an Act of Parliament intended to apply both to England and to Ireland. It is certainly a very inconvenient mode of legislation, because words and phrases are used in a general Act of this sort, which are wholly inapplicable to the state of things in Ireland. So that what we must do, unless there is something manifestly repugnant, is to apply it so far as the state of things in Ireland enables us to do. A good deal of stress was laid by Mr. McDonough on the phrase "surveyors of highways," and on the fact that no such office was known in Ireland. Be it so: the result is that the provisions as to surveyors of highways do not apply to Ireland; but the substantial part of the section, that relating to the management of streets, and the vesting of pavements and materials, &c., in the Commissioners, does apply: as also that part of section 48 which exempts the inhabitants of the district from payment of highway-rate and grand jury cess. Then comes section 49, enacting that "the Commissioners shall be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanour in the same manner as the inhabitants thereof, or of any parish, township, or other district therein, were liable before the passing of the special Act." That seems to me to put the remedy by indictment against the Commissioners on the same footing as the remedy by indictment against the inhabitants. Well, I believe, in the recollection of any one no such thing was known as an indictment against the inhabitants of a parish in this country, and I think if there was an indictment against the Commissioners to be supported by this section alone, it would be very difficult to maintain it. Well, we now come to the Rathmines Improvement Act, which incorporates the general Towns Improvement Act, and section 28 recites the transfer of the powers of the grand jury to the Commissioners. It is said that this cannot apply in the present case, because in point of fact the grand jury never presented for or interfered with this road, but on looking at the 28th and 33rd sections of the Rathmines Act, and the corresponding sections of the Rathgar Act, it is manifest that though their effect was to transfer to the Commissioners all the powers of the grand jury, there is nothing to limit their powers to what the grand jury had. The Commissioners had had by the general Act, the fullest powers to manage all streets within their district. The grand jury had certainly nothing to do with this particular road, but there is nothing in the 28th section of the Rathmines Act either expressly or by implication to shew that the Commissioners are only to deal with the roads which the grand jury had. Then the question is, is this a road the repairing of which is cast on the Commissioners? In my opinion it is. The state of the law, the several Acts of Parliament relating to the canal company have been fully stated by my brothers. I shall only refer to one, the 11 & 12 G. 3, c. 31 (Ir.). The 33rd section of it allows the company to erect turnpikes on their trackways, and to take tolls, and section 34 provides "that such toll shall be paid only at one gate and but once in any one day; and that no road which is now public shall be thereby obstructed." That provision as to public roads not being obstructed can-

not be relied on as drawing any distinction between the trackway and public roads; but the legislature gave the public a right to use that as a highway, provided they paid a toll. The power of the Company is limited to the amount of the toll, and to its being paid but once. Subject to those provisions, I think the Company had a right to the road, and I think it is a public road within the meaning of those subsequent Acts. What is the definition of a highway? A very short definition will be found in the note to *Dovaston v. Payne*, (2 Sm. L. O. 128). It is there said, "A highway is a passage which is open to all the king's subjects." The writer goes on to say: "Mr. Wellbeloved defines it to be a *thoroughfare*; but there are still doubts whether a highway must necessarily have been originally a *thoroughfare*; and it seems, at all events, that if a highway were stopped at one end, so as to cease to be a *thoroughfare*, it would in its altered state continue a highway—per *Patteson, J., Rex v. Marquis of Downshire*, (4 A. & E. 713). However, I have adopted the above definition as the safest; since, whether or no a passage to be open to all the king's subjects need be a *thoroughfare*, it is clear that every passage which is open *de jure* to all the king's subjects, must be a highway." That this is a highway to which the public have a right to resort, is clear. That case in 15th Q. B., 689. is decisive on that proposition. It will be observed in reading the judgment of Lord Campbell and of the other judges of the Court, that they held, that, the fact of the party who dedicated the road, having a toll on it does not prevent it from being a highway. Upon that state of things, what is the reason why these parties should not be bound to repair? Is it the fact that the Canal Company receiving the toll may be the party primarily liable. That may be; but the Commissioners are answerable to the Crown, and if the Canal Company have received tolls, and are bound to keep the road in repair, it is open to the Commissioners to proceed against them. Upon these grounds, I think that our judgment should be for the Crown.

LEFROY, C.J.—On the first question in this case, I am of so doubtful an opinion, namely—whether a mandamus would lie, that I would rather concur with my brother Fitzgerald, for the purpose of leaving it an open question to have more consideration than it has had from me. The inclination of my mind is to follow the doctrine laid down by Lord Mansfield in the case cited by my brother Fitzgerald. On that part of the case I give no definite opinion, but I concur for the present in the view taken by my brother Fitzgerald. With respect to the main question whether this was a public road, the duty of maintaining which was thrown on the Commissioners, because it was a public road, I must say, if I were to go into the case as I should desire to do, I could do little more than take the line and follow the course which has been so clearly, and, in my mind, so satisfactorily taken by my brother Fitzgerald, leading to the conclusion which he came to, and in which I fully concur, that this was not a highway, within the meaning of either the special Act, or the Towns Improvement Act. The ground upon which it has been argued that this was a public road, was by speaking of a

dedication,—a dedication created by the Act of Parliament or authorised by it, and acted upon, or created by the Company *pleno jure*, having got the property, the land, which they have by their Act dedicated to the public. Well, now, with respect to the act of dedicating it to the public, and making these trackways public roads, or making it imperative on the company to contract or control their absolute right over these trackways; see what the effect of giving that construction to the Act of Parliament would be. It would literally make it *felo de se*. Can any man who ever saw the way in which the Canal Company carry on business in respect to these trackways, suppose that they could for an hour carry on business if they were subject to be interrupted by the general use of the public going along the road, while their horses were drawing their boats by the same road? And while that is going on, the whole body of the public is to be at liberty to take up the trackway as it pleases! The object of the Act of Parliament was to give the Company the power of allowing the public to use the road, simply as a source of revenue, so far as they conveniently could; but they were not forced to relinquish to the public this right of ownership, which was essential to their enjoyment of their property. The object was to allow the Company to turn these trackways to account, for their benefit, so far as they conveniently could; and they were allowed to erect toll-gates and take tolls, and with a view to raise a revenue so far as they conveniently could, they are allowed to open these trackways to the public, as often, and so long, as they may find it convenient and compatible with the carrying on of their work. They were obliged to make a profit as far as they could, consistently with the Act of Parliament, but are we to consider that as a grant to the public of a right which would be totally inconsistent, if it were to be carried out, with the great principle of the Act, which is to benefit this great public concern, and to induce persons to engage in it by giving them the property in these trackways, and enabling them to make as much profit as possible, not to place them in a state of impossibility of carrying on their work, but to give them an additional advantage? As has been observed by my brother Fitzgerald there is a plain distinction on the face of the Act, between the public highways and these trackways. The very provision shewing this distinction is decisive, and therefore I confess without repetition; and I could not, without repetition, add anything to the line of argument which he has taken, without going further into the case than this, looking at the object and recitals of the Act, I would that say that it would be giving it a monstrous construction and making it *felo de se*, if the construction now contended for, were to prevail. I concur with my brother Fitzgerald in *omnibus*,—on the first question in order that it may remain open—but as to the other I have no doubt at all.

THE COURT being equally divided, Fitzgerald, J., as the junior judge withdrew his judgment and there was

Judgment for the Crown.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

LIPSETT v. BELL.—*Jan.* 16, 19, 30.

Evidence of special custom—Replevin.

The plaintiff, in an action of replevin, in order to prove the existence of a custom in the County Fermanagh, by which, in estimating the amount of rent due upon the number of acres comprised in his farm, a public high road which ran through it ought to be excluded, gave the following evidence:—C., a land-agent, and the son of the head-landlord of the premises in question, deposed that he knew of no instance in which a public road was charged for, but did not know what was the practice on the large properties in the county, and always directed the surveyor not to measure the road. L., a surveyor of six years' practice, stated that he knew all the large estates in the county; that he never knew of an instance in the county in which roads were charged for, but did not know whether, in the cases he referred to, there were express agreements. C., a surveyor, stated that he did not know whether the tenants paid for the roads or not; that he always measured the roads separately. Held, that there was no evidence of the alleged custom to go to the jury.

THIS was an action of replevin. The summons and plaint, besides the ordinary count in replevin, contained one for trover and another for trespass in taking and carrying away the plaintiff's goods. The defendant pleaded to the first paragraph, that during all the time, &c., the plaintiff was tenant of a certain dwelling-house and lands to the defendant, under a demise thereof, at the yearly rent of £60 13s., payable half-yearly, and because £30 6s. 6d. of the said rent at the time of the alleged taking was due and in arrear from the plaintiff to the defendant, the defendant well avowed the taking of the said goods, &c., as a distress for the said rent which still remained due and unpaid. The second defence traversed the conversion complained of in the second paragraph. The third defence was pleaded to the third paragraph, and was in substance the same as the first. To the first defence the plaintiff replied that he had the dwelling-house and lands in the said defence mentioned as tenant thereof to the defendant under a demise at the yearly rent of £2 for each and every acre, and so in proportion for every lesser quantity which the said lands might contain; and that the lands so demised included 29 acres 3 roods and 18 perches, and no more, and that the yearly rent payable under the said demise amounted to the sum of £59 14s. 6d., and no more: and that the amount of the rent in arrear at the time of the said taking and distress was the sum of £29 17s. 3d., and no more; and that he was always ready and willing, &c. The plaintiff also filed to the third defence a replication, which was in substance the same as that filed to the first. The case was tried before Chief Justice Monahan, during the sittings after Trinity Term, 1863. The plaintiff read in evidence a lease of the 22nd of Janu-

ary, 1858, for seven years, reserving an acreable rent of £2 an acre; and the only question at the trial was whether a public high road, which ran through the lands should be calculated in estimating the acreage of the demised premises. It appeared that the demised premises consisted of a dwelling-house and small demesne in the County Fermanagh, and it was contended on the part of the plaintiff that by the custom of that county the tenant was not liable to pay for the public roads running through his farm. The following evidence was given on the part of the plaintiff of the existence of this custom. Mr. Chartres, a land agent, stated that he knew of no instance in which a public road was charged for or measured on the occupying tenant, but said that he did not know what the practice was on Lord Enniskillen's and other large properties in the county, and that he always directed the surveyor not to measure the road. Patrick Leonard, a surveyor of six years' practice, stated that he knew all the large estates in the County Fermanagh, that he never knew of a single instance in the county in which roads were charged for; that the tenants never paid for roads, but he did not know whether in the cases he referred to there were any express agreements. Hugh Clifford, a surveyor, stated that he did not know whether the tenants paid for the roads or not; that he always measured the roads separately. Defendant's counsel objected to the admission of this evidence, on the ground that it tended to contradict an instrument under seal. At the close of the plaintiff's case, counsel on behalf of the defendant called upon the learned Chief Justice to direct a verdict for the defendant, on the grounds that the evidence of custom was inadmissible, and even if admissible, was insufficient to prove the existence of the custom relied on by the plaintiff. This his Lordship refused to do; and the defendant then went into his case, and gave evidence to disprove the existence of the custom. At the close of the case the learned Chief Justice, in his charge, told the jury that in the absence of custom the plaintiff was liable to pay for the road which was included in and passed by the lease, and left to the jury the question whether there was such a custom in the County Fermanagh as the plaintiff relied on. The jury found that such a custom did exist, and the learned Chief Justice directed a verdict for the plaintiff, reserving leave to the defendant to move to have the verdict entered for him if the Court above should be of opinion that the learned Chief Justice should have rejected the evidence of the alleged custom, or should have held that there was not sufficient evidence of the existence of the custom to be submitted to the jury. A conditional order was accordingly obtained, against which

Jan. 16.—*Barry, Q.C.*, (with him *Sidney, Q.C.*) showed cause.—An inference may be raised on Clifford's evidence. Leonard's evidence was very strong to go to the jury—"Lessors should protect themselves by express stipulation against the disputes which are caused by an inaccurate admeasurement of the land comprised in the lease."—*Furlong's Landlord and Tenant*, 389. The evidence of the custom was properly received.—*Wigglesworth v. Dallison* (1 Smith's L. C., 520); *Muncey v. Dennis* (1 H. & N., 216); *Brown v. Byrne* (3 El. & Bl., 703). The only question is, if there was evidence to go to the jury.

Dowse, Q.C., and *Purcell* in support of the rule—The evidence was inadmissible. It was sought to establish something inconsistent with the deed. No parol or extrinsic evidence is admissible to vary a written document. In the notes to *Wigglesworth v. Dallison*, cited on the other side, it is laid down that "such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument."—*Taylor on Evidence*, s. 1064; *Spartali v. Bernecke* (10 C. B., 212); *Malcolmson v. Morton* (11 Ir. Law Rep., 230); *Trueman v. Loder* (11 A. & E., 597); There are Conyngham acres, plantation acres, and statute acres in the country, and the Courts have decided that evidence of any but statute acres will not be received. It is not admissible to go into evidence of what "per acre" means. There is also a qualification attached to the rule at the end of the notes to *Wigglesworth v. Dallison*—"it is only on the ground that the parties who made the contract are both cognizant of the usage." [*Monahan, C. J.*—It is supposed that both parties are cognizant: if there was a contract made in Liverpool, where there is a usage, a merchant who came there the day before, and did not know of that custom, would be bound by it. If the usage was general in the county, nobody would believe that the party did not know it, and I was not asked to leave a question on that to the jury. The fact of a man swearing that he did not know of the usage would not be conclusive if it were proved to generally exist.] As to what constitutes a custom, custom is defined to be a usage which has obtained the force of law. Among the various requisites one is certainty.—*Tyson v. Smith* (9 A. & E. 421); *Rogers v. Blenton* (10 Q. B., 26); *Blewett v. Tregonning* (3 A. & E., 554); *Padwick v. Knight* (7 Ex., 854). [*Monahan, C. J.*—What uncertainty is there in this custom?] It does not extend over the district; it must have continued from time immemorial. [*Balk, J.*—That amounts to this, that if the origin of it can be shown, it is not a custom.] It must be compulsory on every person in the district, and not optional. It must be strictly proved; the plaintiff must go the length of establishing that the road did not pass. *Herbert v. Kennan* (7 Ir. Jur., 43) was a well-considered decision. Land bordering on the highway is presumed to belong to the adjoining owner, and if he owns lands on both sides, the presumption is that he owns the whole road.—*Starkie*, 408; *Lord v. Commissioners of Sydney* (12 Moore's P. C. Cases, 473). The same holds as to a river. There is no evidence of a custom at all in this instance: there is evidence of individual instances. There is no witness who swears that there is a custom within the county. Chartres, the land-agent, says he knows of no instance in which a road is charged for. That is no evidence. We might say we knew of no instance. He always directed the surveyor not to measure the road; that is his practice. So far from proving the custom, it proves the contrary, because if the custom existed it would not be necessary to do this. Why was he not asked of the existence of a custom? [*Keogh, J.*—Suppose there are a hundred estates in Fermanagh, and that he went through the whole, and found it was so in every instance?] But going through four-eighths would not do. [*Keogh, J.*—Would it not be

some evidence? *Monahan, C. J.*—How can he prove the existence of the custom but by giving instances? He does not tell you the custom existed before him. There is nothing in Clifford's evidence. The defendant was examined. [*Monahan, C. J.*—A new trial is never granted because the verdict was against the weight of evidence where the subject-matter is of small amount. There is a rule to that effect.]

Sidney, Q. C., in reply.—As to whether the evidence was admissible, there is a distinction between usage and custom. The evidence here did not go to vary the written contract.—*Wigglesworth v. Dallison* (1 Smith's L. C., 529, 533); *Hutton v. Warren* (1 M. & W., 466); *Smith v. Wilson* (3 B. & Ad., 732). A thousand, as applied to rabbits, meant twelve hundred. That case is recognized in *Grant v. Maddox* (15 M. & W., 737), which appear to be the strongest case on the subject. Platt, B., says the evidence amounts to no more than translating the contract.—*Myers v. Sarl* (30 L. J., Q. B., N. S., 9). There is no class of cases where there are so many annexed incidents as contracts between landlord and tenant. If a merchant sells so many yards of cloth, there is a selva or edging which is not charged for. So a hundred eggs means a hundred and twenty-six; a hundred apples means a hundred and twenty; a dozen loaves means thirteen.—*Dalby v. Hirst* (1 B. & B., 224). A usage by a landlord to pay the tenant compensation is a reasonable usage, and it was held that such being a mere usage of the neighbourhood, need not be a custom, and need not be immemorial.—*Legh v. Hewitt* (4 East, 154) was referred to and recognized. [*Ball, J.*—The reporter of the marginal note seems to have taken a great liberty with the judgment.] This case adopts that case in 4 East, and the evidence shows that there was not immemorial evidence. [*Ball, J.*—Do you find that as a *dictum* or decision in any other case?] No. *Senior v. Armytage* (1 Holt's N. P., 197). Was there any evidence to go to the jury? Mr. Chartres is agent to his father; therefore we have the agent of the head-landlord of this very farm, who always directs the surveyor not to measure the road. That is some evidence. [*Ball, J.*—That is only evidence of his own practice. Five or six landlords in the County Fermanagh are but as a drop of water in the ocean.] He knows of no instance in which the public road is charged for. It is not necessary to take a whole county. I do not know where the line will be drawn. It must be a question for the jury. [*Monahan, C. J.*—This man does not appear to have any other property, and it does not appear whether he held this as fee-simple, or as tenant to somebody else, and so there is no way of showing whether this applied to anything but his own property.] The evidence would amount to this: I am agent for several townlands, also for the very lands the subject-matter of this contract. I know of no instance, &c. He then states that he always directs the surveyor not to measure the road, Leonard's evidence is, that he knows all the large estates in the county: the tenant never pays for the roads. *Cur. adv. vult.*

Jan. 30.—MONAHAN, C. J.—This case comes on a

question reserved by me at the trial. The action was one of replevin for improperly distraining cattle. The case of Bell was that half a year's rent was due £30 6s. 6d. The plaintiff said that the half-year's rent was only £29 17s. 3d.; that he tendered it before the distress was made. The only question was, whether a public high road that ran through the lands was to be measured upon the tenant in calculating the rent. The lease was in the common form, yielding and paying therefor and thereout, &c., and it was conceded that if the road was not to be measured, the lesser rent was all that should be paid. The lease was a lease for seven years. I was of opinion at the trial that by the construction of the lease this road passed under the demise, and became the property of the tenant; that the rent was reserved out of all, and therefore that the landlord was right *prima facie*, and entitled to the larger rent. Lipeett went into evidence to show that according to the custom it was not the custom for the road to be charged for, and therefore though the road passed, the calculation should be merely for the profitable land. I thought it better to receive the evidence that it was a case where evidence might be given to control the contract, and next I held that there was evidence which might be submitted to the jury. The question is, was I right in receiving the evidence? and secondly, if I was right, was there such evidence as justified me in submitting the question? They gave in evidence the lease. The plaintiff was examined. He did not prove anything himself; he alleged conversations, and said he always paid the rent under protest. The man did not know anything of any custom himself, but made the claim. The agent of the defendant said no such thing had occurred at all. The first witness, Mr. James Dix, did not give any evidence. The next witness, Mr. Chartres, a land-agent over property in the County Fermanagh, son of the head landlord, knows of no farm where such is charged for; receives £100 a-year; always directs the surveyor not to measure the road; does not know what is the custom on Lord Enniskillen's property. He merely says, "I direct the bailiff not to charge." Therefore, though this man proves that the thing is not received, that is indifferent. No matter what the general law is, landlord and tenant may contract as they please. This is not showing that where a contract exists, there is a custom. Leonard knows all the large estates in the county; does not know the road ever to be charged for; does not know whether by agreement or not: therefore that is no evidence. Then the defendant went into evidence, and the substance of his case is, that so far as he knows in small farms the road is not charged for, but in the large it is; but he cannot state whether that is by contract or not. Then a grand juror says that nothing which can be called a custom exists, but that in all old leases the road is not charged for. But no case or instance was given where road is not paid for where *prima facie* by the contract it would be liable. Therefore there was no evidence to go to the jury, and it is unnecessary to form an opinion on the very important question, viz., whether if a custom could be shown, whether such a custom would or would not control this contract. The case shown by the tenant must therefore be disallowed.

Rule absolute.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

LEO v. KEARNS.—May 7.

Amendment of pleadings at the trial—Common Law Procedure Act, 1853, s. 231.

To an action for the conversion of the goods of the plaintiff, the defendant pleaded a traverse of the conversion of all the goods except five, and as to those five, defendant averred that they were not the goods of the plaintiff.—To interrogatories exhibited, the defendant's answer was likewise a traverse of the conversion of all the goods except said five and no more, and that these were not the property of the plaintiff. On the trial the defendant admitted having the possession of another three articles, and as to these, defendant also denied that they were the property of the plaintiff; thereupon, after the defendant's case had closed, defendant asked leave to amend the plea by adding a traverse of the plaintiff's property in said three articles; this the learned judge refused, and the jury consequently found as to those three for the plaintiff. Held, that the amendment ought to have been allowed.

THIS case came before the Court on cause shown by the plaintiff against a conditional order obtained by the defendant "that the verdict had for the plaintiff at the Nisi Prius sittings after last term be turned into a verdict for the defendant, and if necessary that the plea denying the property of the plaintiffs be amended so as to include therein the sofa, the chair, and the timepiece mentioned in the said verdict, and that thereupon that the verdict be entered for the defendant pursuant to the leave reserved by the learned judge at the trial, unless," &c. The action was brought against a Mrs. Kearns, who was a servant in the employment of the late Robert Whyte, by his personal representative, to recover certain articles, sixty-eight in number, which were alleged in the plaint to be the property of the plaintiffs, and converted by the defendant to her own use. The defence denied the conversion of all the goods, except merely a press, two tables, and two water-barrels; the evidence, however, on the trial, went further than the defence did, and showed that there were other three articles, namely, a sofa, chair, and clock, that were the property of the defendant; but the property in those articles not being denied in the defence, though denied in the evidence, to be the property of the plaintiff, the counsel for defendant applied to the learned judge who tried the case (Baron Fitzgerald) after both sides had closed, to amend the pleadings by inserting a traverse in the defence of the property in those three articles being the property of the plaintiff, so as to let the evidence so given go to the jury; this his lordship declined to do, and the jury were constrained to find that the sofa, chair, and clock were the property of the plaintiff, the plaint claiming same to be plaintiff's property, and the defence not denying it, in addition to which the defendant did not claim said articles to be her property in answers to certain interrogatories exhibited to her before the case came on to be tried, the first of which was, "Are you

now, or have you been at any time, possessed of the following articles, which were the property of the late Robert Whyte, or any of them, that is to say, one sofa, one easy chair, one clock, a double press, a loo table, a spider table, two water barrels?" and also several other articles, amounting in all to sixty-eight in number. Her answer thereto was as follows: "I say that I am now possessed of the articles mentioned in the said interrogatory, that is to say, those severally described as a double press, loo table, and two water barrels, and, save as aforesaid, I am not now, nor was I at any time, possessed of any of the articles specified in the said interrogatories." The following is a transcript of Baron Fitzgerald's note of the case:—

"The summons and plaint complained of the conversion by the defendant of certain goods, including, amongst several others, a sofa, an easy chair, a clock, and also a double press or wardrobe, a loo table, a spider table, and two water barrels, the property of the plaintiffs as administrators of White. The defence denied the conversion as to all the goods except the press, the loo table, the spider table, and water barrels, and as to them averred that they were not the property of the plaintiff. The first witness examined on the trial for the plaintiff was

"James Charles North. His evidence was—"I am an ironmonger in Capol-street. I knew the late Robert White; he was a customer of mine. He bought goods in my establishment in the latter end of November or beginning of December, 1861. He said he had lodgings at Sandymount, and wanted cheap articles for immediate use; he bought about to the value of £10."

"Second witness—John Leo—"I am son of the plaintiffs, Mr. and Mrs. Leo. I know the house No. 2 Seafort-avenue. I remember going there after the death of the late Robert White; was there before he was buried, 18th March, 1862. Margaret Kearns, the defendant was in the house, and I also saw a person named Walsh, to whom it belonged. White had had lodgings in it. I told Mrs. Kearns that I was the nephew of the deceased; that my mother was his sister. I remained about half an hour; I called again that day; I told Mrs. Kearns that my mother was the only near relative of the deceased, and that the property was hers. She said she had often heard the deceased speak of having nephews in the country. I saw in the rooms on these occasions a large sofa and clothes press, two water casks, which were in the yard." This witness described some other articles as seen there, but these were the only ones about which any question arose. "I afterwards got up some of the property of Robert White from the rooms; I never got any of those which I have mentioned; I did not see then a mahogany loo table or a spider table: I applied afterwards for the articles I have mentioned to the defendant, Mrs. Kearns, early in May, 1863. I applied more than once; she was then in the Seafort-avenue House. There had been no delay in getting out administration when I demanded the articles; she first denied any knowledge of any; then she by degrees admitted she had them, and then said she would not give them up unless compelled by law. I told her the double clothes press cost £7. She at first denied she had it, when I mentioned the name of Mr. Beakey, the cabinet-

maker, she admitted it. In November, 1863, she said she had the articles in the house of one Ellis in Seaforth-avenue. The articles were demanded at least four times in my presence. I don't remember that Walsh was present when any of the demands were made. At first Kearns gave no reason for keeping the articles; afterwards she said indirectly that they had been given her or bought for her by the deceased. They had been demanded three times before that.'

"On cross-examination—'White was dead when I first went to the house. I believe he died that very day. The press that I saw was not the double clothes press which cost £7; it was a single-parted press. The property which was taken away by my father and mother was got in September, 1862, by them; it was packed up in straw and mats by workmen; I was present. I specified the articles that I wanted to Mrs. Kearns. I am sure of the double clothes press and table. At first she refused to listen to me at all; she slapped the door in my face, and told me to apply through some attorney. She said she never saw the things. I handed her a list of things; she refused to read it, or to hear it read. This was in November. The first time I asked, I had no list. The first time I spoke to her of several things; she said she knew nothing of them. She said she never saw the press. In Mr. Roche's office she said she had them.' I think she confined her admission to the five articles mentioned in her defence, and said she knew nothing of the others (looks at two others). 'One of them was written by me; the other was written by my sister for my mother.' Administration was taken out on 7th July, 1862.'

"Third witness—Joseph Lemass—'I am a cooper, No. 9 Pill-lane. I knew the late Robert White. I remember his buying from me two water casks and a couple of tubs. I was paid for the casks. The document now produced here is my bill. £1 was paid for them.'

"Cross-examined—'This was on the 21st March, 1860.'

"Fourth witness—Brian M'Dermott—I am a foreman to Mr. Beakey, of Stafford-street. I remember the late Mr. Robert White buying articles at his establishment, a large double clothes press—I called it a parted wardrobe; that was bought in December, 1860. It cost £7, fair value. I remember repairing furniture for White, an easy chair; the repair cost 11s. 6d. In September, 1861, he bought a mahogany loo table; the price was £2 5s. In August, 1860, he bought a maple spider table; the price £1 4s. We also repaired for him a large sofa; that cost £1 11s. 6d. As well as I remember, the sofa may have been worth about £3. The *easy chair* which we repaired may have been worth £1.' The witness deposed to the purchase of other articles; but the question as to them did not turn out to be material. 'I remember his book-cases; I took them to be his own; two of them were fixed in the walls, the others not so; we repaired them for him; I went out to his place shortly before his death. I went over an account with him; when there I saw all the articles which we had supplied and repaired, and went over them with him. He was a very particular man.'

"Cross-examined—'White told me on two occa-

sions that he was very fond of Kearns; he got the wardrobe for her room; he said on two occasions that he wanted to make her comfortable. The second occasion might, but I am not sure have reference to one of the tables. He bought articles for the hall, for the kitchen, and to put in her room.'

"Fifth witness—G. Fagan—'I knew the late Robert White; he was a tenant of mine at the Cunningham-road, near the Park, was there for five or six years; left in the beginning of the year 1860. He had the whole house, and furnished it himself. I remember he had a large *sofa* covered with haircloth and a large *easy chair*.'

"Sixth witness—John Kelly—'I went with Mrs. Leo to demand furniture from the defendant, Mrs. Kearns; it was shortly before this action was brought. I began to read to her a written list, and she refused to let me read it; I read two or three items; she said she had only a few articles, and would not give them up till the law compelled her; she said they had been given to her by Mr. White.'

"This closed the plaintiff's case. The defendant, Margaret Kearns, was examined and sworn—'I am the defendant; I was for 22 years in the service of the late Robert White; at first he lived in Peter-place. I was then with him about two years; he was sold out; it was a sheriff's sale; he was in bad circumstances for a long time after. (This evidence was objected to on the part of the plaintiff's counsel.) He was always friendly to me; he always said he would do something for me when he was independent, and had settled with his creditors. I know the double press, or wardrobe, in question; I have it in my possession; I had it for a year and a half before White died. He told me that he bought it for me; I thanked him for it, and he said it was only a token of what he intended for me. I have always used it since as my own property; I had and have the key of it. I have a loo table; I got it about a month after I got the press. He sent me to Beakey's to choose a table; I did choose one. He would not let me keep it; he said I should have a better one. He bought the one in question, and it was sent over to me from Beakey's. I have got a maple spider table; Mr. White gave it to me about a month after I got the loo table; he told me to take it down to my own room. Up to that time it had been in his room. I have had the two tables in my possession ever since. I have two water casks. I got them very shortly after. We went to Sandymount in 1860; they remained at Walsh's till the beginning of November, 1862; I have them with me where I now am; I got them from Mr. White; I asked him to buy a water barrel, and he bought two, and told me to take care of them, and that they would do me as long as I lived; I have a *sofa* that had once belonged to White; I bought it at his auction in Peter-place with my own money; I bought the *easy chair* with my own money in Liffey-street; I also bought at his auction a *clock* with a maple stand; I have not any of the other articles mentioned in the plaint; I have had none of them since White's death.'

"Cross-examined—'He gave me the barrels about a year and nine months before his death; they were for the general use of the house; while he lived, water was drawn from them for him, and for the use of the

house; he paid me six guineas per annum wages; I was his only servant; the water barrels were in the yard; they were for catching rain; Mr. Walsh, the landlord, and his family lived in the house; I made use of the barrels as White's servant; they were used for the whole house; I bought the *sofa* mentioned in the plaint with my own money at the sale in Peter's-place; I paid for it £1; it is the same sofa which Beakey repaired; the *easy chair* of which I have spoken is the same as that for which the deceased paid for repairing; the *sofa* was pawned after the auction; I pawned it, and gave the money to White; the *sofa* and *easy chair* were in his room; he was 72 years of age when he died: sometimes the *chair* was in my bedroom; he occupied two rooms in the house, I occupied another; he paid rent for the three; my room was not comfortably furnished; there was no furniture in it but my own; he had but one bed; I took away my own bed; there were two tables in my room before his death, and two chairs; I took away the chairs; it was my clothes only that were kept in the wardrobe; sometimes I have laid his clothes for the washing in it; there were drawers in it; it was in the press part that I put the washing clothes; a smaller press would have done me; except as to the washing clothes it was not used for my master; he had muslin curtains; they were not put into the press; he had no house linen; I remained in the house for some time after his death; his things remained there till September, 1862; all are away now; the *sofa* is at the Walsh's; the *easy chair* is there now; they are moved; the loo table was never in White's room; the spider table was at one time in his bedroom over near the window; there is nothing of mine at Walsh's but the *sofa* and *easy chair*.'

"Mr. Heron, Q.C., for the plaintiff, insisted that as to the five articles mentioned in the defence, I ought to direct a verdict for the plaintiff, there being no evidence of any valid gift, and in particular no delivery. He also insisted that he was entitled to a verdict as to the three articles, the *sofa*, *easy chair*, and marble pier clock, the property being admitted in the pleadings, and the defendant by her evidence admitting them to be in her possession, and claiming them as her own.

"Mr. Serjeant Armstrong, for the defendant, asked for leave to amend his pleadings by inserting a traverse of the articles being the property of the plaintiff. As to the amendment, Mr. Heron referred me to the answer of the defendant to interrogatories which had been submitted to her in the cause. I declined to allow the amendment, Mr. Heron, for the plaintiff, consenting that any verdict for the plaintiff should, so far as the value of those articles were concerned, be changed into a verdict for the defendant if the Court should be of opinion that I ought to have allowed the amendment, and I reserved liberty for Mr. Serjeant Armstrong to move accordingly. I declined to direct the jury that there was no evidence of a gift as to the five articles mentioned in the defence; but I told the jury that though a formal delivery at the time of the alleged gift by words was not necessary, they must be satisfied, before they would find for the defendant, that there was a parting with possession, or leasing to possess by the alleged giver, and a posses-

sion assumed by the party to whom the gift was alleged to be made. I directed the jury, in any event, to find the value of each of the articles in question. The jury found for the plaintiff as to the three articles admitted by the defendant to be in her possession, and not covered by the defence. Damages £1 3s., stating the value of the articles thus—*sofa*, 15s.; *easy chair*, 5s.; *clock*, 3s.; total, £1 3s. They found for the defendant as to the articles mentioned in the defence, and stated the value to be due—wardrobe, £3 10s.; loo table, £1 10s.; spider table, 12s. 6d.; cask, 10s.; total, £6 2s. 6d. I reserved liberty to the plaintiff to have a verdict entered for him for the amount of the five articles, or of such of them in respect of which the Court should think that I ought to have directed a verdict for him."

Heron, Q.C., (with Daniel) now shewed cause against making the above conditional order absolute. Had the judge amended the pleadings at the trial, it would have been a surprise on the plaintiff; and it is said in *Adams v. Atkinson* (9 I. C. L., Ap. xviii.) that a judge at the trial will not amend the pleadings under the 231st section of the Common Law Procedure Act of 1853, if the result of doing so would be a surprise on either party. The defendant has admitted that the *sofa*, the *chair*, and the *clock* are the property of the plaintiff; for while she has distinctly denied that the other five articles were hers, she did not do so with respect to these three articles, and therefore the articles being in her possession, and the property being admitted to be in the plaintiff, a verdict for a few shillings was found for the plaintiff, and it is now sought at heavy expense to set that aside. [Fitzgerald, B.—Yes; but that few shillings carries half costs, which would be ruinous to a person in the defendant's humble position in life.] Her counsel framed the defence she put in, and it would be intolerable if, when the case had closed, he could endeavour to shape his pleadings at the close of his case to ensnare his adversary. This amendment would be absurd; had it been a slip of the pleader's or a mistake in the instructions to her professional advisers, the case would have been widely different, but in her sworn answers to the interrogatories she says she was only entitled to the very articles she claimed in her defence, and yet an attempt is now made to admit evidence not alone at variance with the pleadings but with her own sworn answers. In *Bradworth v. Fosham* (10 W. R., 760), it was held that an amendment of a declaration will not be allowed at the trial, where in a case of *tort* the plaintiff has stated one cause of action, and then, his evidence failing to sustain it, has endeavoured to raise another one, and "it would be better," says Pollock, C.B., in delivering judgment in that case, "that there should be no pleading at all, than that a plaintiff should be allowed to state one cause of action, and then, on any difficulty arising as to his maintaining it, on the evidence to amend, so as to raise another and different cause of action. It would be better to allow no pleadings at all than to allow pleadings which could only operate as a snare." In *Wilkin v. Read* (15 Man. & Granger, 192) the declaration in an action was "for giving a false character of one P., a clerk, and it alleged that the defendant fraudulently represented to the plaintiff that the reason

why he had dismissed P. from his employment was decrease in his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from the plaintiff the fact that P. had been dismissed from his employ on account of dishonesty. It appeared at the trial that P. had been guilty of dishonesty while in the defendant's employ, but that the defendant had not mentioned that fact to the plaintiff when he recommended him to try P. It further appeared, however, that P. had not been dismissed from the defendant's employ on account of dishonesty, but really for the reason the defendant had assigned to the plaintiff; and it was there held that the evidence did not support the declaration. The judge at the trial refused to allow the declaration to be amended by inserting an allegation 'that P., whilst in the defendant's employ, was guilty of dishonesty,' instead of the allegation 'that P. had been dismissed from the employment of the defendant on account of dishonesty,' and it was held, that the amendment was properly refused, the matter in controversy between the parties being not whether the defendant had fraudulently suppressed the fact that R. had been guilty of dishonesty, but whether he had given the true reason for having dismissed him; and further, it was decided in that case that it is for the judge at the trial, looking at the record and at the evidence, to say what is the real question in controversy. The application in this last-mentioned case was under the 222nd section of the English Common Law Procedure Act of 1852, to which the 231st section of the Irish Procedure Act of 1853 is analogous. Vide also *Adams v. Smith* (1 Foster & Finlason, 311). It is an absurdity to contend that an amendment can be made at the trial when the effect of such amendment would be to raise a totally new question.—*Islam v. Dunn* (2 Foster & Fin., 163); *Raynor v. Child* (2 Fost. & F., 775); *Cowan v. Lascelles* (3 Fost. & F., 631).

Serjeant Armstrong (with *P. White*). The learned judge ought to have allowed an amendment at the trial. The Common Law Procedure Act allows of any amendment necessary for the purpose of determining, not the question, but the real question in controversy between the parties. The object of the Act was to correct mistakes. *Roles v. Davis* (4 Hurl. & N., 484) was where a declaration alleged that the defendant, by falsely representing that he was paying £70 a month for stock consumed, and was receiving £100 in receipts from his business as publican, induced the plaintiff to purchase the business. At the trial it appeared that the payments and receipts were as alleged, but the business was chiefly out-door business, and that the representation was that it was done over the counter. On the trial the judge amended the declaration by inserting the words, "And that the business was a bar business, carried on at home, or chiefly over the counter, and not a business done elsewhere, or out of the house," and it was held that the judge had power to make the amendment under the 222nd section of the English Common Law Procedure Act of 1852.—*Buckland v. Johnson* (15 C. B. 145); *Davis v. Reeves* (5 I. C. L. 533); *Little v. Midland Great Western Railway Company* (6 Ir. Jur. 291); *Douglas v. Ewing* (1 Ir. Jur. N.S. 310.)

HUGHES, B., said—I think the amendment should have been carried to its full length, and that an injustice would have been here worked unless the amendment were allowed.

FITZGERALD, B., thought that he would not have any doubt on the question of amendment if the parties were not taken by surprise, but here he thought the amendment would have taken the plaintiff by surprise, his opinion was not altered from what it was at the trial.

PIGOT, C.B.—This is a very peculiar case, and one I have had considerable doubts about; however, I find, concurring as I do with Baron Hughes, that an injustice would have been worked unless the amendment was allowed.

Amendment allowed.

Court of Appeal in Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

IN RE ALEXANDER HALL.—Jan. 19, 20, 21.

Partnership—Tentative or experimental—Carrying on trade as manager with option of becoming partner.

H., who was the sole proprietor of a wholesale woollen and cloth establishment in Dublin, agreed with M. to become the manager and partner in a separate and larger concern in the same trade in Huddersfield, which had been conducted by and belonged to M.; and it was arranged at the same time that M. should come to Dublin to superintend the separate business which was there carried on by H, though upon no definite and conclusive agreement, but with the object of testing the capacity and value of the concern, and ascertaining whether it was sufficiently profitable to be continued. It was further agreed that at the expiration of a year, M. should have an option of becoming a partner in the Dublin house, and should be entitled to a share of the profits, if any, of that year, but should receive no remuneration nor any portion of the profits, if he elected not to join in the Dublin business. M. never exercised his option of becoming a partner, but having left Ireland and apparently abandoned the concern, died before the expiration of the year of trial.

Held, that M. had not by his superintendence become a partner in the Dublin business, and that, consequently, a claim made by the executors of M. to be admitted as creditors of the estate of H. for goods sold and cash supplied by the Huddersfield house to the Dublin concern should be allowed.

THIS was an appeal from an order of Judge Lynch bearing date the 27th of November, 1863. The facts of the case and the proceedings in the Court of Bankruptcy are reported in 8 Ir. Jur., N.S., 356.

Brewster, Q.C., (with him *Heron, Q.C.*, and *P. Martin*) for Anne Mallinson, William Mallinson, and James Shaw, the appellants, the executrix and executors of Thomas Mallinson.—This order of the Court of Bankruptcy cannot for many reasons be allowed to

stand. In the first place it would be a startling doctrine, that a person who goes into a mercantile house to look at the business and see if it would be advantageous to enter it as a partner, although allowed expressly a definite time within which to declare his intention of becoming a partner, should be deemed a partner *ab initio* when he has actually abandoned the concern, and never exercised his option. In the next place the evidence used against the appellants at the hearing and upon which the judgment of the Court below is based, was taken behind the back of the appellants: liberty to attend and cross-examine the witnesses was refused and leading and other illegal questions were freely asked.

[After some discussion, the LORD CHANCELLOR having stated that this evidence was clearly inadmissible and that the case must be either argued on the remaining evidence or sent back to the Court below for further investigation, *Mr. Brewster*, on behalf of the appellants, consented to waive all objections on the ground of the inadmissibility of this evidence and to discuss the other question of law involved in the case].

It is plain from all the evidence in the case, and more especially from that of *Mr. Hall*, that *Mr. Mallinson* was never a partner with the bankrupt in the business carried on at No. 9 William-street. He offered indeed to become a partner at once on his coming over to Dublin, but *Mr. Hall* replied to him, "Not on any terms till you see the working of it.—Remain there for twelve months, see for yourself, and if you see it is worth your while to enter into a partnership, very well; but if not, let us give it up." This is *Mr. Hall's* express testimony and nothing is brought forward to contradict it or impeach his veracity. *Mr. Mallinson* had a year to consider whether it would be beneficial for him to join as a partner in the concern, and before that time had expired, he gave it up *in toto* and left Ireland. No account was ever settled between him and *Mr. Hall* as to the Dublin business. His actions when in Dublin and his language in his letters to *Mr. Hall* are but such as might be expected from a friend and near connection of *Mr. Hall*, who had some thoughts of a contingent partnership in the William-street business, and who, in the meantime, aided in its management and direction. And if such were the facts, the case is ruled by strong and well-considered authorities.—*Gabriel v. Evill*, (9 M. & W., 297) is *multum a fortiori*, and the law on this point is also clearly laid down in *Edmundson v. Thompson*, (2 F. & F. 564); *Dickenson v. Valpy*, (10 B. & C. 128), especially in the judgment at p. 141; *Cox v. Hickman*, (9 C.B., N.S., 47), which afterwards went to the House of Lords, (8 H. of L. Cas. 268), where this principle was decided unanimously by the Law Lords; *Re English and Irish Church Assurance Company*, (1 Hem. & Mill. 85); and *Kilshaw v. Jukes*, (32 L. J., Q.B. 217).

Kernan, Q.C. (with whom were *Serjeant Armstrong* and *Woodlock*) for the assignees.—*Mr. Mallinson* must be considered to have been a partner in the Dublin house; and several of the letters that passed between him and *Mr. Hall* show that such a partnership was agreed on, although they are not very clear or definite as to its terms. When *Mr. Mallinson* came to live in Ireland, his acts in the establishment at

William-street are only intelligible upon the supposition that he was a partner in it. He took upon himself the entire superintendence and control: he attended regularly to the business, going to the office daily and remaining there usually during the day. He examined the books and accounts and gave directions for reducing the accounts and credits given to some of the customers. He gave and refused credit to customers, and in certain instances closed the accounts. He bought and ordered goods for the Dublin house, drew money from it for his own use, employed clerks and messengers and dismissed them, and, according to the evidence, on occasions of being spoken to on matters of business by *Mr. Craig*, the book-keeper, and by others, he admitted that he had a direct interest in the concern. [*The Lord Justice of Appeal*.—Do you mean to contradict the evidence of *Mr. Hall*?] I do not mean to impugn anything that was said by *Mr. Hall*; but I maintain that he was mistaken on a matter of law, namely, as to what would render *Mr. Mallinson* in the eye of the law a partner in the William-street business.—*Waugh v. Carver*, (2 H. Bl. 235); 1 Smith Lead. Ca. 818.)

Woodlock, for the same parties, referred to *Cox v. Hickman* (ubi supra); *The English and Irish Church Assurance Company*, (ubi supra).

Heron, Q.C., in reply cited *Rawlinson v. Clarke*, (15 M. & W. 292); *Ex parte Davis*, (9 Jur., N.S., 859; 8 L. T. 745).

THE LORD CHANCELLOR.—Perhaps it might have been better if this case had been remitted to the Court below for the purpose of having a full, satisfactory, and legal examination of all the parties who have been already examined in this matter, and whose evidence and depositions have been relied on by the respondents in this appeal. However, judging from all I can see of this case, it appears to me that no result could ultimately have been arrived at substantially different from that to which this Court has now come, and which as far as the facts are concerned, differs but little from the view taken by the Court below. Whether the law has been correctly applied to this state of facts by the learned judge of the Court of Bankruptcy, is a different question. However, it plainly appears, that some time in the beginning of the year, 1861, *Mr. Thomas Mallinson*, who was an eminent woollen and cloth merchant in Huddersfield, being unwilling or unable from failing health or other reasons to carry on his large business without assistance, entered into negotiations with his brother-in-law, *Mr. Alexander Hall*, with a view to forming a partnership. A correspondence was then commenced, and subsequently carried on between the parties with the object of bringing about some definite and satisfactory arrangement. There are some passages occurring in the letters which passed between the parties at this time, which if not explained and contracted in their meaning by other evidence, might go far to prove that a partnership in fact was then concluded between *Mr. Mallinson*, and *Mr. Hall*. As to the Huddersfield establishment, there is no doubt that these letters sufficiently establish a contract of partnership between *Mr. Mallinson* and *Mr. Hall*. The terms, however, upon which the business at No. 9 William-street was to be carried on, are not so easily ascertained. *Mr. Mallinson*

then came over to Dublin, and, it is true, many of his acts while here have the appearance of being those of a person having a direct interest in the William-street concern, and in some degree taking on himself its management and control. However, his conduct can be accounted for quite as satisfactorily on the supposition of a contemplated future partnership, as on that of one existing actually *in presenti*. Still, however, the question comes round to this, what position did Mr. Mallinson really hold with respect to the Dublin business? Was he a partner or was he not? Where are we to look for the true explanation of the matters? These are matters of evidence. If all the parties were dead, we might be compelled to look only to the letters, and the presumptions to be drawn from the acts of the parties; but the question must be determined by the best evidence attainable, and though Mr. Mallinson is dead, we can still learn from Mr. Hall, himself, what was the true state of facts. The judge of the Court below has spoken highly of the behaviour and testimony of Mr. Hall; no attempt has been made to impeach his veracity, and very justly so, for I believe he must be regarded as worthy of all faith and credit. His evidence, therefore, cannot for a moment be supposed not to be according to the actual facts of the case. What then does Mr. Hall say? He tells us that this proceeding of Mr. Mallinson was with regard to the William-street concern, was, in the language of the judge of the Court below, only *tentative* or *experimental*. Mr. Mallinson, indeed, was desirous, it would seem, of entering into an immediate partnership with Mr. Hall in the Dublin business, but at Mr. Hall's earnest suggestion, and by his advice, it was agreed that Mr. Mallinson should remain in Dublin for twelve months, to watch the working of the concern, and that at the end of that time, if he were satisfied with the nature of the business and its connection, he should have the option of becoming a partner and sharing the profits, if any, of the year, which would then have expired. Even then, however, there was no definite agreement as to the terms of the partnership. No doubt it was part of this arrangement, that Mr. Mallinson should have a share in the profits of the Dublin business if he elected to become a partner, but if he did not at the end of the year of trial choose to enter into any partnership, no agreement appears to have been made as to any recompense for his services during that period. In fact Mr. Hall in his evidence distinctly stated that in such an event Mr. Mallinson was to have no participation whatsoever in the profits. That being so, the present case does not differ substantially from some decisions which have been cited, amongst which *Rawlinson v. Clarke* (15 M. & W. 292) goes even further than this. In that case, although, a person had actually remained for a long time ostensibly a partner, and acted in the management of the business, and was to get for this a share of the profits, he was held not to be a partner, inasmuch as he had been given an option of entering the partnership at the end of a definite time, and had not exercised that option. Now, here it is plain to my apprehension, that unless Mr. Mallinson on the expiration of the first year thought it a prudent thing to enter the William-street concern as a partner, no partnership would in

fact or in law exist. His whole conduct during his stay in Dublin seems to bear out this view of the case. He does not in his own name deal with a single customer of the house, as he would have done if he had been a partner. The name of the firm was not changed. The power of attorney which had been executed by Hall, before leaving Dublin, for Huddersfield, was acted on during the whole time by the person to whom it had been given. Mr. Blood continued always in the chief management of the business, though occasionally assisted, it appears, by the advice and experience of Mr. Mallinson. Mr. Blood, alone, signed all the bills, letters, and other formal documents, and transacted all the business directly belonging to the person at the head of the concern. Then we find that Mr. Mallinson left Dublin before the end of the first year, and he appears never afterwards to have inquired about the state or prospects of the Dublin business. He never speaks of his having any interest in its success, and although he and Mr. Hall seem to have corresponded frequently after Mr. Mallinson's departure from Ireland, no allusion is made to the Dublin house as forming part of their joint transactions. Nothing can be more distinct than this is upon the evidence, and is quite consistent with the theory, that Mr. Mallinson's presence here was merely an experiment, while it is wholly irreconcilable with his having been a partner. It is plain that either presently or prospectively he was to have an interest in the business, and he abandoned it within the period arranged by the agreement between the parties. So far then from its being requisite for the appellant to show a cessation of the partnership, it is incumbent on the assignees to prove its commencement. As, to my mind, they have not succeeded in doing this, I must declare that this proof ought to have been allowed, and, therefore, the order of the Court below must be reversed. I think it but fair to the learned judge of the Court of Bankruptcy to remark, that the leading authorities on the question involved in the present case do not appear to have been cited to him.

THE LORD JUSTICE OF APPEAL.—In this case I am entirely of the same opinion as the Lord Chancellor. Plain justice on the result of all the facts requires us to reverse this order of the Court of Bankruptcy. The assignees call on the Court to disallow the proof of the appellants' claim, and become plaintiffs in a proceeding for compelling the Court to do so. There may be very strong presumptive evidence from the acts of the parties as to the existence of a partnership in the William-street business, and it might be a question whether on the result of these if unexplained, such a partnership should not have been held to exist. Mr. Mallinson, however, may be considered to have executed all the authority which a manager might possess. He never did any legal act which would mark him out, distinctly, as a partner. He never signed, endorsed, or executed any bill or instrument in his own name; now does it appear that any person advanced money, supplied goods, or did anything on the faith and supposition of his being partner? All the formal acts of the house were done by a regularly constituted person, under the power of attorney, given by Mr. Hall on the occasion of his leaving Ireland. Mr. Mallinson's presence and superintendence of the concern in William-

street, were such as in similar establishments form the employment and duty of confidential managers. It is plain, therefore, that his acts in this apparent capacity leave the question open, and that further evidence was required before these acts could be referred to his right and character of a partner. The assignees have accordingly insisted that such evidence is supplied by the correspondence which preceded Mr. Mallinson's interference, and by the evidence of the bankrupt himself. Now, as to the correspondence, I shall say no more of it than that it totally fails to establish an agreement by Mr. Mallinson to become a partner, so that the assignees are obliged to revert to the evidence of the bankrupt. His evidence, however, merely establishes an agreement, that at the end of a year of superintendence of the business, Mr. Mallinson should if he pleased become a partner, and that if he so elected, he should be given retrospectively a right to a portion of the profits. In fact, however, he discontinued his attendance and services before the year expired, seceded from the partnership, never claimed any share in the profits, or received any account of the transactions of the year, and totally abandoned, as it was competent for him to do, all claim to profits, and never afterwards took any interest in the concern, or made any claim founded on this arrangement.

Order below reversed.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

CROWN SIDE.

THE QUEEN v. THE LORD MAYOR OF DUBLIN.

IN THE MATTER OF THE APPEAL OF RICHARD JOHNSON, AGAINST THE ADMISSION OF ROBERT FITZGERALD, JOHN M'MULLEN, EDWARD MELLON, AND MICHAEL HOGAN, UPON THE BURGESS ROLL OF THE BOROUGH OF DUBLIN.—June, 9, 23, 24.

Borough franchise in the city of Dublin—Rating—Subletting of part of premises rated—St. 12 & 13 Vict. c. 85.

The subletting of a portion of the premises for which a party is rated, does not deprive him of the municipal franchise in the city of Dublin.

THIS case came before the Court upon motion to make absolute a conditional order, that the names of Robert Fitzgerald, John M'Mullen, Edward Mellon, and Michael Hogan, should be erased from the burgess roll of the borough of Dublin, upon the grounds that no one of them occupied premises in the said borough sufficient to qualify him to be a burgess thereof, and that such names should not have been retained on the said burgess roll at the last revision thereof. The case was in fact an appeal against the retention of these names upon the burgess roll by the Lord Mayor and his assessors at the revision which took place in October, 1863. The facts of each case were as follows:—

In the case of Robert Fitzgerald.—The said Robert Fitzgerald appeared upon the rate book to be rated as the occupier of the house and premises, No. 137 Townsend-street, in the words and figures following: "1507, Townsend-street, door No. 137, house and yard, Robert Fitzgerald, £10," the rating comprehending the whole of the house and yard. He was objected to on the ground of his having sublet his premises, namely, a cellar, and shop and parlour with separate entrances, to certain tenants; and it appeared that the cellar of the house and premises for which he was rated, and a portion of which he occupied, was in the occupation of a certain tenant, and it was further admitted on behalf of the said Robert Fitzgerald, that there was no internal communication between said cellar so occupied by the said tenant and the remaining portions of said house so occupied by the said Robert Fitzgerald and his other tenants, and that there was a distinct and separate entrance from said Townsend-street to said cellar, that is to say, an entrance separate and distinct from the entrance from the said street to the other portions of said house so occupied by said Fitzgerald and his other tenants; and that said tenant of said cellar sleeps in the said premises so occupied by said tenant as aforesaid, and that the said Robert Fitzgerald had likewise let the shop and parlour of said house and premises, 137 Townsend-street, to a certain other tenant who had sole control over the said shop and parlour. And that there was a distinct and separate entrance from said Townsend-street to the said shop and parlour, that is to say, an entrance separate and distinct from the entrance from the said street to the said cellar thereof so occupied by said first mentioned tenant, and also separate and distinct from the entrance to the house and other portions of said premises so occupied by said Robert Fitzgerald and his other tenants; and that said tenant of said shop and parlour when closing the said shop, closes said shop from the inside and passes from said shop into the said parlour at the rear thereof, and thence by a door into the hall of said house, and then leaves the said house through the hall door thereof, and when the said shop door is so fastened there is no other entrance from said street to said house or shop, save by the hall door.

In the case of John M'Mullen.—The said John M'Mullen appeared upon the rate book to be rated as the occupier of the house and small yard, No. 2 Merrion-row in the words and figures following: "Rate 965, door No. 2 Merrion-row, John M'Mullen, yearly value £58," the rating comprehending the whole of said house. He was objected to upon the ground of his having sublet a shop portion of the premises, and upon examination of the said M'Mullen it appeared that he occupied the said house No. 2 Merrion-row under a lease thereof, dated 16th April, 1860, and which said lease he had obtained when he the said M'Mullen was going into possession of said house, and on cross-examination he admitted that the shop of the said house had been and still was let by him to one Elijah Dunne as tenant thereof, and that the said Elijah Dunne, does not sleep in the said shop but resides elsewhere, and that the said Dunne on leaving the said shop at night, locks up the same, fastening the door of said shop on

the outside and takes the key of the said shop away with him; and the said M'Mullen further stated that there was no internal communication between the said shop so occupied by his said tenant Elijah Dunne, and the remaining portions of said house so occupied by him the said John M'Mullen, and further that there was a distinct and separate entrance from said Merriown row to said shop, that is to say, an entrance separate and distinct from the entrance from the said street to portions of said house in Merriown-row, occupied by said John M'Mullen, and further that he the said John M'Mullen had no control over the premises so occupied by him the said Elijah Dunne, so long as he the said Elijah Dunne paid the rent therefor.

In the case of Edward Mellon.—The said Edward Mellon, appeared upon the rate-book as the occupier of the house, office, and yard, No. 20 Lincoln-place, in the words and figures following: "Rate, No. 814, Edward Mellon, value £36," the said rating comprehending the whole of the said house, office, and yard, No. 20 Lincoln-place. He was objected to in consequence of his having sublet the shop and drawing-room, part of said premises, to one Daniel North, in whose exclusive possession and occupation the said shop and drawing-room were. From the evidence of one Robert Magrath, who was examined before the Revision Court, it appeared that the said Edward Mellon had let the drawing-room and shop to North who was then in occupation thereof, and who had full control over the shop entrance. Edward Mellon appeared in person to support his right to be retained as a burgess upon the list, and deposed that he had let the shop previously to the month of March, 1863; and that he, the said Mellon, had in the said month of March, 1863, let, in addition to the said shop, the drawing-room to said North, and that the said North usually slept since the month of March, 1863, in said drawing-room, and that the said North when closing the said shop, fastened the door thereof inside, and passes from said shop into a parlour at the rear thereof, and thence by a door which he locks after him into the hall of said house. And the said Mellon stated that said North did not reside in the said house previously to the month of March, 1863, when the said North commenced to sleep in the drawing-room of said house aforesaid; but that previously to the month of March, 1863, he the said North was accustomed to fasten the door of his said shop as aforesaid on the inside, and having then locked the said parlour door, taking the key with him, departed from said house through the hall door thereof. And the said Edward Mellon stated, that when the said shop door was so fastened there was no other entrance to said house or shop save by the hall door, which said hall door said Edw. Mellon had control over; but he the said Mellon admitted that the said North had a right to enter by the said hall door and so proceed to the premises whereof he was exclusively possessed as aforesaid, and further that he the said North must, when returning to his shop, enter through the hall, and by the hall door; and further, that he the said Edward Mellon could not get into said shop save by the permission of said North.

In the case of Michael Hogan.—The said Michael Hogan appeared upon the rate-book, rated as occupier

of the house and yard 32 Lower Baggot-street, in the words and figures following: "Rate No. 101, Michael Hogan and Michael Joseph Hogan, value £48," in the year 1861, and in the year 1862 "value £45"; also at rate No. 101, office and stable rated at £3, commencing January 1, 1862. The rating comprehended the whole of the premises up to the 1st Jan. 1862. Michael Hogan was objected to on the ground of his having let his stable to a tenant, and having appeared in person in the Revision Court to support his right to be retained as a burgess upon the list, he deposed that he had occupied the said house and premises for three years up to and ending May, 1863, that about eleven months after he had so commenced to occupy said premises, that is to say, on or about April, 1861, he had let the stable attached to said house to a tenant, and that same still continued to be let to a tenant; and the said Michael Hogan also admitted that there was a separate entrance to the said stable which said separate entrance was from the lane at the rear of said premises, and which said entrance was and is used by said tenant.

In all these cases the objection was that the parties had not been and was not on the 21st August, 1863, in occupation of the rated premises during the period required by the statute, to wit, the period of two years and eight months next preceding said 31st August, but on the contrary in each case a tenant was during a great portion of that time, and still was in the occupation and exclusive possession of the part of the rated premises in each case respectively sublet to him. The Revision Court however decided upon retaining the names upon the burgess-roll, and the conditional order above stated having been obtained, cause was shewn against it, and the case now came on to be argued in this Court.

M'Donogh, Q.C., Chatterton, Q.C., and Norwood, appeared in support of the conditional order.

Devitt, contra.

The following statutes and cases were cited. Stat. 3 & 4 Vict. c. 108, ss. 30, 50; stat. 12 & 13 Vict., c. 85, s. 3; *The Queen v. The Mayor of Evesham*, (9 Ad. & Ell. 671); *Fludger v. Lombe*, (Cas. temp. Hardwicke, 307); *Cook v. Humber*, (11 C. B., N.S. 33); *Henrette v. Booth*, (15 C. B., N.S., 500); *Bryan Kearney's Case*, (1 Alc. Reg. Cas. 22); *Wright v. The Town Clerk of Stockport*, (5 M. & G. 33); *Pitts v. Smedley*, (7 M. & G. 87); *Walmesley v. Perkins*, (7 M. & G., 151); *M'Keown v. Bradford*, (7 Ir. Jur., N.S., 175); *Lanyon's Case*, (8 Ir. Jur., N.S., 27); *Wauchope v. Reynolds*, (1 Ir. C. L. Rep. 142); *Ryan v. Bates*, (6 Ir. Jur. 72); *The Queen v. Deighton*, (1 Dav. & Mer. 682); *The King v. Hall*, (1 B. & Cr. 123); *The King v. Poynder*, (1 B. & Cr., 178).

June 24—O'BRIEN, J.—This case was very fully argued before us. When the case was first opened involving the case of three or four appeals, there was some confusion as to the facts of the case, and some doubt. However, in the progress of the case, and having regard to the authorities cited by Mr. Devitt, particularly that case in 15th C. B., N.S., the case of *Henrette v. Booth*, it appeared, and I think was fairly conceded by Mr. Chatterton in the argument, that there was no substantial difference between the facts

of these cases; and that the principle involved upon which the right of all depends is this, whether the occupation of premises for which a party is rated should be co-extensive with the rating—co-extensive, not as to time, because that was never doubted, but whether under the Municipal Corporations Act it is necessary that the party should occupy the entire of the premises for which he has been rated, or whether he is not entitled to the franchise by reason of having occupied for a sufficient time premises, themselves of a character to entitle him to it, even though he be rated for those premises in conjunction with others. In one of these cases a man parted with a stable, in another he parted with a shop, and a question arises as to separate tenements, and it was admitted that he did not lose the franchise, provided it was not necessary to hold both house and shop, he continuing to hold the house. It was said that this principle was decided in *Wauchob v. Reynolds*, and we were referred also to *Lanyon's case*, in which it was held that a person by parting with the occupation of part of the premises for which he was rated, lost his claim to the franchise. This case, however, arose under the Municipal Act of 1840. In our opinion, the provisions of the Dublin Municipal Act are essentially different, and the reason of the rule is not applicable to them. It is manifest, on looking to the 30th section of the Municipal Act, that the decision in *Wauchob v. Reynolds*, which was followed in several cases, is right. That section provides that the persons qualified as thereinafter mentioned shall be burgesses, "that is to say, every man of full age, who on the last day of August in any year shall be an inhabitant householder, and shall for six calendar months previous thereto have been resident as such within such borough, or within seven statute miles of such borough, and who shall occupy within such borough any house, warehouse, counting house, or shop, which either separately or jointly with any land within such borough occupied therewith by him as tenant, or occupied therewith by him as owner, shall be of the yearly value of not less than ten pounds," to be ascertained according to the poor law rating. Now it is manifest from that, that the right to the franchise can only be established by shewing on the poor-law rating, that the premises which he occupies are of the yearly value of £10. The poor-law rating, and that alone, is the test. The very moment that the occupier parts with the occupation of part of the premises for which he was rated, that test is no longer applicable; and there were no other means of ascertaining the value. Until he was rated separately for the premises which he had retained, there were no means of ascertaining the value, and so he lost his claim to the franchise. With respect, however, to the cases before us under the Act of 1849 for the city of Dublin, the case is different. Value is no longer made the test for the franchise. The only test is occupation of a certain class of premises for a certain period of time, and that during that time such premises should have been rated to the relief of the poor. Of course there is involved the necessity of payment of the rates. When therefore the reason of the rule of exclusion ceases, that rule should be no longer applied except we can collect that the Legislature intended that occupation should not

merely be co-extensive in time with rating, but should extend to the whole of the premises rated. Of course if that should be collected, our duty would be to follow the Act. I cannot, however, find words in the Act to warrant us in coming to that conclusion. I find it stated in the Act that he should occupy premises of a certain class, and that it is necessary that those premises should be rated. Are they not rated? Or does he lose the qualification for the franchise, value being out of the question, because the premises happen to be rated with other premises? Are we to be told that when a man with three or four houses occupies one, and happens to be rated for all together, therefore he is not entitled to the franchise? It was necessary so to hold under the former Act, because of the ingredient of value. But where the test of value is abolished, the reason ceases, and we have no right to import words into the Act different from what the Legislature has used, and by a strained construction to give a meaning to the Act which it does not bear. Occupation for two years and eight months is essential; and upon looking through the Act, it may be so construed as to contain nothing adverse to the proposition for which Mr. Chatterton contends, but it is necessary for him to shew that under the provisions of the Act, the party who is qualified and establishes his qualification to the franchise, loses it by parting with the occupation of part, while he retains in his occupation a tenement of a character sufficient to qualify him for the franchise. Upon these grounds we have come to our conclusion, and as we were told that the parties were anxious to have the decision for a guide, my brethren will express their views, and we hope this will be a sufficient declaration of the law. Upon these grounds, I say, we think that the cause against the conditional order should be allowed.

HAYES, J.—I concur in opinion with my brother O'Brien that these gentlemen should be retained on the roll of burgesses. From the argument of Mr. Chatterton yesterday, it is plain that the four cases resolve themselves into one or two points. The great point is the one which Mr. Chatterton put forward early in his argument, namely, whether rating should be coterminous in legal limits with occupation. Undoubtedly, the decision of that point would decide two cases, namely, *M'Mullen's case* and *Hogan's case*. Those turn altogether on that point. We took a distinction yesterday between the borough franchise and the parliamentary franchise. I do not conceive that he was warranted in that or in thinking that *Wright v. The Town Clerk of Stockport* did not apply. I think it does, and that the reason given there by the Chief Justice applies. In both the franchises it is necessary that there should be not only occupation but rating. In both it becomes necessary to inquire whether the individual should be separately rated for these premises apart from all others. The case of *Wright v. The Town Clerk of Stockport* decides that that is not necessary; and the expression of the Chief Justice is, that a person is not the less rated for certain premises because he is rated for those premises and others also. He said that the statute had not words to shew that the rating must be not only for those premises but for those apart from all others; and, therefore, it appears to me that in both these

cases, and whether we consider the object of the rating to have been as an additional evidence of occupation or as an additional evidence of the status of parties in society, but bearing his share of the public burdens,—in either of these views there is nothing in the slightest degree which requires us to introduce the distinction which Mr. Chatterton has asked us to do, namely, that the rating must be for these premises separately from all others. Well, as I have said, I think that disposes of the two first cases. It goes a long way with the others. I shall only say a word on those others. In *Mellon's case* the party held a shop and the parlour, and the shop was closed on the inside, and the party at night went through a door into the hall, and out by the front door of the house. Something of the same kind occurred in *Fitzgerald's case*. With his shop he had a right to the shop door, but there was a door communicating between the parlour and the hall, and though he might have gone that way, he seemed not to have secured that for himself. Now, it appears to me that that right in either or both of these cases in these persons to pass through the hall door, was nothing more than a liberty or easement, a sort of servitude which did not derogate from the master's rights as owner of the house, and that the existence of this servitude did not take away from the franchise. I therefore concur in the judgment of the Court.

FITZGERALD, J.—I concur in the result at which the Court has arrived, but I propose to offer an opinion only on the single question, to which the very clear, candid, and able argument of Mr. Chatterton reduced the case. In each case it was conceded that there was a tenement which, if separately rated, was sufficient to confer the franchise, the occupation being sufficient in point of time; but it seems to me, that the tenement occupied is not the less duly rated to the relief of the poor, because it is rated with some other premises, forming part of the holding which is duly rated.

O'BRIEN, J.—With respect to the costs of this appeal, we look upon this as a very important question. We look upon it not merely as a case between the appellant and the respondents: the ground upon which it was put really made it a general question of great public importance, as to which it was desirable that there should be some guidance, and we, therefore, do not think it a case in which there ought to be any costs.

[BEFORE O'BRIEN AND HAYES, J.J.]

LORD TALBOT DE MALAHIDE v. CUSACK.—June 9, 24.

Evidence—Refreshing memory—Copy of document.

To refresh the memory of a witness, a document was put into his hand. This document was not in his writing, but he deposed that at the time of the transactions in question, and while they were fresh in his recollection, he made certain memoranda; that afterwards at a distance of two or three months, those memoranda were copied by another person,

into the book now produced; that he (witness) inspected the copy, when made, and compared it with the original, at the time, and that he found it to be correct. The original was lost; the person who had made the copy was living. Held, that the copies of the memoranda, in the book now produced, were admissible for the purpose of refreshing the witness's memory.

THIS case came before the Court upon an appeal from a ruling of Master Bushe. It had been referred to him to take certain accounts between the parties, and in the course of the investigation several witnesses were examined orally before him. One of the witnesses being examined as to certain items, a book, containing memoranda, was produced to refresh his memory as to them. The memoranda were not in the handwriting of the witness, but in that of one Keenealy, who copied them from a book in which the witness at the time of the transactions now being inquired into, and when they were fresh in his memory, made entries respecting those transactions. The entries were afterwards, in some instances, at a distance of two or three months, copied by Keenealy into the book now produced. This copy was not made in the presence of the witness, but was, from time to time, compared by him with the entries in the original book in his own writing, and found to be correct, and at the period of the examination the master also was satisfied, by the evidence of the witness, that the copy was a correct one. The non-production of the original book was accounted for by its loss. Keenealy was stated to be still alive. On the part of the plaintiff it was objected that the book produced was not a document by which the witness could be allowed to refresh his memory. The Master however ruled that it was such a document, and from that ruling the present appeal was brought.

Chatterton, Q.C., and Leech for the plaintiff.—The Master's ruling was erroneous. This was not a document by which the witness could refresh his memory. How can the witness swear now to the correctness of the copy without seeing the original? By the original he could have been allowed to refresh his memory as to these transactions; but that link is missing. *Jones v. Stroud* (2 O. & P. 196); *Doe dem. Church v. Perkins* (3 T. R. 749) *Burton v. Plummer* (2 Ad. & Ell 341); *Beech v. Jones* (5 O. B. 696); *Taylor on Evidence*, ss. 1264, 1265. If the witness could have sworn that at the time when he compared the entries he recollected the facts, the case might be different; but all that he can do is to swear that when he made the original entries he recollected the facts, and that he afterwards found that the copy correctly represented the original memorandum made by him. That is not sufficient.

Carleton, Q.C., contra.—It is sworn that the copy was a correct one, and that the original is lost. Where, in the cases, a witness was not allowed to use a copy of a document to refresh his memory, the original was in existence, and the decision went upon the principle of the necessity for the best evidence available being produced. *Tanner v. Taylor* cited in *Doe v. Perkins*. *Horne v. Mackenzie* (6 Cl. & Fin. 628), is the case of a printed copy, by which a witness was allowed to

refresh his memory. There is no decision establishing that the ruling is erroneous, and on principle there is no reason why a witness should not be allowed to refresh his memory in the manner now proposed.

Leech in reply.—Wherever a witness is allowed to refresh his memory by a document, it must be by one in his writing made at the time, or in the writing of some one else made at the time and while the matter was fresh in his memory. A witness cannot refresh his memory by a document which only existed when his memory had ceased. *Burrough v. Martin* (2 Campb. 112.)

July 24th.—O'BRIEN, J.—This was a case argued before my brother Hayes and myself, by Mr. Chatterton and Mr. Carleton. Since the argument, my brother Hayes has referred me to a case on the subject which was not cited, that is the case of *M'Gregor v. Topham* (1 C. & K. 320). The question here is this. It has been long settled that a witness may, for the purpose of refreshing his memory, look at a document in his own handwriting, made at the time of the occurrence to which he is deposing. The rule has been extended to documents which he saw at the time or immediately after, which he read over and as to which he had an opportunity of seeing according to his fresh recollection of the facts, whether they contained the truth. But here the document was not in his writing, nor did he see it at the time, but it is proved to the satisfaction of the Master, that it is a correct copy of the original memorandum which was made. The particular entry here is proved, to the satisfaction of the Master, to be an exact copy of that which he wrote at the time, and the loss of the original is accounted for. Well, one would say that if a document need not be in the witness's own writing, but must be one which he looked at at the time, on the same principle, when there is a copy of a document, it being proved to be a copy, and the loss of the original being accounted for, the same rule would apply. Consequently in the absence of express authority, we were so disposed to hold. None of the cases to which we were referred were against that view. The case in *Adolphus & Ellis* would imply that the non-production of the original was not accounted for, and that the party should not be allowed to look at the copy unless he accounted for the loss of the original. Well, I now come to the case of *Topham v. M'Gregor* to which my brother Hayes has referred me. In that the facts were curious. It became necessary to prove the state of the weather in a particular year, and to do that, it was proposed, in order to corroborate the testimony of a witness, to read an article from a newspaper, published at the time, and which contained a statement confirmatory of the witness's evidence. This was objected to; then the editor of the newspaper was called, and he stated that the article had been furnished by a gentleman who had been in the habit of writing such articles for the newspaper; he also proved the loss of the original manuscript. The writer of the article was then called, and he stated that he had no recollection of having communicated the particular article referred to; he stated, however, that, at the time mentioned by the editor, he had been in the habit of furnishing him with articles, with reference to phenomena connected

with the weather, and he swore that the statements contained in those articles were invariably true. It was then submitted that the article should be read. "No," said the judge "you cannot do that," but he held that the article might be used to refresh the witness's memory, and that he might be asked, whether, looking at the article in question, he had any doubt that the fact really was as therein stated. In this case the copy seems to be a true one, and therefore we think that the Master should allow the witness, for the purpose of refreshing his memory, to look at entries in the book proved to the satisfaction of the Master to be correct copies of what the witness had written immediately after the transaction, when the matter was fresh in his memory. This being a question of some novelty, we think the costs should be costs in the cause.

HAYES, J.—I concur with my brother O'Brien. At the time of the argument I myself did feel that all reason was on the side of the defendant here, and all that I felt was wanting was an authority, and therefore I searched for one which I think gives all that is wanting, and I should say that there is no doubt that if this document itself, this lost document had been produced, it would have been all right, as it is said to refresh the witness's memory. That I would say is an inexact expression, for the witness looks at the document, and all that he does is, seeing that that is his writing, though his memory is a blank, he will undertake to swear to the truth of the matters which he sees in the document. It is hard to say why he should not be allowed to do the same thing if the document itself is lost, and another is produced which is proved to be a true copy of the original. That was exactly the case in *Topham v. M'Gregor*, for there the party refreshed his memory from a copy. So, here is a case where it was done not, I would say, to refresh the witness's memory, but to replace memory.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

[CORAM MONAHAN, C.J., BALL AND CHRISTIAN, J.J.]

MACMAHON v. ELLIS AND OTHERS, April 21, 22, 24, 25, 26, June 11.

Exceptions—Evidence of tolls and customs under 4 Anne, c. 14—Evidence of appointment to office of weighmaster—Evidence of oath being taken—Presumption—Rebuttal—10 G. IV, c. 7, sec. 20.

At the trial of an action brought by the plaintiff for disturbance in his office of weighmaster under the 4 Anne (Ir.) c. 14, evidence was given that there had been boards fixed up in front of the market-house of Clones, and in front of the shambles, with tolls and customs marked on them; and that when meal and potatoes were brought to the market, the buyers used to pay rent for the liberty of re-selling them. Held, upon the argument of a bill of exceptions, that this was

evidence from which the jury might infer that tolls and customs were legally leviable in Clones, and that Clones was a town in which the office of weighmaster, under the 4 Anne, c. 14, existed.

The 4 Anne, c. 14, imposed a penalty of 40s. a month on the owner of tolls and customs who should neglect to appoint a weighmaster. There was evidence given that Sir T. B. Leonard was the owner of the tolls and customs of Clones, and the plaintiff gave evidence that he acted as weighmaster from the death of his father till 1851. Held, that there was evidence to go to the jury, that the plaintiff was duly appointed weighmaster pursuant to the 4 Anne, c. 14.

Held also, that evidence of the fees taken by the plaintiff being larger than the statutable ones, supposing it given, would weaken but not annul the other evidence, as it was for the jury to choose between imputing a violation of the statute to the owner of the tolls and customs, and imputing extortion to the plaintiff.

The plaintiff gave no direct evidence of having taken the oath required by the 10 G. IV. c. 7. The defendant gave some evidence of a fruitless search for the oath amongst the records of the Court of Chancery, but none of any in a Court of assize. Held, that this was not such a rebuttal by the defendant of the presumption that the oath was taken arising from the plaintiff's having acted in the office, as entitled the defendant to have the question withdrawn from the jury. 1. Because this assumed that the plaintiff was bound to follow section 20 of 10 G. IV., c. 7, as to the time and manner of taking the oath, which he was not. 2. Because waiving this, the neglect of the officer to record the oath would not invalidate its effect if taken. 3. Because the search was insufficient.

THE first count of the summons and plaint complained that for fourteen years before the filing of the summons and plaint, the plaintiff was weighmaster and possessor of the office of weighmaster of the market town of Clones, under the statute of the 4 Anne (Ir.) c. 14, and of the emoluments thereto belonging; that he was provided with beams, scales and weights, which were set up in the market-house of Clones; that the defendants on the 6th of June, 1851, broke and entered the market-house, and ejected, expelled, and removed the plaintiff therefrom, and kept and continued him so expelled, &c., from thence hitherto; that they seized and carried away his beams, scales, and weights, and thereby and otherwise from said 1st June, 1851, hitherto hindered and disturbed him from exercising his said office, and prevented him from receiving the fees and emoluments thereof. The second count complained that the plaintiff was tenant from year to year under Sir T. B. Lennard of the ground story of the market-house; that the defendants on the 6th June, 1851, broke, and entered it, and expelled him, and since have kept him so expelled; that on the 12th June, 1851, he brought an action in the Queen's Bench for that trespass in which he obtained a verdict, by which the jury found that he was tenant from year to year of a certain part of the said ground story, called the office, and gave him £25

damages, upon which verdict he on the 13th Nov. 1851, obtained judgment; that though the tenancy from year to year so found by the jury was still subsisting, the defendants had since the time to which damages were recovered in said action, continually hitherto kept, and still did keep the plaintiff ejected, expelled, and removed from the possession of said ground story, including the said part called the office. The third count stated a tenancy from year to year in the ground story; that the defendants expelled the plaintiff, &c., alleging special damage and a taking and carrying away of the plaintiff's goods. The pleadings were continued down to sur-rejoinders. There were nineteen issues settled for trial, of which the following are material. 1. Whether the office of weighmaster under the statute of the 4 Anne existed in the market town of Clones, in manner and form as stated in the first count of the summons and plaint? 2. Whether the plaintiff is now and has been weighmaster and in possession of the office of weighmaster of the market town of Clones, by virtue of the statute of 4 Anne in manner and form as stated in the said first count? 3. Whether the plaintiff took the oaths mentioned in the 3rd section of said statute of 4 Anne, as directed to be taken by said statute? 5. Whether the plaintiff always professed the Roman Catholic religion; and, whether within the period, and in the manner and at the place stated in the 2nd replication to the 3rd. plea, he duly took and subscribed the oaths appointed by the statute 10 G. IV. c. 7, as required by said Act? 8. Whether the defendants broke and entered the house in the said count mentioned as therein alleged? 14. Whether at the commencement of this action and at the time of the committing of the supposed trespass, wrongs, and grievances, for which damages are sought by the second count, the plaintiff was tenant from year to year of any portion of said ground story of said market house, other than the part called the office? 15. Whether the tenancy from year to year, found by the jury in the suit in the second count mentioned was at the commencement of this action, and at the time of the committing of the trespass for which damages are sought by said count, a subsisting tenancy from year to year? 16. Whether the defendants committed the trespasses for which damages are sought by the said second count? 19. Whether the causes of action in the summons and plaint mentioned, occurred before the action? At the trial of the action before Monahan, C. J., at the Hilary after-sittings, 1863, there were forty exceptions taken by the defendant, eighteen at the close of the plaintiff's case, and twenty-two to the charge of the learned Chief Justice. The jury found for the plaintiff. The nature of the exceptions as well as the evidence given at the trial, will, for the most part sufficiently appear in the arguments upon the defendant's bill of exceptions, and the judgment of the Court.

April 21.—*H. Ellis* (with him *J. E. Walsh*, Q.C.) in support of the exceptions.—Of the three counts, one in case and two in trespass, I will deal with the counts in trespass first, as being the simplest. The count charges a trespass, and shows upon the face of it that no trespass could have been committed. Trespass is a possessory action.—*Selwyn's Nisi Prius*,

1296-98; *Brown v. Notley* (18 L. J., Ex., N. S., 39). There is no authority the other way. The defendant asked the judge to direct a verdict for him on the third issue on the second count. This is the subject of the 14th exception. As to the 13th exception, which is in reference to the second issue on the second count, is the tenancy of the little office in 1851 evidence of a tenancy in this case, when the Statute of Limitations is pleaded? Or must the Court presume upon that plea that the tenancy has been determined till the contrary be proved?—*Leigh v. Thornton* (1 B. & Ald., 625). At the close of the case the defendant called on the judge to direct the jury on the question of the Statute of Limitations. But if the former point be well-founded, it disposes of this, because if the action of trespass could never have been brought, it could not have been brought within six years. This disposes of the exceptions relating to the trespass. Coming to the count in case, by the 17th exception the defendant asked the judge to tell the jury that the mere exclusion was no disturbance, and that it should be shown there was some demand to exercise the office since 1851. It is admitted that the plaintiff never exercised the office since 1851, and that he never made an effort to exercise it, nor any preparation to exercise it in the way of beams, scales, &c. Can a disturbance take place in the exercise of an office during the time when it is admitted no such exercise existed? This is analogous to the question of trespass; but it is stronger.—3 Bla. Com., 236; 27 Geo. 3, c. 41, s. 2. Should a jury be allowed to speculate on what would have been, if a demand had been made some years before, which never was made?—*Dexter v. Hayes* (11 Ir. C. L. R., 106); *Dexter v. Cust* (13 Ir. C. L. R., 97). In these cases the fact that Dexter was standing at the place with his apparatus ready, was the foundation of the argument. Eight years here are the same as eighty. The defendant alleges—1. That the office could not have existed under the statute of Anne. 2. That the office held by the plaintiff was held by will. 3. That the lord of the manor as such was the person, and not the owner of the tolls. A market-toll is payable by the buyer, and not the seller, unless there be a custom to the contrary. There was no attempt to prove a grant of tolls, but only to show receipt of them.—*M'Gahey v. Alston* (2 M. & W., 206). Without acting, the presumption that the oath was taken cannot be made. A presumption cannot be founded on a presumption. The fees taken by M'Mahon were often two, three, or seven times the fees given by the statute of Anne; and therefore, if acting under that statute if weighmaster under that statute, he was guilty of fraud, extortion, and robbery, and will the Court presume crime? It would be for the first time.—*Doe dem. Hammond v. Cooke* (6 Bingham, 174). He may have been a manorial weighmaster. This evidence of acting is no evidence of good title. It is presumptive evidence in our favour, since if he were weighmaster he acted criminally. One presumption was built upon the other. The letter of 29th August, 1847, was a copy of the resolutions of the Court Leet. The 5th resolution is quoted by Ellis. This is relied on as a recognition of the plaintiff's being in the office. This is not a recogni-

tion of the plaintiff being weighmaster under the statute of Anne. Why should the resolutions of the Court Leet be sent to one who was appointed under a statute? The letter does not lean to one side more than the other.—*Avery v. Bowden* (6 Ell. & Bl. 962.) The plaintiff set up cranes in obedience to his orders which he would have had no business to do if appointed under the statute of Anne. If the letter were taken by itself, it would show that it was as to a manorial crane it was sent, but the party who wrote the letter himself proved he was addressing a manorial officer.—*M'Mahon v. Lennard* (6 H. of L., N.S., 1010). John Payne's evidence was some evidence, and the House of Lords decided that if the defendant gave some evidence, the plaintiff could not have a verdict. J. P. proved he searched everywhere he could for the oath taken by John M'Mahon, and could not find any except the oath he took when admitted as a barrister. The question is not if that be complete evidence, but is it some evidence, so as to impose upon the plaintiff the necessity of giving some evidence he did take the oath? The Courts in England are taken to be the places where people in England take oaths, and the Courts in Ireland where people residing in Ireland are to take them. The plaintiff is to be taken to be residing in Ireland as a barrister. The Chief Justice told the jury the presumption from the acting in the office would be rebutted if there was search everywhere for the oath in vain. But it was not a rebuttal, but a negative proof. It was not for the judge to tell the jury how much evidence would rebut a presumption. Lord Wensleydale, in correcting his own report, underlined the word "some," and it appears in italics showing that any evidence at all was sufficient. There is no evidence of the existence of the office of weighmaster in the town of Clones. It is necessary to prove some person received the tolls and customs at the time of the alleged appointment. It has not been proved that there ever was a grant of these tolls and customs, nor was the question asked on cross-examination; nor was a collector of tolls and customs ever seen in the town of Clones.

E. M. Kelly (with him *Hemphill, Q.C.*) contra.—The existence of the office of weighmaster under the statute of Anne is admitted on the record.—Stephen on Pleading, p. 181; Suller's Nisi Prius, 298, a, referring to Dyer, 183, c. 58. [*Ball, J.*—The traverse is, that the plaintiff is not weighmaster of Clones.] Suppose a party claimed to be possessor of the office of Chief Justice of Common Pleas, and it be traversed that he is Chief Justice of Common Pleas. Would any Court allow the defendant to argue there was no such office as that of Chief Justice in existence? Or if the traverse is that the plaintiff did not run a certain horse for the Derby, could he argue there was no such thing as the Derby?—*Carter v. James* (13 M. & W., 137). [*Christian, J.*—The first issue seems to exclude this argument.] We objected to this issue being put on the record. [*Monahan, C. J.*—We must assume from the pleadings that the issues were justifiable.] No issue unwarranted by the pleadings can remain upon a bill of exceptions. In 4 Anne, c. 14, s. 3, the Legislature took it for granted that in every city, borough, and

market-town in Ireland a weighmaster should be appointed. There is the exception made where the tolls and customs belong to some particular person. James Murphy deposed to being 24 years in Hugh M'Mahon's employment, and seeing tolls taken. [Ball, J.—Was the witness cross-examined as to the meaning of tolls? Monahan, C. J.—It is plain that that evidence would not do unless we knew what he meant by tolls. Christian, J.—This man was a servant of Hugh M'Mahon, and if Hugh M'Mahon was entitled to fees, and not tolls, this would lead one to infer that when he speaks of tolls he means fees.] Potatoes must by law be weighed gratis, and therefore the twopence paid for weighing potatoes must mean tolls, no matter what the witness thought. He saw tolls and customs painted on the boards. [Ball, J.—There is contrary evidence as to the boards.] But if there be any evidence, this Court will not disturb this verdict. Philip Duffy deposed, that when a countryman would come in, he paid witness fourpence a sack, and that he got paid also for the standings in the market. Stallage is tolls. Dr. John Brady deposed that there was a board with a list of tolls and customs painted on it, and the name of Hugh M'Mahon at the foot of it. Michael Reilly deposed that he paid Hugh M'Mahon £10 for two years, and £8 for the subsequent four years, &c. Clones is a market town. Toll being once taken, there is the presumption that they continue till the contrary be shown.—Best on Presumptions, 186; Taylor on Evidence, sec. 155. The language in the statute shows this. In section 5 it is expressed "tolls or customs." Customs are merely tolls existing by prescription.—Coke Littleton, 58, b, "*consuetudines*." Lord Abinger, in *Earl of Egremont v. Saul* (6 A. & E. 925) says that "*consuetudines*" was generally used as signifying tolls. This was a *dictum* at Nisi Prius, but not quarrelled with. Toll is a custom founded on prescription.—Gunning on Tolls, 44, 45, 85. Tolls and customs are convertible terms, as statute after statute shows.—1 George 3, cap. 17, sections 10, 26; 3 George 3, cap. 34, sec. 56; 11 & 12 George 3, cap. 31. The acting of the weighmaster in the town, coupled with this language of the statute is evidence of the fact. The existence of the office is included in the plea, the plea, the traverse, and the issue. [Ball, J.—Do you mean it is evidence of the existence of a weighmaster under the statute of Anne?] Yes, of the existence of the office.—*M'Mahon v. Lennard* decides this. Taylor on Evidence, s. 139; *M'Gahey v. Alston* (2 M. & W., 206); *Doe v. Barnes* (8 Q. B. 1037). [Monahan, C. J.—That abstract proposition that acting was proof of the existence of the office, was decided in this case in *M'Mahon v. Lennard* in the House of Lords. But it is said here there is evidence showing the gentleman did not receive the legal tolls.] [Christian, J.—The question of the existence of the office does not appear to have been agitated in that case as appears from the beginning of Judge Wightman's judgment, where he says the office as between the parties must be taken to have existed.] There is no authority for such an office as is suggested of manorial weighmaster. [Christian, J.—Might there not be a person weighing neither manorial nor under the statute of Anne? Suppose Sir T. Lennard chose

to weigh or appoint a person to weigh for any person coming.] That would be illegal. [Christian, J.—That is upon the assumption that Clones is a market town with tolls and customs.] Whether or not it would be illegal. [Ball, J.—Where is the prohibition?] [Christian, J.—What is to prevent me from setting up a beam and scales and weighing for anyone who may come to me? This is only criticizing your argument to this extent—acting alone is relied on; but if you have other evidence along with it that tolls and customs existed, it may be quite different.] As to the second issue, we have only to show we made a *prima facie* case. If the plaintiff had acted illegally, that would not destroy his title to the office. [Monahan, C. J.—That is assuming he was in possession of the office.] That is for the jury. [Christian, J.—Except that when you rely on acting as evidence of an office under the statute you must show these acts were in accordance with the statute.] Monahan, C. J.—No doubt, many witnesses proved that the plaintiff attended for many years, and received money (leaving names out of the question whether he be called weighmaster or not). It is equally certain none of them called him weighmaster under the statute of Anne; and some of them proved he took what was more than the fees given by the statute of Anne. There is no substantial dispute about the evidence of the witnesses.] James Murphy deposed that immediately after the death of Hugh Mac Mahon he saw the defendant, Mr. Ellis, presiding at the Court Leet as seneschal; that he said "I hope you will have no objection to Mr. MacMahon's son being weighmaster." They all said "No." Mr. Mac Mahon went to the market after that, and the witness weighed for him. We are not dealing with the weight of evidence. It is contended there was no evidence to go the jury that the plaintiff was weighmaster under the statute of Anne. Next come the conversations. Then the letter of 8th July, 1848, and the letter of 17th July, 1848, which says "Sir Thomas will not hear of any transfer of the office by you;" and the letter of 20th July, 1849, in reply from MacMahon to Ellis. That letter never was replied to. There is Ellis's letter of 15th August, 1849. There is no distinction between craner and weighmaster. How could a man surrender an office he did not possess? Craner and weighmaster are used at random in these letters from Ellis to Mac Mahon. *Reg. v. Grimshaw* (10 Q. B. 747), where Coleridge, J., says "Ratification may amount to appointment." Acquiescence in an alleged right or title is evidence against the party acquiescing.—*Edwards v. Towels* (5 M. & G. 624); *Lucy v. Moulet* (5 H. & N. 229, 29 L. J. Ex. 110). Pollock, C. B., says, "The letter unanswered is conclusive against the plaintiff"—*Carme v. Steer* (5 H. & N. 628). It is said there was no evidence of disturbance of the plaintiff in his office; but this is admitted on the record, and there is no issue on it. *Powell v. Milburne* (3 Wilson, 355) is an answer to the defendant's argument, that if there be some presumptive evidence given by the plaintiff the judge is to withdraw the case from the jury though there be ever so much evidence the other way. There is no evidence that Mr. Mac Mahon comes within 10 Geo. IV., c. 7, s. 20, as to where

he resided. As to the search it was evidently made carelessly, and there is loose swearing. [*Monahan, C.J.*—If the oath was taken before a judge of assize, and he were to file it at all, it would be among the records of the town.] [*Christian, J.*—I could not follow the observation that it must have appeared if taken before a judge of assize.] If they had made the fullest search, still it was a question for the jury. As to the Statute of Limitations. [*Christian, J.*—This was a freehold office; and the plaintiff, if he had it, could not be dispossessed of it but by legal proceedings. But the question is, if one party put another out, denying he has any right, may the other man lie by for eighty years passive and then bring an action for disturbance for the last six years?] [*Monahan, C.J.*—What is the effect of the plaintiff lying by for a period exceeding six years?] The pleadings do not warrant that question being raised. [*Monahan, C.J.*—That objection is patent on the 1st count of the summons and plaint.] The statute must be pleaded. [*Christian, J.*—Do you argue that a young man possessed of a freehold office, and turned out of it, and living 100 years, without having exercised or having attempted to exercise it, might bring a possessory action?] That is not this case. On stallage I refer to 2 Inst. 220; *Lockwood v. Wood* (6 Q. B. 42 & 43); Com. Dig. tit. Market, F. 1, Toll. As to the second count, the possession necessary to maintain trespass may be either actual or constructive possession. [*Christian, J.*—That constructive possession is traversed; the other, the actual, is not and did not need to be so, because the jury found against you.] *Monahan, C.J.*—Assuming that it is true that your subsisting estate, from year to year, continues to the present, and that you might bring an ejectment, not being twenty years out of possession, still the question is if that be not your only remedy having lain by so long. This arises either upon exception or motion in arrest of judgment, or in some way or other when judgment must be given. You admit you were out of possession since 1851. Can you maintain this action as an action on the case when you have got damages from the jury for the period?—*Smith v. Miles* (1 T. R. 475); *Hudson v. Nicholson* (5 M. & W. 437). A continuing trespass is a trespass—*Holmes v. Wilson* (10 A. & E., 503); *Bowyer v. Cook* (4 O. B., 236). [*Monahan, C.J.*—May you not be driven back upon the ejectment?] A man kept out of office must have some remedy by case or trespass. [*Ball, J.*—Or ejectment.] An ejectment here might be worthless—*Lawrence v. Obie* (1 Starkie, R. 22). *Leigh v. Thornton* can be distinguished, for here the premises are in the possession of the party who put us out of possession.

Hemphill, Q.C., on the same side.—As far as the first count goes all the exceptions mean this,—that the judge should have directed a verdict for the defendant or have nonsuited the plaintiff, on the ground that there was no evidence that the plaintiff was weighmaster of Clones. Because this will involve whether Clones is a market town; whether Mac Mahon was the weighmaster of it; whether he took the necessary oath. A second class of exceptions means this: that the judge should have directed the

jury that the presumption arising from acting in the office had been rebutted. The third class means that the judge should have directed a verdict for the defendant, on the second count generally. The fourth class refers to the Statute of Limitations, and stands upon a different footing. No proposition of law laid down by the judge has been quarrelled with. The fourth exception is the first substantial one. [*Monahan, C.J.*—I ruled that there was evidence that the office existed.] *Bain v. Whitehaven and Furness Junction Railway Company* (3 Ho. of Lor. 1) shows what should be in an exception. The case has been argued as if we were on a new trial motion. The weight of evidence was dealt with. *Lord Trimleston v. Kemmis* (9 Cl. & Fin. 749), shows that the law in England and Ireland as to this is the same. [*Monahan, C.J.*—Do they not reserve the right to arrest the judgment?] I think they do. [*Christian, J.*—What that case decided was that judgment must be given upon the exceptions themselves without travelling out into any other portion of the record, the judges having supposed that they were to give judgment according to the very right of the case.] [*Monahan, C.J.*, referred to the words in the judgment where the expression "or to arrest the judgment" occurs.] It is admitted on the record that Clones is a market town, and it is proved over and over again. The 3rd section contemplates that every market town shall have a weighmaster. It assumes that, and that it has tolls and customs, because it gives power to the chief magistrate when he is the owner, and if he be not, then to whoever is the owner of the tolls and customs to appoint a weighmaster. [*Monahan, C.J.*—Suppose there were no chief magistrate.] Then there would be difficulty in carrying out the Act. The tolls did exist, and if they did they must have belonged to some one. As soon as we showed an acting in the office we need have gone no further till the defendant gave evidence to the contrary, which we might displace. *Avery v. Bowden* has been pushed a little too far. [*Monahan, C.J.*—I thought one of the strongest pieces of evidence was the 57 Geo. III. c. 108, imposing penalties.] Murphy swears to the existence of tolls on the boards. [*Christian, J.*—Murphy swears that he received fees for weighing potatoes.] That must have been a toll. Duffy proved a charge for stallage; and there is no doubt that that comes under the definition of tolls. It is enough for me to show that it could by any possibility be so. If tolls existed and the town were a market town, it was a fair inference that these tolls belonged to somebody. The fifth exception is bad in substance and in form. [*Monahan, C.J.*—They say there was no evidence that the plaintiff acted under the statute of Anne; because any evidence was rebutted by his taking fees different from what were given by that statute.] The exception assumes that Clones was a place where the office might exist. If so no one could have set up the beam and scales but the lawful weighmaster under the statute of Anne. [*Ball, J.*—Is there any statute which prohibits any person from weighing so?] No. [*Monahan, C.J.*—Until a man was appointed is there anything to prevent any person doing so?] The Act is for the benefit of the public. If any person could do this it

would be virtually repealing the Act to hold so. [*Monahan, C.J.*—If no weighmaster was appointed by the owner of the tolls, what is to prevent any other person from weighing? If he did so how is he to be punished?] It would be a misdemeanour. As to the 9th exception, *Dexter v. Cust*, and *Dexter v. Hayes* prove that acting in an office makes a presumption that the requisite oaths were taken. The latter part of the exception asks the judge to assume the functions of the jury. The 10th exception goes by *Dexter v. Hayes*. As to the 13th exception, I refer to *Best on Evidence*, 504; *Wilkinson v. Kirby* (15 C.B. 430). The 14th exception refers to the 3rd issue on the 2nd count, i.e. the 16th issue on the record. There is not the simple issue, were the tolls the tolls of the plaintiff? which would have raised the whole question. The 15th exception is on the Statute of Limitations. As to the 16th exception, there is nothing in either statute or common law to prevent the appointment of a deputy. As to the 18th exception, a presumption of fact can only be rebutted by fact, not by a presumption of law. [*Ball, J.*—This exception requires the judge to assume the functions of a juror in every part of the case.] As to the exceptions taken at the end of the case. As to the 10th exception, we say the search was not sufficient. The Hanaper Office was not the only nor the proper place to search. Mac Mahon was a barrister, but *non constat* that he did not reside at Bray—*Craig v. Norfolk* (1 Mod. 122). A man may bring an action on the case for the profits of an office without seisin.

J. E. Walsh, Q.C., in reply.—The first sixteen of these exceptions are repeated. I will deal with the exceptions thus:—the 4th, 5th, 7th, 8th; the 17th at the close of the plaintiff's case, and the 20th at the close of the whole case. I am not to contend on the amount of evidence which is to go to the jury. The old doctrine of *scintilla* of evidence is completely abolished. When Murphy is cross-examined, he says—"I do not know what are tolls." There is a *scintilla* of evidence on his direct examination, but not such as to warrant the case going to the jury. The case turns in a great measure on what are tolls. Except that loose statement of Murphy, there is not any evidence of the existence of tolls in Clones. I do not dispute the definition cited. Sales by sample cannot be the subject of tolls. But it is not there laid down that there can be a toll for the weighing of goods at the market town. The statutes assume that tolls were payable for something else than weighing. All the parts point out tolls as being at the place where buyers and sellers are brought together, and that no such thing as a toll for weighing is known to the law. Doctor Brady, I admit, states that tolls and customs were painted on the boards; but he speaks of a period long antecedent. We called witnesses who deposed, that they never knew of tolls, &c., that nothing was ever charged except for weighing. There were never tolls for victuals, where live stock also came, and there were not tolls for the live stock. In Covent-garden market there may be tolls on victuals, but there are no live stock. John Kelly's evidence is, that those fees were never paid, nor demanded, except when the articles were "weighed." [*Monahan, C.J.*—How do you make

out that the sixpence was for weighing?] But the boards do not contain this. [*Ball, J.*—Did the boards contain everything which was levied?] No. For twenty years and over, payment was proved to be made in connexion with weighing. There is no evidence of a grant of these tolls. The plaintiff ought to have been non-suited. It is said the defendants are estopped. That might be if these defendants had joined together to put up these boards, but they are strangers. Hugh McMahon and the man before him could not have been weighmasters up to 1829, because they never took the oath, and is the presumption to be made, that the law was continually violated by a weighmaster not being appointed? There was no name but "Hugh McMahon" on the board. He was the collector. There was no owner. [*Monahan, C.J.*—What were the boards there for?] For the same purpose, as the boards are now there for, viz., to contain the tolls to be collected by the person appointed by the seneschal of the Court Leet. Stallage and picage would be for the extent of the stall or tent; but Reilly describes these tolls to be for the carts in the shambles. [*Monahan, C.J.*—Assuming there was no contradiction of Brady's evidence, would not that be evidence of the receipt of tolls?] But not of the prescription which the plaintiff must prove. There is no evidence applicable to the last thirty years. [*Monahan, C.J.*—Supposing Brady's evidence to be some evidence of receipt continuously, but that the great bulk of these fees was received at the crane, would it not be a question for the jury if tolls were included in them?] It would not. As to acting being proof, *Dexter v. Hayes* went very far, but no case has gone the length contended for here. 25 Geo. II, c. 13., 27 Geo. III, c. 41. As to customs it is difficult to say what they are. It would be harder to prove the existence of customs than of tolls. [*Christian, J.*—The fact of appointing a market with customs and tolls goes to show that they are convertible terms, because in a new market there could be no customs in the etymological sense of the word.] Picage and stallage may exist where there are no tolls or customs. 3 Geo. III, c. 34, section 56 was referred to, to show that tolls and customs are used indiscriminately. That statute requires persons to appoint weighmasters by virtue of some grant to them, and independently of the ownership of the soil. Picage and stallage will not support such an appointment under the Act. Customs are payable on what are brought for sale, whether sold or not; tolls are payable on what are sold solely; though that distinction is, in Ireland, often nugatory. 25 Hen. VI, c. 3, contemplates something payable on the passage of goods. As to acquiescence, there is no admission in these letters of a legal appointment; they even negative it. 52 Geo. III, c. 134, refers to a different office from the present. [*Monahan, C.J.*—Who had the appointment?] The magistrates at the Quarter Sessions. In 1827, Hugh MacMahon could not have legally held the office under the statute of Anne. 1. As to the certificate. Weighmaster in that certificate of 1827 means weighmaster of butter. 2. As to the letter of 11th February, 1846. The rent must mean the rent of the office of craner. [*Monahan, C.J.*—Suppose there were tolls payable to Sir T. Lennard,

and that many of them were calculated on the buying and selling, would it be consistent with law, that what Ellis was giving to MacMahon, was the right to receive these tolls, coupled with the weighing of the things? It might. [Monahan, C.J.—Supposing these tolls did exist, might not MacMahon be made lessee of these tolls, contemporaneously with an appointment, and the £40 be the rent of these tolls?] That would be illegal and cannot be presumed. As to the letters of 29th August, 1847, and 31st August, 1847. There is nothing in these regulations of the Court Leet referring to a weighmaster, under the statute of Anne. [Monahan, C.J.—If you prove there were no tolls, there must be a judgment in your favour; but if the plaintiff makes out that there was any question to go to the jury on this point, it were idle to contend that Sir T. L. was not the owner of these tolls. Is there any inconsistency in that communication of the seneschal with the lesseeship of these tolls to MacMahon?] As to the letter of 20th July, 1848. The statute 6th Anne, c. 11. extended and amended a previous statute of Will., III. These and a number of others were consolidated by 52 Geo. III, c. 134. [Christian, J.—Mr. McMahon claims to be weighmaster under the statute of Anne, and butter weighmaster under the 52 Geo. III, c. 134.] This letter speaks of an office held under the statute; that means the two statutes, one of which made, and the other perpetuated the office. The words are “the appointment which my father and grandfather held.” It is possible that the father might have held the office of weighmaster under the statute of Anne, because he survived the year 1829, but it is impossible that the grandfather who died a Roman Catholic, long before, could have held it. The meaning of that letter is “I do not care for you Ellis, or Sir T. Lennard, for I have a freehold office.” The letter of 11th August, 1849, says—“you must recollect that you have never been appointed to the office.” This whole correspondence, so far from containing an admission, says, “whatever you claim, you have no right to. You came in without authority, and I will now force you out. Do not put me at arm’s length, but retire with a good grace.” As to acting. The latest evidence of tolls is prior to 1828. The amount of acting is very trifling. Mr. McMahon was seen walking about and attending to a number of things. He was not proved to have done any single thing which could only be under the statute of Anne; but he is proved to have been doing what was compatible with being a servant of the Court Leet. There is not even a scintilla of evidence. He must, if weighmaster, under the statute of Anne, have weighed things which would not be tollable. In every case he received a fee, which in reference to that office would be extortion. None of these acts can be evidence, because every act has something connected with it to negative the purpose for which the evidence was offered. There is no evidence that Hugh McMahon or any one complied with any of the requisites of this statute of Anne. It is asked, what office was MacMahon’s? I am not bound to answer that. But these things all point to some common law office, regulated by the Court Leet. Such an office would not probably be open to the objection of not being, to be

let at a rent. [Monahan, C.J.—Is there anything to show that any other Court Leet had a power to appoint to an office like this?] There is not. Viner’s Abridgment, tit. Market, proves it was the business of the Court Leet to regulate weights and measures. [Christian, J.—You have given no evidence in this case, of the existence of such an office?] Unless all this proved by the plaintiff is evidence of such an office. It is proved, that somebody, prior to 1829 held an office which could not have been this, under the statute of Anne. [Christian, J.—Does not this make it a question for the jury, to what office the acting is to be referred?] If there were any acting, not coupled with such an office, prior to 1829, evidence of acting, must be evidence of legal acting. [Christian, J.—Would you say if the plaintiff was found taking the fees allowed, by the statute of Anne, and nothing more; that there is no evidence of his holding the office because he is a Roman Catholic?] Yes. In reference to the oaths. That rests on the same presumption. If I be right on the other, as to no evidence, it applies to this:—As to the 9th, 10th, and 16th exceptions, and 18th, 19th, and 22nd exceptions at the close of the whole case; a judge must balance all the presumptions before he lets the question go to the jury. It is a mixed presumption of law and fact from a man’s acting in an office, that he holds the office. The legal meaning of that being rebutted, is that the *onus probandi* is shifted, from whence it follows that this was a question for the judge and not for the jury. *Powell v. Milburne* is no authority; it is a mere *dictum*. [Monahan, C.J.—I thought this very question of presumption of taking the oath was what was settled in this very case in the House of Lords.] If a man could not do a thing without a licence and he did the act, *prima facie* the doing it is evidence he did it with a licence; but as soon as evidence to the contrary is given, that presumption is rebutted, and the *onus probandi* is on the party. [Monahan, C.J.—As I understand there was nothing to confine the plaintiff to taking the oath before a judge of assize in a particular court, I think you are estopped on this record from contending that there was a search made for the oath.] There is no other place but the Hanaper Office where oaths in the Court of Chancery can be taken. It is attached to the common law side of the Court of Chancery. [Christian, J.—Must we not take judicial notice of an office called the affidavit office in the Court of Chancery?] It is enough that the presumption be shown to be answerable. How could the presumption that an oath was taken be rebutted, if it could only be done by examining every repertory and every person before whom it might have been taken? This is the first time the Court is called on to decide what amount of evidence is to rebut the presumption and prevent the case going to the jury. But the rebutting did not turn merely upon the search. There is the contradiction of the certificate mentioned in the Act which imposed the oath. It has not yet been decided that a man abstaining from giving this sort of proof, does not put himself in the same position as that of the spoliator of evidence. [Christian, J.—Did not something like this point arise in *Dexter v. Hayes*!]

There was evidence of acting, but it was proved to have commenced at a time when the plaintiff admitted he had no appointment. But there was evidence, it was said, of an actual appointment. To that it was replied, there must be written evidence of that. To that it was answered, you have allowed parol evidence and the question must go to the jury.] The 11th, 17th & 18th exceptions say there was no evidence of disturbance. There is no act of disturbance shown since 1851.] [*Monahan, C.J.*—Whiteside has been weighing ever since.] He was not appointed by Ellis, and this cannot sustain a joint action. A man must be disturbed in what he is doing, not in what he is not doing. [*Monahan, C.J.*—You do not plead that in fact you did not disturb: there was no issue on it.] The second count is capable of two meanings. The plaintiff cannot allege his own count to be a bad one. It must be a bad one if it does not allege an occasion of grievance. He has alleged a trespass: he was bound to prove a trespass. All the cases quoted of a continuing trespass have no relation to this. If a man will not leave your land, or builds a buttress and keeps it there against your will, that is a continuing trespass: so where the stakes were driven in and the water driven off; but where is the doctrine that to turn out a man from his house and keep him out is a continuing trespass? [*Monahan, C.J.*—Supposing you actually turned him out and then kept him out, is the retaining possession not a ground of action?] The evidence is, that Sir T. Lennard got possession, not that we did. There is no remedy but for the turning out, when that is got, there is no other remedy till the possession is regained by ejectment. Again, this action would not lie for an *interesse termini*. An ousted termor has a less estate than an *interesse termini*, and it ceases to be assignable as soon as he is turned out. *Beck v. Phillips*, (5 Burrow, 2830); 1 Cruise's Dig. 227, par. 21; Coke Littleton, 240; 1 Wm. Saunders, 277f, note. [*Monahan, C.J.*—The count does not allege a trespass it alleges that a trespass had been originally committed.] There is no precedent for this action. If you turn a man out of possession and do not prevent him from going back, he never could recover mesne rates. A tenancy determined by disseisin never resumed, cannot be the foundation of such an action. [*Christian, J.*—Have you any authority for this, that the putting out of a termor has the same effect as the disseisin of a tenant of the freehold?] No. [*Christian, J.*—The ground of its being so in the case of a disseisin, is that the disseisor becomes himself the tenant of the freehold.] At the close of the argument, *Kelly* cited *Doe v. Wright*, (10 A. & E. 763); *Barnett v. Earl Guildford*, (11 Ex. 19); *Doe v. Wellsman*, (2 Ex. 368).

Cur. adv. vult.

June 11—CHRISTIAN, J. delivered the judgment of the Court. [His Lordship read the first and second counts of the summons and plaint.] The third count is more general. Whether these counts or any of them constitute a good ground of action, is a question we have nothing to do with. There is no demurrer nor motion in arrest of judgment. There have been pleadings down to surrejoinders. The duty of the judge at the trial was simply to try these

issues. The only legitimate subject of exception was the mode in which he discharged this duty. Unless he mis-directed the jury, the plaintiff must succeed whatever be his merits. I make this commonplace remark, because it disposes of nine-tenths of the arguments addressed to us. The third count is immaterial. The first five issues constituted the case. It contains three elements. Is Clones a town in which the statutable office could exist? Secondly, Was the plaintiff duly appointed? Thirdly, Did he take the necessary oaths? No issue was taken upon the general averment in the first count of a continuous disturbance. The exceptions, in whatever else they may fail, do not fail either in number or comprehensiveness. There are two sets of exceptions, 18 and 22, 40 in all. The one broad contention that the plaintiff had no case to go to the jury, constitutes the gist of this mass of irrelevant verbiage. Keeping within the issues and beginning with those taken on the first count, the first question I will consider is, Was there evidence to go to the jury, that Clones was a town in which the office of weighmaster under the Statute of Anne could have legal existence? It was contended that the only person to appoint is the person to whom tolls and customs belong, and, therefore, if there is no such, there can be no weighmaster. Clones is neither a city nor borough and the burden of proof was on the plaintiff. What was the evidence? Dr. J. Brady proved that since he knew Clones, there were fixed in front of the market house, and in front of the shambles large boards with tolls and customs on them, and at the foot, "Hugh M'Mahon." Duffy and Reilly gave similar evidence. By the 57 Geo. 3, c. 108, "Persons collecting customs shall erect in some conspicuous place a printed board having thereon a schedule in large and legible characters, and the names of the persons collecting the same, and of the person or persons or corporation claiming right to the same." It was plainly a matter of inference to be left to the jury, that these boards were so set up in obedience to the statute, and it was proof that tolls and customs were legally leviable in Clones. So far as we can gather, they seem to have been payable for weighing. There is other evidence free from that observation. Reilly proved he paid £10 a year, &c., and charged imposts which were not fees for weighing. The three proved also, that when meal and potatoes were brought, besides the fees paid, the buyers used to pay certain rents for the liberty of re-selling. In other words, stallage was one of the imposts in use in the Clones market. There is authority that stallage is a toll.—*Lockwood v. Wood*, (6 Q.B. 31). If there were no more, was not all this evidence to go to the jury, that there were tolls and customs payable in Clones? There was evidence no doubt the other way, as Ellis and several witnesses proved they never knew tolls and customs to be paid, which means of course according to their individual knowledge of what tolls were. But there was clearly evidence to go to the jury. I am disposed to put the case on a broader foundation. As far as living memory extends, there has been a monopoly of charges, for which there is no authority but prescription or usage. Now putting the statute of Anne out of the question, in what respect do these fees fail to answer the term tolls and customs? Is a compulsory impost levied by the

lord of the manor the less a custom, because there is a correlative obligation on him to weigh the goods of the party paying? Stallage again since the argument in this case, has been laid down in *Mayor of Yarmouth v. Groom* (1 Hurlstone & Colman, 102) to be a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. *A multo fortiori* tolls must be such fees as were here charged. It is plain the Legislature meant to include every market town. If we will construe the terms tolls and customs with the same liberality as in that old case in *Lutwyche*, not only was there evidence to go to the jury, but evidence on which they could not find otherwise than in the affirmative. Therefore all these exceptions in reference to the first issue must be overruled. The second question is, was M'Mahon duly appointed? In *M'Mahon v. Lennard* (6 H. of L. 970) the office was held to be a freehold office. Acting in an office is proof of appointment. Was there evidence in the present suit? The plaintiff says he has proved that from his father's death till 1851, he performed the duties, and that that is sufficient presumptive proof. The defendant says this was under circumstances which repel the presumption. It is necessary to revert to the state of things existing in Cloues. There was clear evidence of tolls and customs. The plaintiff seemed to fence with the question, who was the owner of the tolls and customs in a way I do not comprehend. I think it was Sir T. Lennard. He was liable to a penalty of 40s. a month. Therefore if M'Mahon was not weighmaster under the statute of Anne, there was a continuous penalty of 40s. a month. There was acting. There is *prima facie* proof. But it is said the fees were in excess of the statutable fees. The plaintiff cannot, it is said, aver he was weighmaster under the statute, because that would be imputing to himself extortion, for which he might stand in a dock. That was a strong topic to put to the jury, but its effect was to weaken the evidence, not to annul it. There remains the evidence that statutable acts were done. No doubt the proof was not so complete as if the statutable fees only were taken. But it was for the jury to say as to this. Would the jury impute to Sir Thomas Lennard illegality, or would they impute to M'Mahon that he had taken larger fees than allowable? The judge could not direct them upon that. I have been assuming that the fees were not statutable. But if they were, the defendant's whole case fails. When the statute of Anne was passed, it did not take away from the lord of the manor his rights to existing duties. The office was a freehold office. These fees were known to be paid as long back as memory went through three generations of the M'Mahon family. It was unreasonable that the public should be twice taxed, taxed with the old fees to the lord of the manor, and the new ones. There would therefore be probably a fair adjustment. This is a theory which, if there be any evidence of it, would reconcile M'Mahon's receiving the larger fees, with his being weighmaster under the statute. There was evidence in what Ellis himself swore, and the following facts were proved *i.e.* there was evidence of them,—that Sir Thomas Lennard was owner of tolls and customs; that they consisted of ancient fees in part; that Sir

Thomas being bound to provide an officer, M'Mahon is found acting. That the fees were larger is accounted for by the fact, that these fees were farmed at a rent. I have as yet said nothing as to the documentary evidence. It corroborates both the existence of tolls and customs, and the appointment. There is Ellis's letter of 1846. M'Mahon on the 20th July, 1848, asserts his right to a freehold office. It was said and truly said, he did not mean there the Act of Anne, but the Butter Act of Anne. That is immaterial, because he was asserting a statutable right. The only statute which would give this right was the one of Anne. No reply was given to that letter. This is corroborative evidence. The exceptions in reference to the second issue must be overruled. The third question is comprised in the 3rd, 4th, and 5th issues. There are two oaths; that of W. and M., and that in 10 G. IV., c. 7. In *M'Mahon v. Lennard* it was held that the former was dispensed with; but the plaintiff was bound to take the R. C. oath. There are then the oath of office and the oath required by 10 G. IV., c. 7. We have nothing to do with the first, but follow the House of Lords. Acting is evidence of the oath being taken for the same reason that it was evidence of the appointment. No proof was given by the defendant in rebuttal of this presumption. All the exceptions in reference to the first oath must be overruled. The same applies at the close of the plaintiff's case to the second oath. But it is different with the judge's charge. And the defendant contends that the rebuttal was so strong that the judge should have withdrawn the question from the jury. No section of 10 G. IV., c. 7, appoints the time or manner for taking the oath in an office like the present. In *M'Mahon v. Lennard*, Lord Wensleydale said, "The oath ought to have been taken either within the month or within the three months, or on beginning to exercise the office, it is uncertain which; and the safer course would be, no doubt, to take the oath on beginning to act, or one month before beginning to do so, which would be good if the time stated in the 21st section (obviously a mistake for the 20th), namely, three months, was the right one; but if the oath is not taken at all, the office becomes void." He, therefore, thought time and manner in the 20th section were not directed, and if the oath was taken when beginning to exercise the office it would do, and the office be only void if not taken at all. All the defendant's rebuttal assumes the plaintiff was bound to follow the 20th section. His proof of searches made in certain repositories fails for three reasons—1. Compliance with that section was not necessary. 2. Even if the case came under the 20th section, the neglect of the officer to record the oath would not destroy the efficacy of the oath if in fact it was taken. 3. The search was insufficient. The oath might have been taken in the Court of Chancery, or at Quarter Sessions, or before a judge of assize. No sufficient search was made in the Court of Chancery, and none at all in the Court of Assize; and as to the Court of Assize, no evidence was given of where the plaintiff resided. It was some evidence, but I have heard no authority that its effect is to wipe out the proof by acting. The judge's duty is to leave the evidence on both sides to the jury. That the plaintiff did not come and prove

he took the oath, was a topic to insist on to the jury. The jury thought fit to find the oath was taken. I believe that is contrary to the truth of the case, and if on the jury I would not have concurred in that; and if, instead of this mass of bungling exceptions, the defendant had thought proper to strike at the weak point of the case, he should have sought to set aside the verdict as being against the weight of evidence. But to end this litigation would seem to be a secondary object with the parties who have shown themselves desirous to harass and weary out the plaintiff, and, to the utmost of their poor ability, to affront the distinguished judge who presided at this trial. By the sixth exception in each set, the judge was required to direct the jury that there was no evidence by which the jury could measure the damages. This is grounded on a mistake. The legal fees were the standard. The seventh and eighth issues raise questions of fact. The ninth plea is exceedingly absurd in its form. It is obvious that both the plea and the issue involve an admission that the things all did occur; but the Chief Justice did not turn the parties round on that, but made sense of the case, and left a question to the jury. The 17th and 18th exceptions in the second set are not relevant to any issue. That is enough to say of them. This finishes the exceptions in reference to the first count. Of the issues which grow out of the second count, three only need be noticed, the 15th, 16th, and 19th issues. The 13th, 14th, and 15th exceptions in each set apply to these three issues. The 13th exception is distinctly pointed to the 15th issue. That is, if it was a subsisting tenancy; and the only part that had any application was that alleging there was no evidence of title. All the rest of trespass, being possessory, was irrelevant. We are all familiar with the means by which tenancy from year to year is determined. Surrender, actual or by operation of law, and notice to quit. Neither was proved. The judge was asked to direct a verdict on this, and not to leave it to the jury to presume a surrender. To state this is to refute it. Reference was made to *Leigh v. Thornton* (1 B. & Ald., 625). The case is without resemblance. There, instead of any third person having come into M'Mahon's place, the landlord himself came in, and illegally held it. The 13th exception must be overruled. In the 14th exception again the issue was totally lost sight of. The question is, if these things occurred in fact. If they did, the issue must be found for the plaintiff. Nobody denies they did occur. That applies to the 15th exception. This second class of exceptions, more even than the other, displays a misapprehension of the course of a trial at Nisi Prius, and assumes that the judge, in trying the case, is to go through the whole merits of the action, instead of confining himself, as in duty bound, to the issues before him. In saying what I have said, I am delivering the judgment of the Court, but the reasons are my own.

Judgment for the plaintiff.

SAYERS v. BEGG.—June 8, 12.

Libel—Demurrer—Privileged occasion.

To an action by the plaintiff, an importer of French brandy, for falsely and maliciously writing and

publishing of him the following words—“Now, as to Mr. S., I warn him that I am willing to leave the matter to arbitration; as to his conduct I did not say half enough—it more resembles that of a freebooter than of an honourable British merchant,” the defendant pleaded that the defendant published a notice saying that he had tasted the brandy of some of the parties who got prize medals, and it was as vile stuff as ever was made; that the plaintiff employed B., an attorney, to write to him; that the defendant stated it was not to the plaintiff's brandy he referred, but that of some other person, upon which the plaintiff required to get from the defendant a sample of the brandy the defendant meant, and required that the defendant, at his own expense, should procure an advertisement to be inserted in the newspapers fifty times, stating that it was not to the plaintiff's brandy he alluded, but that it was of an excellent quality, and further required that the defendant should pay him a sum of £20, the plaintiff alleging that he had incurred expense to that amount; that the defendant applied both to the plaintiff and B., an agent of the plaintiff, and that both the plaintiff and his agent referred him to B.; that B. wrote to him, threatening immediate proceedings if the £20 was not paid, and the other terms fulfilled; that the defendant believed said demand to be extortionate, and had an interest in endeavouring to induce the plaintiff and B. to abstain from taking legal proceedings against him, and acting bona fide wrote and published the words in question in a letter to B. without malice, and did not publish them except to the said B. Held, that this defence disclosed a privileged occasion.

The first count of the summons and plaint complained that the defendant falsely and maliciously wrote and published of the plaintiff the words following, that is to say, “Now, as to Mr. Sayers, I warn him that I am willing to leave the matter to arbitration; as to his conduct I did not say half enough: it more resembles that of a freebooter than of an honourable British merchant,” meaning thereby that the plaintiff was guilty of conduct unbecoming a merchant and a gentleman. The second count stated that the plaintiff was a merchant, whose business was to import French brandy, and sell it in all parts of the United Kingdom. It then stated the libel as in the first count, and concluded with the innuendo, meaning thereby that the plaintiff was guilty of discreditable and dishonourable conduct in his said trade as a merchant. The third count stated the libel without any innuendo. The substance of the plea which the defendant pleaded to the three counts was the following—that the defendant having published a notice saying that he had tasted the brandy of some of the parties who got prize medals, and it was as vile stuff as ever was made, the plaintiff employed Bloomfield an attorney to write to him; that the defendant stated it was not to the plaintiff's brandy he referred, but that of some other person, upon which the plaintiff required to get from the defendant a sample of the brandy the defendant meant, and required that the defendant, at his own expense, should procure an advertisement to be inserted in the newspapers fifty times, stating that it

was not to the plaintiff's brandy he alluded, but that it was of an excellent quality, and further required that the defendant should pay him a sum of £20, the plaintiff alleging that he had incurred expense to that amount; that the defendant applied both to the plaintiff, and Bright, an agent of the plaintiff, and that both the plaintiff and his agent referred him to Bloomfield; that Bloomfield wrote to him threatening immediate proceedings if the £20 was not paid, and the other terms fulfilled; that the defendant believed said demand to be extortionate, and had an interest in endeavouring to induce the plaintiff and Bloomfield to abstain from taking legal proceedings against him; that Bloomfield was also interested; that the defendant, acting *bona fide* wrote and published the words in question in a letter to Bloomfield without malice, and did not publish them except to the said Benjamin Bloomfield. The plaintiff demurred to this plea, so far as it purported to be an answer to the first two counts of the summons and plaint—1. Because it disclosed no privileged occasion. 2. Because it disclosed no occasion entitling the defendant to libel the plaintiff in his trade. 3. Because of the want of an averment that the defendant had reasonable grounds for believing what he said of the plaintiff to be true.

Palles (with him *Serjeant Armstrong*) in support of the demurrer.—In certain instances excess is only evidence of malice, but where the words are wholly unwarranted by the circumstances the rule as to excess does not apply. Expressions had been published by the defendant with reference to some brandies: that they might be taken to have referred to the plaintiff's, is evident from the fact that a prize medal had been given, and only to him. Sayers threatens legal proceedings. Begg does not say it was not a libel, but that the brandy meant was not the plaintiff's brandy, and therefore he is not injured. The circumstances show that Sayers was entitled to some public retraction of what was said, and a counter advertisement was agreed on. The only question between the parties was, what were the terms on which Sayers would consent to forego legal proceedings. A libel of this kind, if proved, referring to brandy, though not to Sayers individually, could be made the subject of an action if he showed special damage to him. [*Monahan, C. J.*—Would special damage have been necessary?] I admit it would, on the authority of *Evans v. Harlow* (5 Q. B., 624). Admitting against myself that to sustain that action special damage should have been alleged, still Sayers was justified, if he thought proper, in bringing an action against Begg, and showing special damage, and if he was even defeated, he would have been justified in vindicating his brandy. Whether we could have sustained that action without proof of special damage or not, we would have been entitled to have tried our chance. Therefore, it was a fair subject-matter of investigation between Sayers and Begg. They do investigate it, and the terms demanded by Sayers are threefold—that a written statement agreed to by the plaintiff should be given by Begg, and published. That was done, I admit. 2nd (what is of great importance to us), that he should have given us a sample of the brandy he did mean (he did not give us that); 3rd, that he should pay us £20, which we aver here was on ac-

count of expenses we had incurred. Because we had the audacity to so threaten an action unless the £20 were paid, were we to be told that we were dishonest, and this to be said of us in our trade? The position of the parties is to be looked to more than authorities. On the authorities it is plain that a statement of this kind was not made on a privileged occasion. [*Monahan, C. J.*—You admit the occasion was privileged for some statements, and that Bloomfield was a proper person to make some statements to, and therefore your argument is, that the statement so far exceeded what it ought to be, that it is wholly without the privilege]. The very words of the libel show it was published of the plaintiff in his trade, because the words contrast him with other British merchants. This Court has gone as far as any in extending the doctrine of privileged communication, but in *Ede v. Scott* (7 Ir. C. L. Rep. 607) it held the communication not privileged. [*Monahan, C. J.*—We decided that, I think, on the ground that there was no occasion to say the thing. That was a verbal slander, and I think we went upon this, that the occasion in question did not authorize the words, because we did not mean to go contrary to *Ruckley v. Kiernan*, decided a short time before, and therefore it was that, be it right or wrong, I do not think we decided that on the ground of excess, but on the ground of the occasion. We never meant, in *Ruckley v. Kiernan*, to decide that if a man made a statement totally unconnected with the subject-matter, that we should hold the occasion privileged. *Christian, J.*—Suppose the plaintiff said here to Bloomfield, "Have nothing to do with that man, he is a murderer." If a person is to charge an indictable offence, and the occasion be privileged, where is it to stop?—*Huntley v. Ward* (6 C. B., N. S., 514); *Tuson v. Evans* (12 A. & E., 733). Because we claimed damages, the defendant is not warranted in imputing felony to us. It comes within the rule; you may ask for a chattel without charging a felony. [*Monahan, C. J.*—That is not a felony that is charged, but very improper conduct. *Keogh, J.*—Dishonesty may be a felony, but does it necessarily imply an indictable offence? Brandy is our trade: are we to be told we are dishonest because we claim damages? *Christian, J.*—As a test of your argument, could it be sustained on the first count alone?] It could, on the authority of *Tuson v. Evans*.—*Lewis v. Clement* (3 B. & Ald. 702.)

Devitt (with him *J. E. Walsh, Q.C.*) contra.—The plea is pleaded to the three counts. The plaintiff does not demur to the plea save so far as to the first two counts, and therefore the Court has the advantage of the plaintiff's counsel's opinion that without the inuendo the plea is good. It must appear from the plea—1. That the words were spoken in discharge of a duty, or by a person having an interest. 2. To a party having a corresponding interest. 3. Without malice, *bona fide*. 4. That the words admitted to be false were believed to be true. If it be once established that the occasion was privileged, and the subject-matter be not travelled out of, the question if the words be too severe, too abusive, is for the jury, not for the Court, with this exception, that where unjust and improper motives are imputed, which did not arise out of the matter, there are some indications the

privilege is forfeited. It is averred and admitted that the allegation brought by the plaintiff that the defendant had libelled him was false in fact. It must be taken on this record to be so. Then this takes place, a negotiation is opened in order to save this Dublin merchant the annoyance of a lawsuit. What occurs is this, not that an advertisement is agreed upon, but that the plaintiff requires a puff of his own goods, and he requires that this puff should be inserted fifty times. We objected to pay the £20. These facts being unexplained, nothing could be more extortionate. Smarting under the pressure of this conduct of the plaintiff, the defendant writes to the attorney, remonstrating with him, and comparing the plaintiff to a freebooter. It is admitted that no special damage arose out of the original libel.—*Toogood v. Spyring* (1 Cr. M. & R., 193); *Hopwood v. Thorn* (8 C. B. 293). [*Ball, J.*—I do not understand that it is disputed that this was a privileged occasion.] *Carr v. Duckett* (5 H. & N., 783), followed in *Halloran v. Thompson* (14 Ir. C. L. R., 334), where it was held that the alleged excess was for the jury, and did not vitiate the defence. *Murphy v. Kellett* (13 Ir. C. L. 488), where the eighth ground of demurrer was that the defences did not aver facts sufficient to justify the use of the words concerning the plaintiff in his trade.—*Carr v. Hood* (1 Lord Campbell, 355); *Paris v. Levy* (2 Fos. & Fin. 71); *Seymour v. Butterworth* (3 Fos. & Fin. 372); *Morrison v. Belcher* (3 Fos. & Fin. 614); *Beatson v. Skene* (5 H. & N. 898); *Harrison v. Bush* (5 El. & Bl. 344). *Tuson v. Evans* has been overruled by *Cooke v. Wildes* (5 El. & Bl. 328). If *Tuson v. Evans* were still law, the plaintiff's contention would be intelligible. *Huntley v. Ward* was decided simply on the ground that the libel travelled out of the subject-matter altogether, and the judge asked the counsel if he ever knew of such a plea.—15 C. B., N. S., 392, followed in *Prior v. Kinnelly* (15 C. B., N. S., 422); *Campbell v. Spottiswoode* (3 Best and Smith, 769); *Jackson v. Hoperton* (4 New Rep., 242), which last case is the last case on the subject.

Serjeant Armstrong in reply.—The defence shows that the subject-matter has been travelled out of and exceeded. The plaintiff is a brandy merchant, and rightly or wrongly was under the impression that his brandy had been libelled. The result was a denial that that was the brandy meant, and it was open to the plaintiff not to be satisfied with that explanation, and only on certain conditions to waive his right to bring an action. Fifty advertisements were not an unreasonable number. We have the right to point the innuendoes as we have done: that cannot be questioned. The innuendo is, that the plaintiff was dishonest in his trade, and if that be far-fetched, a traverse is the way to meet it. But if a privileged occasion is sought to be established, the defendant is bound to adopt the sense, and to justify in that sense. The dispute is as to whether the defendant is to indemnify the plaintiff. What has that to do with his character as a trader? Where the subject-matter is kept to excess is for the jury to prove malice. Some confusion has crept in with regard to the word "excess." If the excess travels out of the subject-matter, that is for the Court. The defendant has shown affirmatively that he had no

right to attack the plaintiff in his trade. There are three classes of cases—1. Words slanderous *in se*, and special damage unnecessary. 2. Words where special damage is not necessary, because spoken of a man's trade. 3. Words which require special damage. We do not allege special damage, and because "meaning that the plaintiff had been guilty of discreditable and dishonourable conduct in his said trade" are the words of the innuendo. [*Christian, J.*—Might it not be said without any great violence that the words were spoken of him with regard to his trade, if the plaintiff was taking advantage of his position to advertise his goods? 50 looks a suspicious number. *Monahan, C. J.*—A man would not have a right to write to an attorney adding to as much abuse as he liked about the thing in question that on another occasion the party was guilty of felony.] The defence amounts to this: "You said I libelled you, and required certain terms, that warrants me in writing to your attorney that you are dishonourable and discreditable in your trade." I could understand his writing that it was extortionate, and that 50 advertisements exceeded what was necessary; but it is this, I beg leave to add Sayers has been guilty of discreditable conduct in his trade. [*Keogh, J.*—I understand that to mean that it is discreditable to him as a British merchant, having another man in his power, to press him so hard as in this case.] You are not at liberty to read these words "in his trade" otherwise than in their usual way. The meaning of dishonourable in his trade is in the dealings of his trade. [*Keogh, J.*—May it not be outside of his trade?] The received meaning always is the carrying on of his trade. [*Keogh, J.*—Are the words outside the transaction between the parties? *Monahan, C. J.*—The cases go to this extent, if he said it was a most roguish thing to extort £20, the fact being it was all a sham and a scheme between you and him, when there was no injury incurred, I think if the man honestly believed it, that the occasion would be privileged; and if he said, "No decent attorney would do what you are doing, and no decent merchant would do this, and if it was known on the Exchange he would not be associated with," that would be a privileged occasion if he kept within the subject-matter. The truth is, *Tuson v. Evans* was decided on grounds which no one ever dreamed of putting forward.] *Robertson v. M'Dougall* (4 Bingh. 670) was decided in 1826. This is a very open question at present. [*Christian, J.*—Is there any analogy between the right of a public writer criticizing and a private person?] The exigencies of mankind require that there should be free discussion. [*Christian, J.*—A private man has still more right to express himself freely in respect to the subject-matter of his own business.] Was it necessary for the purpose of expressing his belief about the £20, that he should say this of the man in his trade. It is a mere accident here that the man was in trade. [*Monahan, C. J.*—According to that argument it would not be competent to say, "No merchant would act as he has done." *Keogh, J.*, referred to a case in England which had made much excitement. Was not that discreditable, and was that a part of his trade? He did not prosecute, and might it not be said that that was discreditable to him in his trade?] It might not. [*Keogh, J.*—They were

great lenders of money; they did not cheat anyone; they were not accused of cheating anyone—they were cheated.] There might be a traverse of the defamatory sense. In *Huntley v. Ward*, the judge took the case into his own hands; he did not leave it to the jury. The presumption here is, that the plaintiff had something to complain of. *Cooke v. Wildes* was referred to, and supposed to overrule *Tuson v. Evans*. [Monahan, C. J.—Lord Campbell took it upon himself to hold that the occasion was privileged, but that the words were not, because of the motives imputed, and the question was if he was right in that. He directed a verdict for the plaintiff because he thought the excess rendered it an unprivileged communication. He came to the conclusion that was wrong, and that he would be wrong if he directed a non-suit, but that he should have submitted to the jury whether excess was not evidence of malice.] *Cooke v. Wildes* decides nothing pertinent to the present case. The language in *Murphy v. Kellatt* must be taken *secundum subjectam materiam*. “Keeping within the subject-matter” is the meaning of it. The innuendo was that though this man got a high price, he would supply South African sherry.—*Prior v. Kinnelly* (15 O. B., N.S. 422.) [Christian, J.—A mode has occurred to me of testing your argument, whether this lies outside. An innuendo would have been bad before the changes in the law which went beyond the prefatory averments. The Court would have judged of that. Suppose an innuendo followed the first count such as follows the second, would that be demurrable?] I think not. [Christian, J.—If not, the innuendo does not go beyond the prefatory averments; then it would be a question for the jury if published *bona fide*.] The charge is, “You libelled me in my trade.” The answer is, “I did not libel you in your trade.” [Christian, J.—The very same thing might be said of what I suggest.]

Cur. adv. vult.

June 12.—MONAHAN, C. J.—This case comes on demurrer to a plea of privileged communication. The action is brought by the plaintiff, a Mr. George Sayers, against the defendant, Mr. Joseph Begg. There are two counts in the summons and plaint. Without going in detail, the substance is, that this gentleman is a merchant, whose business is to import French brandy, and to sell it in all parts of the United Kingdom; and it would appear that he had got a prize medal. I suppose the defendant was a brandy merchant. It appears he published a notice saying that the brandy of some of the parties who got medals he had tasted, and it was as vile stuff as ever was made. Sayers took this to himself, and threatened to take an action against Begg, alleging that by the allusion he referred to him. A long correspondence ensued, and Begg stated it was not the plaintiff's brandy that was meant, but that of another, who should be nameless, for fear lest he should follow the plaintiff's example. Sayers required to get a sample of the brandy the defendant meant. He required that Begg should publish a retraction, and state distinctly it was not to Sayers' brandy he alluded, but that it was of a first rate quality, and pay a sum of £20 on the allegation that he had incurred £20 expense, I suppose

by consulting counsel or attorney. He required as a condition that Begg should give this sum, and publish the statement fifty times. It seems Begg thought these were rather hard terms, and required to be referred to Sayers himself, that he thought him more likely to stop the proceedings than the attorney was. Either the plaintiff or his agent, on being referred to, referred him to Bloomfield. In that state of things Begg wrote a letter to Bloomfield, the substance of which is this—“As to Mr. Sayers, I warn him that I am willing to leave the matter to arbitration. As to his conduct, I did not say half enough; it more resembles that of a freebooter than that of an honourable British merchant.” In the first count the innuendo, which by the Common Law Procedure Act we must take to be the meaning properly given to these words is, that his conduct was unbecoming a merchant and a gentleman. As to the second count, which has caused some difficulty in the minds of the members of this Court, it states that the plaintiff was a merchant, and traded, and the innuendo is thereby meaning that the plaintiff was guilty of discreditable and dishonourable conduct in his trade—in the first, of conduct unbecoming a merchant and a gentleman; in the other, of dishonourable conduct in his trade as a merchant. The defendant has pleaded distributively, though not nominally, yet really that without malice, and for the purpose of inducing Sayers to forego some part of his demand, he wrote the letter in question to Bloomfield. It is admitted in fact the occasion is privileged, and cases in England, and (if I may refer to our own Court) here also, have been cited to show that where an action is commenced, the party may communicate with the attorney to induce him to forego in language no matter how abusive; and following Lord Campbell, that if the language, though in excess, is germane, and a portion of the transaction, the Court will not determine that the party has lost the privilege by the excess, but that it is to be submitted to the jury, and if they think he was influenced by malice, then the party loses his privilege. There was a strong case of that kind in this Court, where the allegation was that a young gentleman had committed perjury. There the object of the writer would have been satisfied by stating that the young gentleman was mistaken. We thought the word was very strong, but being germane (if I may use the expression), that the party did not so lose the privilege, but that I, or whoever might try the case, would leave to the jury the want of necessity to make that insinuation or charge. The plaintiff's counsel's argument here was this—They referred us to a recent case, in which it does appear that the Court did hold excess was a matter for the Court itself. A party had recommended a man as a gardener. He acted in a very outrageous manner; he said his conduct resembled that of a raging maniac. He wrote to him this letter containing this particular charge. There seems to have been considerable difficulty in coming to the conclusion that the occasion was privileged because that was not asked for. It was the case of a person giving this to a person holding in some sense the position of a former master, &c. The Court seem to have had some difficulty in deciding whether the occasion was privileged. Probably it will be a doubt if that case

can overrule these cases in the Queen's Bench. If it were that his calling him a raging madman was unconnected, it would be in accordance, and not overruling, because if a party writing to an attorney chooses to go into extraneous matter, then the privilege ceases. Serjeant Armstrong argues here this is *dehors* the subject-matter. For some time I thought the true construction of this was that it would be something *dehors*; because the allegation was that this person carried on the trade, and the allegation was that this was of such his trade, thereby meaning improper conduct in his said trade. If that were to be taken of the buying and selling of his commodities, it would come within the principle relied on by Serjeant Armstrong; but we cannot read this summons and plaint by itself; we must take it from the plea itself, which shows all the circumstances under which the letter was written: that this gentleman, in consequence of the previous allegation, insisted on putting forward these advertisements; and if this man honestly and conscientiously thought that this was for the purpose of puffing his commodities, we think it would be dishonourable conduct in his trade, and the whole arose out of his said trade. At the trial this case would take either of these two phases. If the jury think the true meaning was in relation to the plaintiff's dealings in his trade, they probably may find that this publication had no reference to his trade at all. But if they think the innuendo in the libel does not necessarily confine it to that, but may refer to the other I have referred to, then the question will be, if the defendant had just grounds for the opinion he expressed, and so there will be the question if this pleading is or is not supported. These cases in the Queen's Bench and in this Court must be reviewed in another Court, if reviewed at all.

CHRISTIAN, J.—I will state the exact ground on which I think this is a good defence. I was not a member of this Court when several of these cases in this Court were decided. The innuendo in the second count, if you look to nothing else, I should hold not to be within the privilege. [His Lordship read the words of the innuendo.] It would appear perfectly obvious that this means in his trade properly so called, the buying and selling of his brandy, and therefore irrelevant to the occasion referred to as much so as if the words spoken to Bloomfield were that he murdered one of the clerks in his stores. These cases referred to to show what are the limits, can make no difference. It also belongs to the Court to determine that inflammatory matter is irrelevant. I should be of opinion the Court should interpose, and not submit the case to a jury. But when you look, as you must do, at the special matter contained in the defence the meaning is altered. The second count is to be construed as if the several matters contained in the defence were prefatory matters stated in the count. The plaintiff was not satisfied. He thought he had the defendant at an advantage. He demanded advertisements which, as the defendant says, strongly praised the plaintiff's brandy. The defendant being *bona fide* of opinion that this was the course the plaintiff was pursuing, that it was unfair, that it was extortionate, and unworthy of a British merchant, said the plaintiff was guilty of dishonourable conduct, &c. The mean-

ing is changed from what it would otherwise be altogether. The meaning is, then, not that he spoke this of him in his trade, but in a matter relating to his trade. It is no longer irrelevant—no longer outside the matter. It may be excessive—it may be too strong—it may be unwarranted; but if once you come to the conclusion that it was not irrelevant, it belongs to the jury, not to the Court, to say if this was a cloak for maliciousness. Therefore, I think this is the true ground that the meaning of the innuendo is altered by the defence from that which would support the argument of Serjeant Armstrong, by whose arguments I was much impressed.

Demurrer overruled.

Court of Appeal in Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

SKELTON v. FLANAGAN.—Feb. 1.

Practice—Appeal from order—Right to begin.

Where there is an appeal from an order other than a decretal order, the appellant's counsel is entitled to begin.

THIS was an appeal from an order of the Master of the Rolls. When the case was called on,

Serjeant Sullivan, on behalf of the petitioner, in the Court below, the respondent in the appeal, claimed the right to begin, as the appeal was from the entire order.

Brewster, Q.C., *contra*.—No order has been made on the merits, and on an appeal from an order on an interlocutory motion the appellant is entitled to begin.—*Brereton v. Barry* (10 Ir. Ch. Rep., 376).

THE LORD CHANCELLOR.—It is only where the appeal is from the entire of a decree or decretal order that the petitioner has a right to begin.

Court of Chancery.

[Reported by Edmund T. Bowley, Esq., Barrister-at-Law.]

HARVEY v. FERGUSON.—Jan. 13, 14.

Practice—Costs—Account—Injunction to restrain waste—Estrepelement.

A suit for an injunction, in the nature of a writ of estrepelement to restrain waste, when no answer is filed, and no account is sought, should not be brought to a hearing by the petitioner merely for the purpose of getting his costs of suit.

THIS was a suit for an injunction in the nature of a

writ of *estrepement*, to restrain the respondent from committing waste by the cutting and sale of turf. An injunction had been granted at the Rolls, upon a motion founded on the petition and verifying affidavit, and the case now came to a hearing.

Peebles, Q.C., (with whom was *A. Lane*) on behalf of the petitioner, offered to waive the account sought by the petition. There was no appearance for the respondent, and no answering affidavit had been filed.

THE LORD CHANCELLOR.—I can give no costs unless the parties seek an account. I do not like to make a precedent of bringing such cases as this to a hearing. The 3rd General Order of June, 1856, was framed with that view. The proper course would have been to serve a notice on the respondent that you did not intend to apply for an account. I shall give you a decree for an account with the usual direction as to costs, or, waiving the account, you may take the writ without costs.

Jan. 14.—*Peebles*, Q.C., at the sitting of the Court, referred to the case of *Lord Valentia v. Glascott* (*vide infra*); *Lewis v. Fiddes* (*coram* Brady, C., not reported); *Burgess v. Hills* (26 Beav., 214); and *Mayhew v. Maxwell* (3 Law T., N. S., 847), as authorities to prove that costs could be given in such cases even where the account was abandoned, or was not originally sought.

THE LORD CHANCELLOR.—These turf cases have been before this Court for the last century or so, and it has never been the practice to bring them to a hearing for the costs alone.

Decree for an account accordingly.

[NOTE.—Through the kindness of Mr. Adair, the counsel for the petitioner, we are enabled to give the following report of the case of *Lord Valentia v. Glascott*, as taken from the Registrar's notes:—

Lord Valentia } May 22, 1861.—Rolls order.

Glascott. } Mr. Adair moved for an injunction to restrain respondent from cutting timber or trees, and from carrying away those cut. On reading prayer of the petition, Rolls' certificate, affidavit of petitioner's solicitor, Injunction ordered to restrain cutting or carrying away timber on lands in lease of April, 1857, in the petition mentioned, and from committing any waste on lands till answering affidavit and further order.

Hearing.—Rolls.—Nov. 30, 1861.—No appearance for respondents. On hearing cause petition filed, May, 22, 1861, and verifying affidavit, Rolls order, injunction order, affidavit of Mr. Mills, petitioner's solicitor, affidavit of bailiff, dated November 4, 1861, injunction made perpetual; and petitioner, by counsel in open Court, waiving account prayed by petition, his Lordship doth not think fit to direct any account, and it is ordered that said respondent, John H. Glascott, do pay to the petitioner his costs of this suit when taxed and ascertained.]

DUNBANY v. DUNNE.—Jan. 15.

Waste—Injunction in the nature of writ of estrepement—Practice—Account waived at hearing—5th G. O. June, 1856.

Where in an injunction suit in the action of a writ of estrepement to restrain waste, the case is forced to a hearing by the conduct of the respondent, the petitioner, if successful, is entitled to his costs of suit, although an account of the waste committed be waived.

Semble—When in such suits no account is sought, or the account is waived, the petitioner should serve a notice on the respondent to ascertain whether the right to continue the injunction is disputed.

By indenture of lease bearing date the 8th of May, 1835, part of the lands of Belper, with other denominations, situate in the county of Meath, were demised by Joseph Laphan to David Lynch for three lives or forty-one years, whichever should last the longest. This lease contained a covenant on the part of the lessee to repair and keep in repair all the demised premises, together with all buildings, trees, fences, hedges, and plantations thereon. At and previous to the filing of the present cause petition all the estate and interest of Joseph Laphan had become vested in the petitioner, Lord Dunsany, and all the estate and interest of David Lynch in the respondent, Laurence Dunne.

The petition prayed that the respondent might be restrained by injunction from felling timber or timber-like trees on the lands comprised in the before-mentioned lease, and from carrying away or disposing of any timber or timber-like trees already cut or felled; and also from quarrying any stone out of these lands for any other purpose than the necessary consumption for the cultivation of the lands. An account was sought of the trees and timber already cut and felled, the petitioner offering to waive any account of the stones previously quarried. The petition stated that the respondent had cut down a number of trees of considerable value which were growing upon the lands at the date of the demise, and which were highly ornamental to the view from the petitioner's adjacent demesne of Dunsany Castle. The respondent was also charged with having told Mr. Wilkinson, the petitioner's agent, who remonstrated with him on the commission of this waste that he (the respondent) had cut the trees; that he would do so again; and that he had a right to cut them.

The respondent, in his answering affidavit, disputed the nature and amount of the waste committed, alleging that he had only thinned some overgrown hedge rows by cutting away a few ash suckers of no value; and he further stated that the present suit was not instituted *bona fide* for the purpose of preventing waste, but in consequence of some disputes and differences which had arisen between the petitioner and the respondent in reference to other matters. The respondent also maintained that he had been for a great many years in the habit of thinning the hedge-rows in a similar manner, and that no objection had been raised, as it was manifestly for their advantage.

The Master of the Rolls had granted an injunction, and the case now came to a hearing. Evidence was given which showed that the injuries complained of were of a substantial character.

Brewster, Q.C. (with him *Serjeant Sullivan* and *F. White*), for the petitioner, contended that the Court should give damages for the waste committed, which was a direct breach of the covenant contained in the lease of the 8th of May, 1835; but that the account prayed for might be waived, as the actual value of the timber cut down was probably trifling. 31 Geo. III. cap. 40, was referred to.

The Solicitor-General (with whom was *W. C. Smith*), for the respondent.—This case ought never to have been brought to a hearing for many reasons. The value of the waste committed is insignificant; and on the authority of *Doran v. Carroll* (11 Ir. Ch. Rep. 379), the Master of the Rolls considered that as the damages would be merely nominal, the Court ought not to entertain the suit. On this account his Honor reserved the question of costs on the occasion of the hearing of the injunction motion. The injunction too was not resisted at the Rolls; and as everything required was obtained by it, this suit should not have been carried further. The timber cut down cannot be held to be ornamental, for ornamental timber is timber planted for the purpose of ornamenting the place on which it is grown; and though Lord Dunsany may happen to own an adjacent demesne, the view from which may be improved and beautified by these trees, that fact will not render them ornamental within the proper definition.

W. C. Smith, on the same side, cited *Lambert v. Lambert* (2 Ir. Eq. Rep. 210); *Brace v. Taylor* (2 Atk. 253), to prove that the Court will not interfere when the subject-matter of the suit is beneath its dignity.

F. White replied.

THE LORD CHANCELLOR.—In cases of this kind it is not customary for the parties to bring the suit to a final hearing; and it is very much to be deprecated that a practice should be made of taking any proceedings after an injunction has once been obtained. Having regard to the ancient practice of this Court, and also of the equity side of the Court of Exchequer, it appears from Howard's Equity Exchequer Practice that suits for the purpose of obtaining an injunction in the nature of a writ of *estrepement* to stay waste were commenced by a possessory bill. On this bill a motion was made *ex parte* by the plaintiff for an injunction, and if this were granted, no further proceedings were taken. The injunction was, practically speaking, perpetual; and where no answer was filed, and no cause shown by the defendant, no costs of the suit were given to the plaintiff. Where the defendant resisted the plaintiff's case, a notice was served, and the Court virtually heard the case on the affidavits filed by both parties.

Such being the former practice of this Court, when a change was introduced into the procedure by the Court of Chancery Regulation Act of 1850, I was anxious to assimilate the new practice to the old as far as was practicable; and as it was observed that the effect of the 27th General Order of 1851 would be to dissolve the injunction in cases such as the present, if the petition were not set

down for hearing within the time prescribed by the order, I accordingly made a rule, which will be found as the 3rd of the General Orders of the 13th June, 1856, that so much of the 27th General Order as declared that a cause petition if not set down for hearing for two whole terms, should stand dismissed, should not apply to petitions filed for injunctions in the nature of writs of *estrepement* to stay waste. The consequence of that order has been that if no affidavit in answer was filed by the respondent, and no account was sought by the petitioner, no further proceedings were taken, and the object of the suit was obtained by the injunction alone. Where, however, the petitioner's right to an injunction was disputed, or the fact of the commission of waste was not admitted, an answer was filed, and in such case the cause was necessarily brought to a hearing. It does, I confess, appear to me to be a most unwarrantable and a most wanton thing that where no opposition is made to the petitioner's claim, the case should be brought to a hearing merely for the purpose of having a decree made for the amount of the petitioner's costs. If the petitioner seeks an account of the waste committed the case is of course different; but where no account is prayed for, or the account is waived at the hearing and no answer is put in by the respondent, I think the petitioner is not entitled to costs. Unless, indeed, by some notice on the part of the respondent the petitioner is forced to bring his suit to a hearing, such a proceeding would be unjustifiable; where a notice is served the case seems to me to be different.

With respect to the circumstances of the present case, in the order of the Master of the Rolls there was a special reservation of costs; and it was in some measure necessary that this question should be disposed of. No costs could be given at the time of the injunction order, for they had not been asked for by the petitioner in his notice of motion, though he did, I believe seek to get them subsequently by his affidavit in reply. That being so, we must consider now what is the nature of this suit. Nothing was done between the date of the order of the Master of the Rolls and the filing of the answering affidavit of the respondent, and the question then arises as to what issues are raised between the parties by this affidavit. It is a wholesome rule of practice that in such cases as this the injunction, though expressed to last only until the hearing of the cause, would, in fact, have remained for ever if no further proceedings were taken by either party. However, although the respondent by his letter of the 27th of March acknowledges that he had done wrong in the acts of waste he had committed, he files an answer to the cause petition, in which he disputes the statements of the petitioner as to the nature and value of the trees. The language of the letter is very reasonable and proper if acted on in a similar spirit. He says, "With reference to your observations as to my cutting trees on the hedgerows, I could not wish to be on bad terms with my landlord; and although his interest in the land is not like what my own is, I will not cut more if his lordship wishes otherwise. You know that I explained to you in my own parlour that any I did cut were injuring the fence as well as the land about them." Afterwards, however, instead of submitting quietly to the

injunction, he raised the question as to what was the character and nature of the trees; and again, in his answer in the cause he raises the same question, a course which was wholly unnecessary for him to pursue. After the evidence which has been so fully and satisfactorily given in behalf of the petitioner, I cannot consider that the subject of the waste complained of was only offshoots, as represented by the respondent; but, on the contrary, actual trees of considerable weight and scantling.

What, then, is this Court to do? I can either give an account of the waste committed or damages by way of compensation for the injury done. It appears to me that there were very fair grounds for instituting this suit. The positive value of the sticks themselves when cut down may be but trifling, but when standing it may have been very different. Therefore the mere value as given by an account can be no fair test of the damage sustained. That being so, my mind is clear that the allegations of the respondent have been entirely displaced, and there are very good grounds for supposing that this proceeding on his was part of a deliberate plan to annoy and injure the petitioner. He knows he has no right to cut down trees on a forty-one years' lease; and the moment the landlord directed his attention to the fact that he was destroying ornamental timber, it was his business at once to desist. This suit, then, has been forced on by the respondent alone, and the petitioner is entirely free from blame in bringing it to a hearing.

In these cases, however, where an injunction is granted, it would be very prudent for the petitioner to serve a notice on the respondent to ascertain whether the right to continue the injunction is disputed. The object of the suit is obtained substantially by the injunction, and a short notice might save a great deal of expense and litigation.

Decree accordingly.

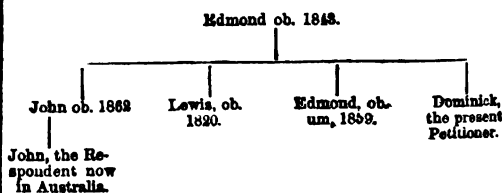
BURKE v. TULLY AND OTHERS.—May 30, 31.

Construction of will—Life estate—"Issue"—Estate tail.

An estate pur autre vie was devised to trustees to permit E, testator's eldest son, to have the use of same for his life, and after his death to permit the first and other sons of said E. to receive and have the profits for their lives, the eldest to be always preferred before the youngest, and on failure of issue male of said E, remainder to testator's second and other sons in tail male, remainder to testator's right heirs. Held, that the limitation of the life estates was precise and clear; and that the words, "on failure of issue," could not be imported from where they stood in the will, so as to create an estate tail to the prejudice of the life estates; and that the words, "issue" or "children" not being used, it did not come within the rule of Roddy v. Fitzgerald.

By indenture of demise, dated 20th May, 1785,

Isaac Stoney demised to John Burke the lands of Toberbracken, containing one hundred and eleven acres, and also the fairs held on, said lands, and the tolls, customs, benefits and profits thereof, to hold for three lives at the yearly rent of £60, with a covenant for perpetual renewal at a peppercorn fine. John Burke having entered into possession and, being so seised, duly made his will, so as to pass real estate, and by it he bequeathed to his daughter, Belinda, £1000, and £500 to his daughter, Mary, and his sons, John and Herbert, each respectively; and then, subject to all his debts and legacies, he devised and bequeathed all his real and personal estate to trustees to preserve contingent remainders, and to permit Edmond, his son, to have the use of the same for his life, with liberty to settle a reasonable jointure on any wife he might marry; and after his death, to permit the first and other sons of the said Edmond to receive and have the profits for their lives, the eldest to be always preferred before the youngest, and on failure of issue male of said Edmond, remainder to John Burke, testator's second son, and his heirs male, remainder to Herbert, and his heirs male, remainder to testator's right heirs. Testator died without revoking his will, and Edmond Burke, the eldest son, entered into possession, and in 1806 married Mary O'Donnell, settling on her a jointure of £250 yearly. There was issue of this marriage four sons, John, Lewis, Edmond, and Dominick M. Burke, the present petitioner. Edmond Burke, the father, made his will in 1843, in which, after reciting that one Skerritt was in possession of the lands, but that his interest would terminate on his (Edmond's) death, and also reciting that he had the power to appoint to any of his children whom he pleased, he devised said lands to his son, Dominick M. Burke and to his children as he should appoint; and if he died without issue, to his daughter, Clarinda Burke, giving her a power of appointing amongst her brothers by will.



Dominick believing that his father, Edmond, had no power to devise the property, took no steps to assert his claim to the lands till the death of his eldest brother, John, in 1862, when he claimed to be entitled under the limitations of his grandfather's will to an estate for life in said lands, and hereditaments with remainder in *quasi* tail to the respondent, John, his nephew, in said premises, immediately expectant on petitioner's life estate therein, and filed his petition accordingly against John Burke, and one Tully, who was in possession under some arrangement with John Burke.

Serjeant Sullivan (with him were Warren, Q.C., and Twigg) for the petitioner.—There can be no doubt as to the meaning of the testator. He intended, and in his will he expressed his intention, that his son Edmond was to have a life estate in the property; then that each of testator's grandsons through

Edmond were to have life estates, seniority having priority, and that expectant upon these several life estates there should be an estate tail given to the issue of his eldest grandson, with remainder in tail male to the issue of his other grandsons, with remainder over. It was clearly his intention to postpone the estates tail till after the life estates. *Parr v. Swindels* (4 Rus., 283) was a very similar case, and there the life estates had the priority.

Brewster, Q.C., (with him *Blake*, Q.C., and *Beytagh*) for the respondent.—The question here is whether the petitioner is entitled to any assistance from this Court, for this suit is defective for want of parties. John who is named a respondent is not before the Court; he is in Australia. Petitioner claims an estate for life in these lands, and contends that when the eldest son John died, his brothers were entitled to life estates prior to his sons' rights. This is not the true construction to put on the will. All the estates given under that will are estates tail by implication, the words used, "failure of issue," point clearly to this. There was an estate tail limited to Edmond by implication, before any of the life estates. He became tenant in tail by implication, as if there had been a perfect devise under the will.—*Jarman on Wills*, p. 500. In the case of *Wight v. Leigh* (15 Ves. 564) the father was held to take an estate tail in order to effectuate the intention of the testator, though there was only a life estate given expressly to him. The rule is well laid down in 1 *Jarman*, 523; *Goodright v. Goodridge* (Wil. 369); and in *Daintry v. Daintry* (6 Term Rep., 307.) In *Doe d. Harris v. Taylor* (10 Q. B., 718) the devise was to A. T. for life, then to his first son lawfully issuing, and then in default of said issue to H. in tail; and it was held that the first son of A. T. took an estate tail. So in *Clements v. Paske* (3 Douglas, 384, and 2 Cl. & Fin. 230, note) the devise was to J. C. for life, remainder to his first son lawfully issuing, and in default of any issue over, it was held that the son took an estate tail.—*Key v. Key* (4 De G. M. & G., 73). Therefore on the authority of these cases it must be held that this will ought to be read as a devise of the property to Edmond and his heirs, which is afterwards cut down to an estate tail.

Blake, Q.C., and *Beytagh* followed on the same side.—The case of *Parr v. Swindels* (4 Rus., 283) which is relied on for the petitioner is not a similar case, there the remainder was to children as tenants in common, and there is no subsequent clause showing an intention to give a greater estate. On the authority of *Clements v. Paske* (2 Cl. & Fin., 230) we argue that the intention of the will was to give an estate tail to Edmond, and if not to him, then to his son John. We have the true intention manifested by the subsequent clause. *Doe v. Taylor* (10 Q. B. 718); *Doe v. Garrod* (2 B. & Ad. 87); *Spalding v. Spalding*, (Cro. Car. 185). On the authority of these cases, the Court will supply the word "issue," so as to give effect to the intention of the testator, evidenced by his using, in a subsequent clause, the words "default of issue."

THE LORD CHANCELLOR (without calling for a reply).—As to the construction of this will I have no doubt; nor does there seem to me anything ambi-

guous in its clauses. If I thought there was, I would be very slow to meddle with it in the absence of John Burke, the respondent. But there is nothing to show that the testator intended to give an estate tail, there are no expansive words used here, no word "issue," as in the case of *Roddy v. Fitzgerald*. There is no word on which you can put such a construction as that sought for. The cases that have been relied on here gave estates to sons, to the prejudice of daughters, but these cases were held so because no man would reasonably prefer the issue of daughters to that of sons; there is no question of that kind here; here is a plain limitation to sons for life, the eldest to be always preferred before the youngest; whether the testator meant to give a larger estate to his son I cannot tell, but he has used words so precise in limiting the life estates, that I cannot presume to alter his express will. The decision in the case of *Roddy v. Fitzgerald* cannot govern this case, for there the words "issue" or "children" were used; those words are not used here, nor can they be imported from the subsequent part of the will, where they stand to destroy the express limitations of the life estates. I must hold, therefore, in accordance with the principle of *Parr v. Swindels*, (4 Russell, 283) that the petitioner here is entitled to the relief sought.

Decree accordingly.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

MURPHY AND OTHERS v. LYONS AND CROSSETT,
May, 3, 4; June, 23.

Replevin—Rating—Exemption—Jurisdiction—Stat. 8 & 9 Vict., c. cxlii. (loc. and pers.)—16 & 17 Vict., c. 114.

The Belfast Improvement Act, stat. 8 & 9 Vict., c. cxlii., after giving to the town council power to impose rates, and to light, &c., the borough, enacts in s. 276, "that it shall be lawful for the council from time to time to declare and direct what districts within the limits of this Act shall be lighted and watched under the authority of this Act, and in like manner from time to time to declare and direct whether any and what districts shall be added to the parts already lighted and watched; and the districts so appointed to be lighted and watched as aforesaid, and the districts from time to time to be added thereto, shall be considered as the district to be lighted and watched by the council, under the authority of this Act, until the same shall be altered by the council;" and it then provides "that the owners or occupiers of any messuages, houses, shops, buildings, or premises not within the district so from time to time set out, lighted, and watched, shall not be subject or liable to the payment of any of the rates by this Act directed to be raised." The occupier of a messuage not within the district set out,

lighted, and watched, was rated; he did not appeal against the rate, and not having paid it, a summons was issued against him, an order for payment made, and finally his goods were distrained. Held, that by reason of the section given above, the town council had no jurisdiction to make the rate, which therefore was illegal and void; and that the party rated and distrained upon was not bound by his non-appeal, and might bring his action against the magistrates who issued the warrant of distress, and the bailiff who executed it.

The Belfast Borough Extension Act, 1853, s. 16 & 17 Vict., c. 114, in section 6 provides, "that so long as any demesne situate within the said borough shall be of an extent of not less than forty acres, and shall be in the occupation of the owner thereof, or his under-tenant, and in which streets shall not have been laid out and formed, and on which dwelling-houses shall not have been built, the owner or tenant of such demesne shall not be rated in respect of such demesne, or in respect of any mansion-house or other building situate therein and occupied therewith," unless he shall require to be so rated. Held, that this section creates merely an exemption from rating, and does not oust the jurisdiction of the town council; and that the case of exemption must be made by appeal on the part of the party rated, and cannot be raised in an action of replevin.

DEMURRER.—The summons and plaint complained, that the defendant on the 20th May, 1862, in a certain mill or factory of the plaintiffs, situate at or contiguous to Linfield-road, near to the town of Belfast, in the county of Antrim, took and unjustly detained the goods and chattels of the plaintiffs, that was to say, 680 bundles or webs of linen cloth, to the plaintiff's damage of £50. To this the defendants pleaded that heretofore, to wit, on the 1st January, 1854, the council of the borough of Belfast in pursuance of, and for the purposes mentioned in, an Act passed in the session of Parliament held in the 8th and 9th years of Queen Victoria, intituled, "An Act for the improvement of the borough of Belfast," modified and extended by the statutable enactments in that behalf, modifying and extending the same, duly made a rate, to wit, for the period from the 1st day of January, 1854, to the 31st day of December, 1854, upon the occupiers of all houses, buildings, tenements, quays, wharfs, and other hereditaments within the limits of the said borough according to the annual value of the same, that was to say, where the said annual value did not exceed £20, a rate of a certain amount as provided by the said statutable enactments, and when the said annual value did exceed £20, a rate of two shillings in the pound upon the said annual value, and which said rate was afterwards duly signed by the mayor and town clerk of the said borough for the time being; and the defendants averred that at the time of the making of the said rate, and from thence hitherto, the plaintiffs were the occupiers of certain tenements and hereditaments, to wit, a spinning mill and manufactory situate at Linfield-road, within the limits of the said borough, and in the county of Antrim, with the hereditaments thereto belonging, consisting of buildings, stores, yards, reservoirs, workshops, offices,

house, land and fixtures appertaining to the freehold, and all other the appurtenances hereinafter styled tenements and hereditaments No. 1, exceeding the annual value of £20, to wit, the annual value of £500, and in respect of which the plaintiffs were subject and liable to the payment of said rate, and that as such occupiers the plaintiffs were by the said rate duly rated in the sum of £50, being two shillings in the pound upon the aforesaid annual value of the said tenements and hereditaments; and the plaintiffs were also the occupiers of certain other tenements and hereditaments situate at Linfield-road, within the limits of the said borough, and in the county of Antrim, with the hereditaments thereunto belonging, consisting of buildings and fixtures appertaining to the freehold, and all other the appurtenances hereinafter styled hereditaments No. 2, exceeding the annual value of £20, to wit, the annual value of £580, and in respect of which the plaintiffs were likewise subject and liable to the payment of said rate, and that as such occupiers the plaintiffs were by the said rate duly rated in the sum of £58, being two shillings in the pound upon the aforesaid annual value of the said last mentioned tenements and hereditaments; and the defendants averred that after the making of the said rate, the said council caused public notice thereof to be given by posting and publishing pursuant to the statutable enactments in that behalf, and did further direct as provided by the said statutable enactments in that behalf, that the same should be, and the same was thereby made payable on the 20th day of January, 1854; and the defendants further averred that the said rate was open to the inspection of all persons rated therein at all reasonable times; and the defendants further averred that the plaintiffs did not appeal against said rate. The defence then went on to aver the striking of several other rates respectively on the 1st January, 1855, 1st January, 1856, 1st January, 1857, 1st January, 1858, and 1st January, 1859, with like averments as in the case of the rate struck on the 1st January, 1854, except that the amounts varied; and then proceeded to aver that after the said respective rates hereinbefore respectively mentioned, were respectively due and payable as aforesaid, payment of the same so respectively due was duly demanded in writing from the plaintiffs by the collectors of the said council, but the plaintiffs did not pay the same or any of them, but made default therein for the space of fourteen days after the making of such demand; whereupon, and after the expiration of more than fourteen days after the making of said demand, six several summonses were on the application of the said council, duly issued by the defendant Lyons, who then was and from thence hitherto had been, and still was a justice of the peace in and for the said county of Antrim, having full jurisdiction in that behalf, requiring the plaintiffs to appear at the Court house, Howard-street, Belfast, at a certain day and hour therein respectively mentioned, before two of her Majesty's justices of the peace for the said county, and there shew cause why the said respective rates so as aforesaid made on the respective days hereinbefore mentioned, together with interest thereon respectively at the rate of £5 per cent per annum, from the respective periods of three months after the same became due and payable

respectively should not be paid; and the defendants averred that the said respective summonses were duly served on the plaintiffs, who afterwards, to wit, on the 14th day of January, 1862, duly appeared at the same time and place last hereinbefore mentioned, according to the exigency of the said respective summonses, before the said defendant Lyons and Thomas Venner, Esquires, who then were, and from thence hitherto had been, and still were respectively justices of the peace for the said county of Antrim, and were then acting respectively as such justices, and the plaintiffs did not show sufficient cause why the said respective rates in said respective summonses and hereinbefore respectively mentioned, and so due from the plaintiffs should not be paid; whereupon, orders were respectively made by the said justices on the hearing of said respective summonses for payment by the plaintiffs to the mayor, aldermen, and burgesses of the borough of Belfast, the complainants in said summonses respectively of the respective amounts of the said respective rates hereinbefore particularly mentioned, with costs; and the defendants further averred that the respective amounts of said respective rates were not, nor was any of them paid by the plaintiffs, and that the said plaintiffs did not appeal against the said respective orders within the period of four months after the making of the same, which period had elapsed before the issuing of the said respective warrants hereinafter mentioned; and the defendants averred that the complainants afterwards, and before the issuing of the said respective warrants hereinafter mentioned, remitted the said costs, and relinquished all claim thereto, whereupon and afterwards, to wit, on the 10th day of May, 1862, the defendant Lyons, as such justice of the peace, in and for the said county of Antrim, and in pursuance of the statutable enactments in that behalf, duly issued six several warrants under his hand, addressed to the defendant Crossett, who then was, and thence hitherto had been, and still was collector of the said rates of the said council of the said borough, requiring him the said Crossett to levy the amount of said six respective rates so due from the plaintiffs, by distress and sale of the goods and chattels of the said plaintiffs, rendering them the overplus, if any, the reasonable charges of said distress being first deducted; and the defendants averred that all things required by the said statutable enactments and by law were done, and happened, to authorise and empower the defendant Lyons to issue the said respective warrants, and to make the same good and valid warrants enforceable against the goods and chattels of the plaintiffs for the said sums for which they were so rated and assessed as aforesaid, and to be executed as hereinafter mentioned; and the defendants further averred that said respective warrants were afterwards delivered to the defendant Crossett for execution, who under and by virtue of, and in obedience to the said respective warrants, and whilst the same were in full force, to wit, in the mill or factory in the plaint mentioned, within the limits of the said borough of Belfast, and within the county of Antrim, and according to the exigency of said respective warrants, did duly seize and take the goods and chattels in the summons and plaint mentioned, as and for, and in the name of a distress, for and by reason of the non payment of said respec-

tive rates, and detained the same as he lawfully might for the reasons aforesaid, which are the respective grievances in the summons and plaint mentioned.

To this the plaintiffs replied, first: that the tenements and hereditaments in said defence mentioned, as occupiers of which said tenements and hereditaments the several rates in said defence mentioned, were alleged to have been made on plaintiffs by the council of the borough of Belfast, were not, nor were any of the said tenements or hereditaments at the time of the making of the said respective rates, or any of them, by the said council, situate within a district in said borough set out, and lighted and watched as required by the statutory enactments in that behalf and in the said defence referred to and mentioned. Secondly: that the said several tenements and hereditaments in said defence mentioned, and in respect of which said several rates were alleged to have been made by the council of the borough of Belfast on the plaintiffs as the occupiers thereof, at the respective times of the making of the said several rates in said defence mentioned, were and still are certain buildings situate in a demesne of not less than forty acres, and occupied therewith, and which said demesne, and also said buildings were and are situate within the said borough of Belfast, and were at the respective times of the making of the said several rates, and are in the occupation of plaintiffs, being during all said time the owners thereof, and in which demesne at the respective times of making said alleged rates or of any of them, streets were not laid out or formed, and on which dwelling houses had not been built; and plaintiffs had not before the making of the said alleged rates, or any of them, by notice in writing, or at all, required to be rated in respect of such demesne and buildings, or any of them, under the said acts in said defence referred to or any of them. To the first replication the second rejoinder put in was, that the plaintiffs ought not to be admitted or received to plead the said replication, because the defendants said that before the making of any of the rates in the said defence of the defendants above respectively mentioned, by a certain order or direction duly made by the said council of the borough of Belfast, pursuant to the provisions of the statutable enactments in that behalf, said order bearing date the 1st day of December, 1853, the said council did order, declare, and direct that the district in said order, declaration, and direction described, situate within the limits of the borough of Belfast, should be, and the same was thereby ordered to be added to the parts, to wit, the parts of the said borough already lighted and watched, and that the district so described, together with the parts already appointed to be lighted and watched, should be considered the district to be lighted and watched, until the same should be altered by the council, which said last-mentioned order which thus set out the district to be lighted and watched, was at the time of the making of said several rates, and still was subsisting and in force and effect; and the defendants further said that the said tenements and hereditaments in the said defence and first replication mentioned, during all the time aforesaid, were and still are situate within the district by the said order, direction, or declaration so declared and directed and appointed to be lighted and watched as aforesaid; and

within a district in the said borough, set out, lighted, and watched. The next replication describes the buildings in question, as being part of a demesne more than forty acres in extent, and in respect of which they say the parties were not liable to be rated. I do not find it necessary to state the rejoinders because it seems to me that the question arises entirely on the replication. Does the first replication present a good answer in law to the defence? It was agreed in the course of the argument, that the determination of that question depends on the question whether the act of the primary tribunal in making the rate was illegal, as being beyond their jurisdiction, and therefore null and void. It was conceded that if the council had acted within their jurisdiction, though erroneously, the alleged non-liability was matter of exemption, and only matter of appeal, and on the other hand, that if the council had acted without jurisdiction, and that their act was illegal and void, the question was properly raised by an action of replevin or trespass; so that the question is, was the act one within their jurisdiction or not? The argument of the case on the main question turned on the construction of the Belfast Special Act, to which I shall now refer. The Belfast Act on which the first question arises, is the 8 & 9 Vict. c. cxlii. (loc. and pers.) passed in 1845, and to be taken notice of as a public Act; and that Act, after, by its preamble, reciting two prior Acts for the improvement of the borough of Belfast, and also that the Municipal Corporations Act was in force in the borough, and after reciting that it would tend to the general benefit of the inhabitants of the borough, and to the improvement thereof, if new streets were opened therein, if the present streets, markets, thoroughfares, and places in the said borough were widened, and better lighted, paved, drained, sewered, and otherwise improved and regulated, and if powers were granted for more effectually removing and preventing nuisances, annoyances, and obstructions therein, and also for better maintaining and regulating the police of the said borough, and for establishing and regulating markets therein, in the first place repeals the provision of the two prior local Acts. It then proceeds in its 3rd section to enact that all provisions matters and things contained in the Municipal Corporations Act, except such of them as are by the Act itself repealed, altered, or otherwise provided for, shall continue, where applicable, to apply to the borough, and that the Municipal Corporations Act, and the present Act, shall be construed and read together as forming one Act; and by section 4 it is provided that the mayor, alderman, and burgesses of the borough of Belfast shall, by the council of the said borough be empowered to carry the Act, and the several powers and provisions thereof into execution. I may mention in passing, that a subsequent clause transfers to the council of Belfast, the contracts, liabilities, and engagements of the Commissioners, whose duty it was to carry out the 40 G. 3 (Ir.) and 56 G. 3. I may now pass to the 66th section, which was the first that we were referred to in the course of the argument. It is the one which provides that the limits of the Act shall be the borough of Belfast, for the time being, and that this Act may be put in force, within the said limits or any part thereof, subject to the provi-

sions thereafter contained. I may pass then at once to section 257, intimating that the intermediate sections confer on the town council very large powers for paving, cleansing, lighting, improving, watching, and general police powers. They give the council very extensive powers in that respect, and the only limit to them is the borough itself. Within the ambit of the borough the powers are to be exercised by the council. We now come to section 257. By it it is provided that the council shall have power to light the streets, roads, lanes, and passages, within the limits of this Act, that is within the borough of Belfast; and by the next section there are powers given by the council, co extensive with the limits of the borough, enabling them to enter into contracts for lighting. We then pass to section 276. The whole question seems to arise on the meaning of the proviso to be found in that section. By it it is enacted "that it shall be lawful for the council from time to time to declare and direct what districts within the limits of this Act shall be lighted and watched under the authority of this Act, and in like manner from time to time to declare and direct, whether any and what districts shall be added to the parts already lighted and watched; and the districts so appointed to be lighted and watched as aforesaid, and the districts from time to time added thereto, shall be considered as the district to be lighted and watched by the council, under the authority of this Act, until the same shall be altered by the council." And it then proceeds to enact that "the owners or occupiers of any messuages, houses, shops, buildings, or premises not within the district so from time to time set out and lighted, and watched, shall not be subject or liable to the payment of any of the rates by this Act directed to be raised." The whole question arises on that provision, which does not limit the taxing powers of the council, but simply directs that the owners of messuages, &c., within the district, not set out, lighted, and watched, shall not be liable to payment of rates, under the Act. Then we come to section 348, which provides—"that for the purpose of defraying the costs and expenses of carrying this Act, and all the powers and provisions thereof into execution, it shall be lawful for the council, once in every year, after the passing of this Act, to be computed from the first of January in each year, or oftener if they shall think it necessary, to make one or more rate or rates, assessment or assessments, upon the occupiers of all houses, buildings, tenements, quays, wharfs, and other hereditaments, within the limits of this Act, according to the annual value of the same, so as such rates or assessments do not exceed in any one year the sums hereinafter mentioned;" the section then specifies the sums, and proceeds—"and such rates shall be applied in the manner and subject to the provisions in this Act contained: provided, always, that no person shall be rated for or in respect of any arable, meadow, pasture, or woodland, or any stable or building used for the purpose of husbandry only;" and it is on this and on section 276, taken together, that the question really arises. You have in the 275th section, the exemption of the occupiers of houses not within a district set out, lighted, and watched; and in the 348th, a further exemption, that

no person shall be rated for arable, meadow, pasture, or woodland, or any stable or building used for the purpose, or husbandry only. But these two exceptions, which I call them for the present, are subject to the general power and authority of the council to rate all the premises coming within the Act of Parliament. The 351st section also deserves attention, for that is also an exempting clause. It provides, that no person shall be rated for, or in respect of any church, chapel, meeting-house, or other building erected, and used for public worship, or any building exclusively used for the gratuitous education of the poor, or for the purposes of public charity. And it seemed to be conceded in the course of the argument, that, if the party who alleged he was not liable for rates, came either within the proviso at the end of section 348, or within section 351, his claim of non-liability to rating was a claim to exemption, simply, and was to be raised by appeal and not by action. The appeal sections are those from the 364th to the 369th, and certainly there is the largest power given to parties to appeal on any ground, whether it may be to shew the illegality of the entire rate, or inequality, or exemption. But I may pass to section 369, which, after, a power of appeal, has been given by section 367, to the Quarter Sessions, says—"that the Court of Quarter Sessions, and the justices in Petty Sessions assembled respectively, shall in any appeal against any rate made under the authority of this Act, have the same powers of amending or quashing such rates as are by law vested in them respectively, for amending or quashing the rates for the relief of the poor, within their several jurisdictions upon appeals against such rates." And in addition to this extensive power which enables them to quash a rate which is wholly illegal, or to amend the rate, or to strike it out; it is to be observed by the antecedent sections, the rate is to be imposed according to the poor law valuation. I have now on this Act of Parliament only one further section to advert to, and that is the 333rd. "The money which shall arise from the said rates to be raised and levied, and all other monies to be received by the council under this Act, shall be applied, in the first place, in payment of the expenses of obtaining and passing this Act, or preparatory or incident thereto; secondly, in payment of the interest of the monies borrowed on mortgage by virtue of the said recited Act of the 40th and 56th years of King George the Third, and by virtue of this Act; thirdly, in defraying the expenses of lighting, paving, cleansing, sewerage, watching, and regulating the streets within the limits of this Act, and of improving the same, and in carrying the several purposes of this Act into execution—this includes also the payment of local police, which the council have under the previous sections, power to appoint and pay—and lastly, in paying off the principal sums borrowed as aforesaid in such order as the council shall direct. Upon the sections which I have adverted to, but mainly upon the construction of ss. 66, 276, and 348, the question in the case arises; and it was conceded that the plaintiff could not sustain his action, if his allegation that he was not liable to the rate was founded upon matter of exemption only, but that he should have appealed; and it was conceded on the

other hand by the defence, that if the primary tribunal had acted without jurisdiction then the rate was entirely void, and an action was the proper remedy; and as I form my opinion wholly on the replication, and whether the facts there stated present a good answer to the defence, it is unnecessary for me to read the rejoinders. One authority was chiefly relied on, it is the case of *The Churchwardens of Birmingham v. Shaw* (10 Q. B. 868). In that case a question arose similar to that in the present, namely, as to whether an objection to the rate was the subject of appeal, or whether it might be the subject of an action; and after dealing with the first question, namely, whether the society in the case came within the Act of Parliament, Lord Denman, says:—"We are driven therefore to consider the second ground on which the rule is supported, whether, namely, *as regards the present rates*, the society is deprived of the benefit of its exemption, because it has not appealed against them." He then farther on says:—"This is not a new question; nor is the principle of decision unsettled or difficult. The only difficulty lies in its application." He then proceeds to deal with the right of appeal. If the Court, he says, has gone beyond its jurisdiction, its act is void; and he proceeds to shew that the party grieved may, if he pleases, appeal, whether he makes a case of exemption, or whether the rate is entirely void. "The question," he then says "in this case is, whether the acts of the overseers and justices in assessing the president to these rates were within their jurisdiction; if they were they are valid now, because not reversed on appeal, and he cannot question them collaterally; if they were not, they were *ab initio* null and void, and he has done nothing which estops him from saying so. Now, it is not disputed that he was the occupier of the premises in respect of which he is rated, nor that they are within the parish, nor is any question made as to the beneficial nature of the occupation; but the objection is that the statute exempts from the rate by reason of the purposes for which the occupation is had; and it is said that the effect of that exemption is to take the premises, for the purpose of rating, out of the parish, and so out of the jurisdiction of the justices, who are only allowing a rate made for the parish. But we think this mode of stating his case cannot be sustained; if it could, the same mode might be adopted, wherever the question was, whether the occupation was beneficial or not; if there be no beneficial occupier, the land for the purposes of the rate might be equally said not to be within the parish, because it ought not to be included in the rate; yet, so far as we know, this question has always been raised on appeal, and the distinction has been between the question, whether occupier or not absolutely, which has been tried by action, and, whether beneficial occupiers or not, which has been tried by appeal. And this seems the reasonable test. As soon as the land is shewn to be in the parish, and A. B. to be the occupier, the case is *prima facie* brought within the statute of Elizabeth, the rate on its face is good, and jurisdiction attaches; whether that *prima facie* case can be answered by any circumstances affecting the character of the occupation, is matter to be determined by the Court of

Appeal, on appeal made." He then proceeds to deal with that case, and to hold that in it it was a matter of exemption, and that the question should have been raised by appeal. The words of the statute on which that case arose exempted in very large terms the premises in that case. Well, I have to consider here if this was matter of exemption, and on this question only I offer my opinion; and it appears to me on this question that the replication discloses a case of exemption, only and not an absence of jurisdiction, and therefore that the remedy, if any, was by appeal, and not by action. I have already called attention to the fact, that the limit of the rating powers of the corporation is the limit of the borough, and the 348th section enacts that they shall make a rate within the limits of the borough, but it exempts several classes; when I consider the conclusion of section 276, which, very likely, was thrown in with a view to encourage the lighting and watching of districts within the limits of the borough, when it provides that the occupiers of premises within the district, not set out, lighted, and watched, shall not be liable, I am unable to bring myself to any conclusion, but that that is matter of exemption only, that the council had jurisdiction to deal with all premises within the limits of the borough, and that if they included in a rate any one or more that were not liable to the payment of the rates by these provisions, that was a case of exemption, that no injury could be done because the party has the most extensive powers of appeal, and full time for it; the appeal being threefold; to the justices, to the corporation and to the Quarter Sessions. On that ground, without considering the rejoinders at all, it seems to me that the defendant is not liable in this action. I am, to some extent, fortified in the conclusion to which I have arrived by the previous Acts relating to the borough of Belfast, and especially the Act 40th G. III. I have already adverted to the fact that under the special Act, contracts entered into under the statute 40 G. III. (Ir.) c. 37, and other liabilities are transferred to the town council under the new Act; but I have looked to what are the rating powers under the 40 G. III. The rating clause is section 18, which directs the committee at certain times to make "one or more equal, fair, and impartial rate or rates, applotment or applotments, upon all persons who shall hold any land, &c., within the town of Belfast, or the precincts thereof." There is no exemption or qualification, and under the previous Acts to the 40 G. 3, the liabilities and engagements of which are cast on the town council, the rating clauses are co extensive with the limits of the borough, and every person within it is liable to be rated. Some force may also be derived from the recollection that the provisions of the Municipal Corporations Act, as qualified by the provisions of this Act, are in force within the borough of Belfast, and I have been unable to find in that Act, any provision which would lead me to the conclusion, that any tenement within the borough, though exempt, yet was so circumstanced that any Act of the town council imposing a rate on it, would be any more than erroneous, and liable to be corrected by the appeal. The second replication is on that part of the Act 16 & 17 Vic. c. 114, which exempts from rating the occupiers of de-

mesnes within the borough of an extent of not less than forty acres, and in which streets shall not have been laid out and formed, and on which dwelling-houses shall not have been built; but it is unnecessary for me further to comment on that section, for it seemed to be conceded on both sides, that if the conclusion to which the Court should arise, was that section 276 was an exemption, *a fortiori*, so was the other. I do not therefore proceed to consider it further, but I confess that I myself should have had more difficulty in coming to a conclusion in favour of the defendants, upon the latter section than on the former. The point being, however, conceded, I shall say no more on it; but on the whole it seems to me that the replication is not an answer in point of law to the defence, and that, therefore, the defendant is entitled to judgment.

HAYES, J.—I concur with my brother Fitzgerald in thinking that for the right adjudication of this matter it will not be necessary to venture any further into the forest of pleadings before us than the replication. All the questions arise upon that. This is an action of replevin, in which the plaintiffs complain that their goods were unlawfully seized and detained by the defendants. The plea that has been put in to that is a very short one. It alleges a rate made on the plaintiffs as occupiers of a mill at a place called Linfield road; that the rate was duly made; that it was not appealed from; that it was demanded from the plaintiffs, who refused to pay it; that there was a summons; and that orders to pay were made by the justices; and that the orders not having being appealed from, and payment not having been made, the defendant, Lyons, a magistrate, issued his warrant to the other defendant, Crossett, who under that warrant seized the goods. Now, the replication to that is two-fold, and gives two matters by way of displacement of the defence. First, the plaintiff says that the tenements were not, when the rates were made, situate in a district set out, lighted and watched by the town council of Belfast. Then, as a distinct answer, it says that the tenements were buildings situate in a demesne of forty acres, in which streets had not been laid out, &c. Now, the question, as I have said, is, whether these two replications, or either of them, afford sufficient matter of displacement of the matter set out in the plea. If there is a sufficient answer in either of them, our judgment ought to be for the plaintiffs. Now, I take it to be sufficiently well established by the authorities that if the town council of Belfast have acted without or in excess of their jurisdiction in imposing the rate, the defendants have acted without or in excess of theirs in issuing and executing the warrant pleaded by them. The question is, has the town council acted without or beyond its jurisdiction; and this is to be ascertained from the Acts of Parliament. The 66th section of the Belfast Act enacts that the limits of the Act shall be the borough of Belfast for the time being. We have here to inquire and determine not what are the legal limits of the Act generally, but the legal limits within which it may be enforced for the purpose in hand; namely, the imposition and execution of rates, and whether they exist absolutely or are to be ascertained on the consideration of any and what provisions. The Act contemplates districts partly

urban and partly rural. In the urban the Act provides for opening streets, cleansing, watering, and lighting, &c. of all streets; and by s. 220 and the subsequent sections the council are authorised to appoint a police force. As there is nothing to exclude the ordinary constabulary force, it may be assumed that that would be sufficient for the rural districts; but it is for the urban districts that the extraordinary force is required. We find that by section 267 the town council are authorised from time to time to cause streets, or such of them as they think fit, to be lighted, &c.; and by s. 276 the council are empowered from time to time to declare and direct what districts within the limits of the Act shall be lighted and watched, and whether any and what districts shall be added to the parts already lighted and watched; and these districts shall be considered as districts to be lighted and watched by the council under the authority of the Act. If the Act had stopped there there might be reason to contend that the order of the council was all that was necessary to constitute any portion of ground within the Act liable to be lighted and watched. But the statute, not content with enacting that the declaration and direction of the council shall be preliminary to the lighting and watching, goes on to provide that the owners and occupiers of premises not within a district so set out, lighted, and watched, shall not be subject or liable to the payment of rates. The doing of all these three matters—setting out, lighting, and watching—is within the exclusive power of the council; and it appears to me sufficiently clear that the doing of all these matters is a condition precedent to the council having jurisdiction to tax the occupiers. It is not sufficient that the order is pronounced, which may never be carried into effect; the place must be lighted and watched as well. The inhabitants must have a material guarantee that if they are taxed they shall have a *quid pro quo*. Mr. McDonogh argued that this was at best matter of exemption, and not matter of jurisdiction; but to say nothing of the vexation and injustice which might arise from this we must look to the 66th section, which says that this Act shall be put in force within the limits of the borough or any part thereof “subject to the provisions hereinafter contained.” And one of those provisions is, that there shall be a district set out, lighted, and watched. For these reasons I am of opinion that the rejoinder to the first replication is not good. I think that the second replication is bad; whether the facts there stated exist is a matter which the plaintiffs were bound to shew on appeal. They only amount to an exemption, and I therefore think that on the second replication there should be judgment for the defendant.

O'BRIEN, J.—I concur with my brother Hayes as to both replications. I think the first replication discloses a sufficient answer to the defence, and I think with him that the second replication is bad. Now, with respect to the first, on which really the argument principally turned, a great many points were raised. It was first said that the legality of the rate should not be tried by replevin at all. It is not my intention to go through the various authorities; I shall refer only to one or two which establish, I think, this proposition, that if the objection is that the tribunal which

made the order had no jurisdiction this replevin might be. The cases in 3rd B. and Ad. decide that the sheriff was bound to replevy goods distrained for poor-rate,—the objection being there that the poor-rate was void. Again, in *Weaver v. Price* (3 B. & Ad. 409), there was an action of trespass brought against magistrates where the party distrained upon had no lands in the parish in which the rate was made; in other words, where the tribunal which imposed the rate had no jurisdiction to do so; and a distinction was taken by Parke, J., between cases, where the objection might be taken on appeal, and where the objection is that the lands were not within the district in which the rate was made. Then the question comes to this: is the objection here one of exemption or one that shows that the town council had no jurisdiction? Now, in all the cases to which we have been referred this distinction is taken where the ground of exemption is personal to the party rated, or where it arises from the use that is made in respect of the premises for which he is rated, as where they are held for charitable or other public purposes. In all those cases the claim to be exempted is ground of appeal only; but where the claim arises on the ground that the district is not within the power of the tribunal to be rated at all, in these cases it is settled that the objection may be taken in the form in which it has been taken here; and that the party is not bound to appeal, but may say that the tribunal had no jurisdiction. Looking at s. 276 of the Belfast Act, to which we have been referred, it will be seen that the words are very peculiar. In the first place the 66th section, in describing the limits of the borough, says that the limits of the Act shall be the limits of the borough; and that the Act may be put in force within the said limits subject to the provisions after contained. It gives the town council jurisdiction over the whole of the borough, subject to those provisions. But we find now under s. 276 that districts which are not set out, lighted, and watched, are taken out of the jurisdiction of the council. [His lordship read the section, which has been already given.] It therefore says that the town-council are to have jurisdiction over the whole of the borough, or over such part of it as they shall bring within their jurisdiction by attending to these provisions. First, they are to make an order what district shall be lighted and watched. That portion is apparently brought within their jurisdiction; but it is not within their jurisdiction for rating unless it is actually lighted and watched. That does not give the owners of property any personal exemption, or any exemption by reason of the purposes for which the premises are used, or by reason of the ground being of a certain extent and used for pasture, &c., or for public worship or charitable purposes as in s. 348 and 351. But it says that premises situate within a district not set out, lighted, and watched shall not be liable to be rated. This appears to me to bring the case within the authorities which settle that where the ground of objection is not anything peculiar to the person of the occupier or anything arising out of the purposes for which the premises are used; but where the objection is that the premises are not within the district which the tribunal had power to rate at all, there the remedy is not confined to a

right of appeal, but the party may let the orders be made, treat them as a nullity, and bring his action. On these grounds, without going farther, I have come to the conclusion that the first replication discloses a sufficient answer to the defence. Then as to the question raised on the rejoinder, it makes a sort of case of estoppel. In the course of the argument here we all agreed that, assuming the grounds of the plaintiff's case on the second replication to be good, no case of estoppel could arise. With respect to that second replication, I think the question arises on s. 6 of stat. 16 & 17 Vict., c. 114, which provides "that so long as any demesne situate within the said borough shall be of an extent of not less than forty acres, and shall be in the occupation of the owner thereof, or his under-tenant, and in which streets shall not have been laid out and formed, and on which dwelling-houses shall not have been built, the owner or tenant of such demesne shall not be rated in respect of such demesne, or in respect of any mansion-house or other building situate therein and occupied therewith, unless such tenant or owner shall, by notice in writing, require to be rated in respect of such demesne and mansion-house under the said recited Acts, or any of them." There, again, the exemption is not by reason of the premises not being within the district, but by reason of the purposes for which the premises were used, and by reason of their extent. I think, therefore, that it is perfectly consistent with the grounds on which I have come to the conclusion on the first replication, that I should hold the second replication bad; and therefore there being judgment for the plaintiff on the first replication and judgment for the defendant on the second, that will entitle the plaintiff to general judgment.

LEFROY, C.J.—In this case I am of opinion, with my brothers O'Brien and Hayes, that this is not a case of exemption, but of original want of jurisdiction to impose a tax. I have come to that conclusion, not upon any of the various cases which have been cited, which, I think, generally speaking, is only a waste of time; for the general rule of construction of the clauses of an Act of Parliament is so well and so long established that I think that furnishes for this case a clear and simple rule. The rule is this: when a right is created by a clause in an Act of Parliament, and when that right is a right to lay taxes on the subject, the first rule is that that right which, it is alleged, imposes a tax, must be given by unequivocal clear words. You are not to tax the subject by ambiguous language. Secondly, what is the criterion by which we are to find in the clause a clear, unequivocal right to lay on a tax? Is this a clear, unequivocal right to lay on a tax when the very clause itself contains, not by a subsequent clause, but where the very clause itself contains that which defines the right to lay on the tax. It contains here the very exception, for it says "shall be subject to taxation subject to the provisions hereinafter mentioned;" and the "provisions hereinafter mentioned" take away the right to lay on the tax just as clearly as the right is given in every other case but the excepted one; but with respect to the excepted case, the body of the clause itself contains the exemption; and, as Flowden says, if the

section itself lays on a rate without equivocation, exception, or distinction, the rate then is laid on in all cases generally, and it is for the party who would take himself out of it to do so; but if he does so by a proviso in a subsequent clause that operates as an exemption, and the consequence of an exemption here instead of a defect of jurisdiction is what makes all the difference. If it was exemption there should have been an appeal; but if there was an original want of jurisdiction it is a case not for an appeal, but for the argument that such a tax was never laid on by the section itself, for the section is "shall be subject to taxation, subject, nevertheless, to the provisions hereinafter contained;" and therefore you have in the very body of the section that which takes out of it everything that is to be found in the subsequent provisions. That brings it within the law of the case to which I have adverted; and the simple question is here, whether in the very terms giving the right to lay on the tax there is not in the very body of the section that which never gave the right as to these particular things. Upon that short ground which takes the case out of the distinction between exemption and want of jurisdiction, I am of opinion that in this case there never was a jurisdiction, and therefore that according to the rule that jurisdiction must be created beyond a doubt, where the Legislature provided for the imposition of the tax subject to particular exemptions, the tax never was laid on; and therefore I am of opinion that there was a want of jurisdiction to lay on a tax according to the distinction between the case where the exemption is by a subsequent section, and where it is found in the very body of the clause laying on the tax. I think, therefore, that the plaintiff had a right to maintain an action of replevin or an action of trespass.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

SWEENEY v. PROMOTER INSURANCE COMPANY.—Nov. 4, 1863; Jan. 5.

Policy of insurance—Equitable replication—Estoppel—Pickard v. Sears (6 A. & E., 469).

To an action on a policy of assurance under seal, the defendants pleaded that the age of the assured exceeded what it was represented to be in the policy. The plaintiff pleaded the following replication on equitable grounds.—That the defendants ought not to be allowed or received to plead the said defence, or to make the objections therein contained, because that before and at the time of the making of the said proposal and policy the plaintiff was in communication with the said defendants upon the subject of the said proposal and policy; and that in the course of and all through such communication, the defendants meaning and intending that the plaintiff should believe and act upon the belief, by their conduct caused the plaintiff to believe and the plaintiff accordingly did believe and acted upon and made said

proposal acting upon the belief that the age of the said R. H. M. did not at the time of the making of the said proposal exceed fifty-six years, and that the plaintiff did not in fact know from any documents or otherwise howsoever, save than from the defendants themselves, whether the age of the said R. H. M. at the time of the making of the said proposal exceeded fifty-six years or not. Held upon demurrer, a good replication.

THE first count of the summons and plaint complained that by a policy of assurance bearing date the 5th day of March, 1859, made by the defendants as trustees of the Promoter Life Assurance and Annuity Company, sealed with the seal of the said company reciting that the plaintiff had proposed to effect an assurance with the said company in the sum of £200 on the life of Rose Helen Meredith for the whole continuance thereof, and had caused to be delivered into the office of the said company a declaration or statement bearing date the 19th February, 1859, signed by the said plaintiff, setting forth the age, habits, and state of life of the said Rose Helen Meredith, and other things as in the said policy mentioned; and that the plaintiff was interested in the life of the said Rose Helena Meredith to the amount of the said sum of £200; and that it had been agreed that such declaration should be the basis of the contract between the said plaintiff and the said company; and that the said plaintiff had paid to the said company the sum of £10 16s. 8d., as the premium or consideration for the assurance of the said sum of £200 on the life of the said Rose Helen Meredith, for the space of one year, commencing on the day of the date of the said policy and terminating on the 4th day of March, 1860, both inclusive, it was declared and agreed by the said policy that if the said Rose Helen Meredith should die before the 5th day of March, 1860, or if the said plaintiff, his executors, administrators or assigns should, in the event of the said Rose Helen Meredith living beyond the said 5th day of March, pay to the said company during the remainder of the life of the said Rose Helen Meredith the annual premium of £10 16s. 8d. on or before the said fifth day of March, and on or before the 5th of March in every subsequent year, the funds and property of the company should be subject and liable, according to the provisions of the said company's deed of settlement, to pay unto the said plaintiff, his executors, administrators or assigns, within three calendar months after due proof should have been received at the office of the said company of the death of the said Rose Helen Meredith, the sum of £200. The count contained a proviso for making void the policy, which concluded as follows:—"Or if anything averred in the declaration or attestation thereinbefore mentioned should be untrue, or the referees should be proved to have knowingly given false testimonials, the policy should be null and void, and all monies which should have been paid on account of the said assurance should be forfeited to the said company." The count proceeded to allege that at the time of the making of the said policy the plaintiff was interested in the life of the said Rose Helen Meredith to the amount so assured as aforesaid, and that the said Rose Helen Meredith survived the said 5th day of March,

1860, and that the plaintiff duly paid to the said company the annual premium of £10 16s. 8d. on or before the 5th day of March in each subsequent year, for keeping the said policy in force; and that the said policy at the time of the death of the said Rose Helen Meredith, thereinbefore mentioned, was and continued in full force; and that whilst the said policy was in such full force and effect and before this suit the said Rose Helen Meredith died; and at the time of the death of the said Rose Helen Meredith, and thenceforth hitherto, the funds and property of the said company, in the hands or power of the defendants, were and always had been sufficient, according to the provisions of the deed of settlement of the said company, after satisfying all prior claims thereon, to pay, satisfy and make good to the plaintiff the said sum of £200, according to the tenor and effect, and true intent and meaning of the said policy. The count then averred performance of conditions precedent and non-payment. To this the defendant pleaded that the declaration or statement in the policy of assurance and writ of summons and plaint respectively mentioned, and which was by the said policy made the basis of the contract for assurance between the plaintiff and the said company was a certain proposal in the words and figures following, that is to say,

("Life of another")

"Promoter Life Assurance and Annuity Company.—I, B. Sweeny, of Tralee, in the county of Kerry, builder, being desirous of effecting an assurance with the Trustees of the Promoter Life Assurance and Annuity Company in the sum of £200, without profit, on the life of Rose Helen Meredith, widow, born in Tewkesbury in England, and now residing at Dicksgrove, Castle Island, in the county of Kerry, for the whole term of life, do hereby undertake that her age does not exceed fifty-six years; that she has had the small-pox or cow-pox; that her habits are sober and temperate; that she never had the gout or asthma, or any fit or fits, or suffered a spitting of blood; that she is not afflicted with any complaint, affection or disorder which tends to shorten life; and that I have an interest in the life of the said Rose H. Meredith to the full amount of £200; and I do hereby agree that this undertaking shall be the basis of the contract between me and the said company; and that if any untrue averment be contained therein, and if the referees have knowingly given false testimonials, all monies which shall have been paid to the said company, on account of the said assurance, shall be forfeited, and that the said policy shall be null and void; and I do also agree that I will abide by the provisions contained in the deed for the settlement of the said company, dated the 5th day of July, 1826, which relate to the privilege of voting for auditors, and to the liabilities of the shareholders and officers of the institution; and likewise that I will acquit from all responsibility all the other holders of policies in the said company.—(Signed) BATT SWEENEY." That by the said policy in the said summons and plaint mentioned it was provided that if anything averred in the declaration therein and hereinbefore mentioned was untrue, the said policy should be null and void; and all monies which should have been paid on account of the said assurance should be forfeited to the said company. That all

conditions had not been fulfilled; nor had everything happened or being done necessary to entitle the plaintiff to receive the said sum of £200, because the statements contained in the said declaration were not true in the particular hereafter mentioned, that is to say, that the age of the said Rose H. Meredith at the time of the signing of the said declaration exceeded fifty-six years; by reason whereof and by force and effect of the terms and conditions of the said policy, all monies paid to the said company on account of the said assurance had become forfeited, and the said policy was null and void. To this the plaintiff, by leave of the court, pleaded upon equitable grounds the following replication:—That the defendants ought not to be admitted or received to plead the said defence, or to make the allegations therein contained, because that before and at the time of the making of the said proposal and policy in the summons and plaint and said defence respectively mentioned, the plaintiff was in communication with the said defendants upon the subject of the said proposal and policy; and in the course of and all through such communications the defendants, meaning and intending that the plaintiff should believe and act upon the belief, by their conduct caused the plaintiff to believe, and the plaintiff accordingly did believe, and acted upon and made said proposal, acting upon the belief that the age of the said Rose Helen Meredith did not, at the time of the making of the said proposal, exceed fifty-six years; and that the plaintiff did not in fact know, from any documents or otherwise, howsoever, save than from the defendants themselves, whether the age of the said Rose H. Meredith, at the time of the making of the said proposal, exceeded fifty-six years or not. The defendants demurred to this replication.

Serjeant Sullivan and Jellett in support of the demurrer.

Barry, Q.C., and W. O'Brien, contra.

Cur. adv. vult.

Jan. 25.—*MONAHAN, C.J.*—This is an action against the defendants as trustees of the Promoter Insurance Company. [His Lordship stated the pleadings.] This replication has been demurred to. By the members of the Court, the question has undergone a great deal of discussion. The judgment is unanimous. The argument for the defendants was that this replication was a departure from the summons and plaint; that the contract being under seal, the plaintiff could not put forward parol statements made before. If the replication did vary the summons and plaint, the argument would be well founded. We must assume that the defendants made this representation in person as of a fact in their own knowledge. The question is, does *Pickard v. Sears* apply to a case like the present? The rule is there laid down, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things as existing at the same time. In *Freeman v. Cooke*, (2 Ex. R. 654) “wilfully” is explained to be, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that

it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party would be precluded from contesting its truth. Parke, B., shows how this applies in the case of a retiring partner. According to *Cornish v. Abington*, (4 H. & N. 549) “wilfully” means no more than “voluntarily.” It seems that this case falls literally within this rule. Is there then any objection to apply this rule to a case like the present, where the representation is made by one of two contracting parties, and one enters into a contract on the faith of it? It is true that in *Pickard v. Sears* the representation was made by a third person. There the goods originally belonged to Metcalfe, but he had mortgaged them: the mortgagee made no claim, but consulted with the execution creditor as to the best way of disposing of the property. It was conceded that the mortgage was *bona fide*, and that the defendant had purchased *bona fide*. The case was tried by Lord Denman, who directed the jury to find for the plaintiff, if they thought that the mortgage was a *bona fide* transaction. On motion for a new trial, Lord Denman laid down the rule in the words I have repeated. In *Graves v. Key*, (3 B. & Ad. 318) the doctrine is laid down that a receipt on the back of a bill of exchange is not conclusive evidence of payment, but if any one had acted on it, the party would be estopped as to him from denying it. In *Freeman v. Cooke*, the party told the officer the goods were the goods of C., and then that they were the goods of D.—the Court held that he was not estopped. It was not found he intended to induce him to seize the goods, and whatever he intended he contradicted it before the seizure was made. Parke, B., says, “In truth, in most cases to which the doctrine in *Pickard v. Sears* is to be applied, the representation is such as to amount to the contract or licence of the party making it.” In *Clarke and Chapman v. Hart*, (6 Ho. of Lords, 633) the Chancellor says, “With respect to the waiving or abandoning of a right, it is necessary to understand precisely what is the qualification which has been introduced by the case of *Freeman v. Cooke* into the law, as it was laid down by Lord Denman in *Pickard v. Sears*.” He lays down the rule as Lord Denman did, as I have already said. He then says, Baron Parke says, “In most cases the doctrine in *Pickard v. Sears* is not to be applied, unless the representation is such as to amount to the contract or licence of the party making it.” In *Cornish v. Abington*, which was for goods sold and delivered, the plaintiff was held liable to the defendant. The Chief Baron at p. 555 says that Lord Wensleydale in *Freeman v. Cooke*, commenting on *Pickard v. Sears*, pointed out a limitation of the application of the rule. He then says, “No doubt, unless the representation amounts to an agreement or licence, or is understood as amounting to that, the rule would not apply.” He then says if a person so conducts himself, that another may reasonably infer the existence of an agreement or licence, the party cannot gainsay the reasonable inference. Such being the cases, the leading cases in which *Pickard v. Sears* was considered, it remains to be

seen whether the facts here bring the case within that rule. The pleader has used the words of that rule, and the plea means, if you will sign a policy, I undertake so and so. But it is said the contract cannot be turned into fraud. We do not think this at all varies the written agreement. It is a collateral agreement which would be the matter of an action, and at all events of an equitable replication. In *Simpson v. Accidental Death Insurance Company* (2 C. B., N.S. 257) the defendants pleaded non-payment of the premium. The plaintiffs replied that the defendants induced the plaintiff to believe it was paid. There was no judgment, because it was assumed the replication was good. It passed through the hands of able counsel. But the facts showed they made no such representation. Since this case has been argued, another case has come within my recollection, and seems to be relevant. If a party becomes surety in a Court of Equity, under an instrument under seal, on the faith that there be three, and there be not three, that cannot be enforced. Neither can it in law, where equitable defences are admissible. That case has been cited in some of the Law Journals. I do not doubt much but that that case was rightly decided, because particular privileges belong to an infant. No such thing occurs here. This company is of full age. They represent a matter of which they say they had knowledge, and the plaintiff had no knowledge. The nearest case to this case is that of the prospectus. We have come to the conclusion that the plaintiff is entitled to judgment. Another demurrer on this record was not argued, because it was known the Court had decided on the pleading before. Our judgment is for the plaintiff on both demurrers.

Judgment for the plaintiff.

KENNY v. CHISHOLM.—Jan. 13, 14.

Wrongful Dismissal.

Semble.—A master who has dismissed a servant may justify the dismissal by showing that at the time of the dismissal the servant had committed an act which justified it, though the master did not assign it as the ground of the dismissal, nor even know of it. *Sed Quære, Cussons v. Skinner* (11 M. & W. 161.)

M. Morris, Q.C., showed cause against a conditional order to set aside the verdict, as being against evidence and the weight of evidence. The action was for wrongful dismissal. The plaintiff was a tailor, who came up to get employment as a foreman tailor in Sept., 1861, and saw an advertisement, and he was employed by Chisholm. Two questions arose on the trial. There were two pleas. Our case was that it was a hiring for a year, and that we should have got a month's notice. *Forgan v. Burke* (12 I. C. L. 495). The defendant said it was a weekly hiring. There was a second plea,—that we were habitually drunk. *Christian, J.*, says in his report, "I told the jury that the contract was to be gathered not from the agreement of October, but from that and a previous writing taken together, and that as the defendant had destroyed the

latter, they were to gather it from the evidence. I told them if they believed the plaintiff, I thought that they should find for the plaintiff. The other question I left to the jury." They found for the plaintiff on both issues. There was no point made that the damages were excessive. It appeared that in Sept., 1861, there was a writing drawn up to some extent defining the terms of the hiring. It appeared that the plaintiff proceeded to Ballina on the 5th Oct. to be foreman by direction of the defendant. It is also admitted that the payment was £2 10s. a week, from the 7th Oct. to 25th Oct.; then another agreement was drawn up. The defendant's case was, that that took the place of the former, and therefore he destroyed the former. Our case was, that the second agreement of Oct., 1861, was only arranging terms which had not been arranged by the former. The evidence of Kenny was, that he was a foreman tailor, and being unemployed in Sept., 1861; saw the advertisement; saw defendant at the European Hotel; agreed to take £2 a week for the first year, on condition of getting £3 afterwards. There was no writing then. He called on him afterwards; he called for pens, ink and paper, and said, I wish to bind myself for twelve months—I agree to enter the employment of Chisholm as foreman tailor, at a weekly salary of £2 10s.; the plaintiff kept no copy. Further agreement ran thus: "Whereas, I have entered into an agreement with Mr. Chisholm upon certain terms not necessary to be set forth at length, and I agree not to interfere with the customers of said J. W. Chisholm now for the further and better carrying out the said agreement to the extent hereinafter declared, I will not act as a tailor or cutter for my own benefit nor directly nor indirectly interfere with the customers of the said J. W. Chisholm, and I will not for twelve months after I shall leave the employment of said J. W. Chisholm in Ballina act as a cutter or tailor." This does not take the place of the former agreement, but on the contrary refers to it and says, it is unnecessary to set it forth, and it contains what this does not—the terms of £2 10s. a week. Some notion seems to have entered into Chisholm's head after he was three weeks with him that Kenny might go and set up for himself, and so he enters into these covenants in the penalty of £500. [*Ball, J.*—Does it appear when the first was destroyed?] The defendant says *eo instanti* when the second was drawn up, and it was done in the presence of Kenny. Kenny swears there was nothing of the kind. [*Monahan, C.J.*—The judge told the court he thought it was a proper subject of discussion; that on the sober habits of the plaintiff he did not think much of the verdict.] Chisholm swore on his direct examination that the reason he did not employ the plaintiff for twelve months was that he never employed any one in that way; it was proved that two others were employed for twelve months. One of them swore he never saw Kenny drunk but once, and that was on the 10th March, when Kenny admitted he was. The defendant's attorney wrote a notice, stating that he was ready to give a copy of the agreement of Oct., 1861, and that there was no other agreement between the plaintiff and defendant; and the defendant had to admit at the trial that this was untrue, and he told it to his attorney. The rest of his testimony would be af-

fect by that. As to the drunkenness, the plaintiff was in the habit of drinking porter at his dinner. Three witnesses deposed to having seen him drunk. Mr. Baxter found him much the worse for drink; he can't fix the time, but says it was between Nov. and February. Armstrong, a Presbyterian clergyman, saw him drunk. Four gentlemen of respectability did depose on this point. The notice was on the 7th March, 1862, to quit on the 7th April, 1862. The question was, what were the grounds on which this man was dismissed, not was he ever drunk. [*Monahan, C.J.*—What was the question left by the judge to the jury?] "Whether the plaintiff was given to intoxication so as to disqualify him for the duties of his employment." *Smith v. Allen* (3 Foster and Finlayson 157) says, "it is for the jury whether the dismissal was *bona fide* and really on such grounds." [*Monahan, C.J.*—There are much better cases the other way.]

Burke, Q.C., contra, read a letter of 7th May, 1862, from plaintiff to defendant—"Dear Sir—On your giving me the bill the last Saturday I was with you, you said to me to settle when convenient. I will write you shortly, however, as at present I am not in funds. Mrs. K. had a small account against you, &c"; and one dated July 19, 1862.—"In reply to your's, I beg to say I sent Mrs. K's account for work. I have been unwell. I have also had keepers on my house for rent. On your paying me my last week's wages you very kindly said I might suit myself as to time of settling. Do you think was I entitled to anything for the week in Dublin? I mention these things for your consideration, and wish your view of them that we may know our relative position," &c. There are two propositions. As to the contract, the verdict was against the weight of evidence. Chisholm contradicts what is stated about the first agreement. The second agreement says, "Upon certain terms as to payment not necessary to be set forth." [*Monahan, C.J.*—Why not necessary; but because the other document was to speak for itself?] It refers to payment.] [*Concannon* objected that the letters were not on the judge's notes nor in the certificate.] They were marked by the registrar. One of these letters was in answer to a letter from the defendant, telling the plaintiff that when he left he owed him a sum of £2 10s. 8d., and calling upon him for payment, and he makes no remonstrance in that letter, never says, "You have dismissed me before the time; you owe me for wages, and for dismissing me before the time." As to the second point. The plaintiff admits himself he was in the habit of drinking. [*Monahan, C.J.*—The notice you gave "is according to the terms of the agreement." That is quite a different notice from what you would give if dismissing him for drunkenness. You need not have given him any notice at all. Your lying by from November up to March would look like an admission on your own part that the drunkenness was not such as would disqualify.] There were two means of putting an end to this contract. If the defendant gave the plaintiff the benefit of a month's notice, does it follow that he was not acting upon drunkenness as the ground? [*Keogh, J.*—You ask the jury to believe that it was for drunkenness you dismissed him, though you never assigned that to the

man himself as the cause in the notice.] If a gentleman found his butler drunk when he went home he might turn him out on the moment; but if he says, "Humanity suggests to me to put up with him for a month, because otherwise his family will be ruined, and I will give him a month's notice," must he state in the notice that it is for drunkenness? That is a parallel case.

Concannon, in reply—The defendants' counsel did not read the letters to show them to be a release, but to convince the Court as a jury that they were inconsistent with a hiring for a year. He either knew the law or he did not. He may have been ignorant that he was entitled to a month's notice. The real cause of the dismissal was the language, supposed to be abusive, which was used by the defendant, "He might as well be a soldier in a barrack," and he then said, "I have no remedy till the end of twelve months, nor have you to get rid of me." Is it likely that any one would leave Dublin to go to Ballina at £2 10s. weekly hiring? [*Monahan, C.J.*—We do not think we can interfere on the first ground. *Spotswood v. Barrow* (5 Exch., 110), is a case of very high authority. It was proved that the man had misapplied the money, and it was proved it was not known to the master at the time of the dismissal and could not have been the ground, yet it was held he could dismiss him.] [*Christian, J.*—I told the jury that if the defendant could establish the fact of the drunkenness he was entitled to a verdict whether he knew it or not, and that was not questioned at the trial.] If a party is not aware of the cause he cannot justify by *ex post facto* information. [*Monahan, C.J.*—That is the very thing it is decided he may, in that case, in 5 Exch.] [*Keogh, J.*—Might not you more fairly contend that as he did not rely on the intoxication, the jury did not believe the intoxication existed, and that would get you out of that case in 5 Exchequer. *Christian, J.*—That was the course the case took at the trial.] It was plain to the jury that whether he was drunk or not the defendant condoned the drunkenness, and dismissed him for words supposed to be abusive and which were not.—*Cussons v. Skinner* (11 M. and W., 161.) [*Monahan, C.J.*—You are going on dangerous ground if you show he did not know of the drunkenness that would justify him in dismissing him.] [*Christian, J.*—The jury thought that notwithstanding all these witnesses, yet in Mr. Chisholm's own view the intoxication was not sufficient to incapacitate him for his work.] [*Monahan, C.J.*—*Mercer v. Hall* (5 Q. B. 447), would be a stronger case for you, but that went on the form of the pleading. I was surprised at the law of that case in Foster and Finlayson, and thought it must have gone on the pleading, and I looked at the note and found that it did. The other case in 5 Exchequer is always referred to.]

Cur. adv. vult.

Jan. 30.—*MONAHAN, C. J.*—This case comes before the Court on a motion for a new trial, because the verdict was against the weight of evidence. The action was brought by Kenny against Chisholm, a master tailor. The plaintiff says that he was hired for a year, and that he was improperly dismissed, and has sustained damage. The defendant pleaded that there

was no such thing as a hiring for a year, but for as long as the parties pleased. There is a further plea, the substance of which was, that on several occasions the plaintiff was intoxicated during the hours of business. The issues settled were whether these pleas were true in substance and fact. The case was tried before *Christian J.*, at the last assizes, and a great portion of the controversy was whether there was a hiring for a year or an indefinite period. The plaintiff's case was that it was a written contract in Dublin between himself and the defendant, and that he was hired for a year; that he went down to Castlebar and a further document was signed, which I hold in my hand. It refers to the previous agreement without giving the substance of it, and states the rate of payment; it does not state in terms the period, but it says it shall be competent to determine by giving a month's notice. The defendant admitted there was an agreement, but he denied that it was for a year, and said it was for an indefinite period. Be that as it may, the judge, without any objection being suggested, held that if the agreement had been in fact entered into in Dublin, the subsequent one did not alter its being a hiring for a year. The substance of both would be a hiring for a year. But if the defendant's case were true it was optional to determine. There was much conflicting evidence. The jury found in favour of the plaintiff, and therefore, that there was in effect a hiring for a year. The Judge reported that he was quite satisfied with that finding, and as far as we can form an opinion we are, because the idea of such a hiring is more likely. In the course of the altercation which gave rise to his dismissal, the plaintiff stated that there was no power to dismiss him. There is no ground to disturb the verdict on that. The matter is not quite so clear as to the other point. The allegation was that he was intoxicated on several occasions. The facts appear to have been that at the end of five months there was a trial which excited some public interest, and this man was anxious to go to the mail car to get a report of the trial. The master asked where he was going. He said he was going for a newspaper. The master objected. The man said it was a great hardship, and that it would be better to be a soldier in a barrack, and the master said, "You have the remedy in your own hands," and he said, "I have not." That he dismissed him on the supposition that he had the power to determine the employment at the will of the party on the terms contained in the second memorandum. There was no substantial difference between the plaintiff's and defendant's evidence on this point. There was no plea that it was for impertinence he was dismissed. The master stated that on several occasions before Christmas he did observe him drunk; that he remonstrated with him, and that the man promised to be better behaved; that in January a customer came in, and he was unable to measure him from actual drunkenness, and the master had to do it himself. But, what has some reference to that it is alleged, that Mr. Chisholm stated he would overlook it on that occasion. He does not state any drunkenness subsequent to that month of January. There were 3 or 4 witnesses examined, respectable men. Several deposed to having seen this man drunk on several occasions. There is evidence

of drunkenness subsequent to this in Jan. The question was left to the jury by Christian, J. The plea was that the plaintiff had been intoxicated on several occasions. The judge says, "The other issue I left to them on the evidence." The jury found that he was not given to intoxication, so as to interfere with his capacity. Neither party asked an issue as to whether there was particular drunkenness subsequent to January, and as far as we can judge, and the judge has submitted to us the view taken by the jury was, that inasmuch as Chisholm had continued this man up to the month of March, that when he then gave him a month's notice, the jury considered the master himself thought there was not what would entitle him to dismiss him on account of drunkenness. The jury do not seem to have taken the wisest way of looking at it. If on the ground of being against the weight of evidence we were to set aside the verdict, it would be on the terms of the party paying the costs. It is not our opinion that it was necessary for Chisholm to assign the drunkenness for a cause. If found as a fact, if he had not assigned it or even known it, it would justify the dismissal.

Rule discharged.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

GODFREY v. BRODERICK.

Mistake of arbitrator no ground for setting aside an award.

Upon the face of an award an expression appeared which was construed in one sense by the taxing master, but in a different sense (as it appeared by the arbitrator's certificate subsequently given by him) by the arbitrator himself; nevertheless the Court, on motion to remit the award to the arbitrator for his explanation, refused to interfere with the interpretation put by the taxing master on the expression used.

THIS case came before the Court on motion by the plaintiff, that the taxing master be at liberty to allow certain items disallowed by him in the taxation of costs in an action, where the matters in dispute between the plaintiff and defendant, the costs of the action, and of the reference and award, were referred to an arbitrator, who accordingly made his award, whereby he found the issues of fact for the defendant, but allowed the plaintiff's demurrer to certain defences, and the costs thereof in the following terms:—"I accordingly allow plaintiff's demurrer to each of the said fourth defences to said first and second counts, and award to the plaintiff the costs of said demurrers up to and inclusive of the costs of setting down same for argument in the Court of Exchequer, but not further or otherwise, and I order said costs to be paid by plaintiff to defendant, or to be allowed by defendant to plaintiff out of the

costs hereinafter awarded by me to be paid by plaintiff to the defendant." The award having been thus made, the costs came on for taxation before the taxing master, and when taxing the plaintiff's costs of the demurrer, he declined to allow the costs of briefs and counsel's fees on the argument of said demurrer, on the ground that the costs of the briefs, and also the fees to counsel, were not any portion of "the costs of setting down the demurrer." Application was then made to the arbitrator to explain his award, when he gave the following certificate—"I hereby certify that, by the award made in this action, I intended to allow the plaintiff *all* costs of the demurrer incurred by him previous to the case coming down for trial; but being under the impression (which I am informed was an erroneous one), that no costs had been incurred since the demurrer was set down, I allowed the following words to stand in the draft award furnished me by the defendant, that is to say, 'up to and inclusive of the costs of setting down the same for argument in the Court of Exchequer, but not further or otherwise,' and I thought that these words were introduced to prevent the plaintiff from ascribing any part of the costs of the hearing before me to the demurrer, which was, in fact, argued before me." Application was now made "that the taxing master be at liberty to allow the briefs and fees to counsel for the argument of the demurrer, or that it be referred back to the arbitrator to amend his award in relation to said costs pursuant to his certificate."

Jellet, in support of the motion, referred to Russell on Arbitration, p. 677.

O'Riordan, contra.—The arbitrators having once made an award, it cannot be subsequently altered, neither can the certificate of the arbitration be of any avail, and so it was held in *Leggo v. Young* (16 M. G. & Scott, 626). In *Hodgkinson v. Fernie* (3 C. B., N. S., 189) it is said that the decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matter of law and fact. There a verdict was taken for the plaintiff, subject to the award of an arbitrator *as to the amount of damages*, and his award included an amount of damages which (it was assumed) the plaintiff was not entitled to legally in the action, yet nevertheless the Court refused to interfere. *Misconduct* alone on the part of the arbitrators will induce the Court to interfere with the award.—*Hall v. Hinds* (2 M. & G., 847). *Phillips v. Evans* (12 M. & W., 309) was an action for goods sold, &c., to which the defendant pleaded a set-off. Having been referred to arbitrators, the defendant admitted that the plaintiff had a claim against him for £82 3s. 8d. for goods sold, &c., and for £119 7s. 4d., the produce of the plaintiff's goods sold by him under a distress for rent, which sums together exceeded the entire set-off claimed by the defendant. The arbitrator, omitting by mistake the £119 7s. 4d. admitted to be due by the plaintiff, awarded that the defendant's set-off amounted to £100 0s. 6d., and thereby exceeded the plaintiff's damages, which he assessed at £94 13s. 4d. It appeared by the affidavits that on the error being pointed out to the arbitrator he admitted it, and requested the defendant to allow him to reconsider his award upon the evidence before him, which the latter refused.

The error did not appear on the face of the award, nor did the arbitrator make any affidavit. The Court, under these circumstances, refused to set aside the award, adhering to the general rule that the mistake of the arbitrator is no ground for setting aside an award.—*Cleary v. Cleary* (10 I. C. L. R. 329). In that case it was held, upon appeal from an order by a judge in Chamber, remitting the award to the arbitrator for amendment, that the award not being void on the face of it, should not be remitted to the arbitrator for amendment.

Pigor, O.B.—We cannot grant this motion; the arbitrator has made use of an expression in a sense which the taxing master did not understand, or at least it was construed in another sense by him. The arbitrator in his award states expressly his intention was to apportion the costs between the parties; and he awards the costs of the plaintiff's demurrer *up to* a certain stage of the case to the plaintiff. The taxing master understands that to mean setting down the demurrer for argument. There is, however, a well-established rule, that the mistake of the arbitrators is no ground for setting aside an award. If parties select the tribunal of arbitration, they must accept all its consequences. In *Phillips v. Evans* a manifest injustice was done, yet the Court would not interfere.

Motion refused with costs.

Court of Admiralty.

[Reported by William Chamney, Esq. Barrister-at-Law.]

THE ROTHSAY CASTLE.

Salvage—Signal of Distress—Costs.

In this case where there was no personal risk or any danger, but which was an ordinary salvage service performed with skill, good conduct and complete success to a vessel in imminent peril of being totally lost, the Court awarded to the salvors a sum of £375 or "one fourth" of the admitted value and costs.

THIS was a suit instituted by the registered owners of "The Holyrood," a screw steamer of 533 tons burthen and 100 horse power, Captain Fudge, the property of "The London, Limerick, and Liverpool Steam Ship Co." against the river steamer "Rothsay Castle," of Glasgow, the property of "The Oriental and Inland Steam Co." William C. Mahon, master, to recover compensation for salvage services alleged to have been rendered to the impugnant vessel a few miles off the Tuskar upon the South East coast of Ireland. The impugnant vessel including stores, &c., was admitted to be worth £1500, and one half that amount was claimed for salvage. The salving vessel and cargo were stated to be worth £16,800. The case was by consent heard *viva voce*, and the facts appear fully in the judgment of the Court.

Doctors Townsend and Chatterton, Q.C., for the salvors.—It was a case of merit, and deserved the marked approbation of the Court which should award at least one-half the value of the property saved.

They cited *The Martin Luther* (Sw. Rep.), and *The Barklay* (Sw. Rep.)

Doctor Gibbon and Elrington for the *Rothsay Castle*.—No doubt services were rendered and should be paid for, but the amount claimed was most exorbitant.

JUDGE KELLY.—This case has been spread out in the pleadings perfectly free from exaggeration, and spoken to on both sides so as to assist the Court very materially. No question of law has arisen, and the single duty devolved upon the Court is, to ascertain what amount of compensation should be awarded to the petitioners for the services proved by the evidence to have been rendered by them. That evidence is singularly corroborative, presenting one uniform narrative, without contradiction by witnesses at either side upon any material point. The *Rothsay Castle* it appears, is a long river steamer, intended for inland navigation in India, and early in November last was stripped of her engines and machinery and rigged as a three-masted schooner to proceed to Calcutta under canvass, the company who owned her having deemed that the most advisable course, her boiler and steam machinery, having been shipped for the same destination in the *Earl of Lincoln*. For the purpose of avoiding the delays of the Channel navigation, the *Rothsay Castle* had been towed from Lamlash to Queenstown; and then, on the 13th of November, from the latter harbour to the Old Head of Kinsale, for the purpose of giving her a good offing. Scarcely had she been cast off, and made a little to westward of Cape Clear, when the wind came on to blow heavily from S.W., and by W. to N.W., and she was brought round to run up channel. The next day the step of the foremast gave, and the weather became so thick and dark, the master could not tell where he was—he was unable to take an observation, and his expression is, “He was puzzled to know where he was going, it was so dark and thick, and the vessel was drifting like a bladder on the water.” At this most embarrassing juncture, the crew, refusing to work, came aft, and insisted on the master making for the nearest port. He asked them to give him one day’s time to see if it would clear, and thus matters then stood. Through the course of that night an American vessel passing him, the master endeavoured to make sail after her, and threw out signals, but she passed on unheeding him. The next morning it cleared, when he found himself off the coast of Waterford, instead, according to his own calculation, of being to the west of Cork; having, to use his own words, made more way than he anticipated to leeward—in plain language, having drifted upwards of fifty miles to eastward of his then intended port. At this moment of time, viz., noon on Thursday, the *Holyrood* screw steamer, on her voyage from Liverpool to Limerick, with a valuable cargo, had passed the *Tuskar*, sighted the *Rothsay Castle*, then distant about seven miles, and seeing her ensign union downwards, at once shaped her course to come up with her to assist her. The position of the *Rothsay Castle* was then sufficiently perilous, the *Saltees* being under her lee, the strong current of the flood tide, which was then making, setting fast towards them; and the *Hook*, the entrance to the only harbour available, full eight miles to the north, the wind blowing nearly a gale from W.N.W., and a

heavy sea rolling, the foremast of the vessel herself disabled, and her crew terrified and mutinous. The evidence of the master is, that he could not have cleared the *Saltees*: and the evidence of the other witnesses is, that he could not have fetched the *Hook*. The *Holyrood* having hailed her, was asked to tow her to the nearest port, yet for that purpose the master of the *Rothsay* admitted he had not on board a rope sufficiently strong. That want was speedily supplied by the vigour of the master of the *Holyrood*, who, after two ineffectual attempts, one of them not without personal risk to himself, succeeded in getting his own towline made fast to the *Rothsay Castle* and the vessel herself in tow. The *Holyrood* then, abandoning the further prosecution of her own voyage, turned back, towing the *Rothsay Castle* on towards the *Hook*, and then up the river to Passage, where, after a labour of about five hours, and a traverse of about nineteen miles, she left her at anchor in perfect safety. The master of the *Rothsay Castle*—the best witness on the point—made no secret of his sense of that providential rescue, having said to the master of the *Holyrood*, “that he thanked him for saving his life and his ship,” and to the witness *Philips*, that it was “a lucky thing he had met the *Holyrood*, or he did not know where he would be then.” An occurrence which took place but a few hours later that same evening, gives particular force to those last expressions. The wind had been blowing strong, nearly a gale, during the morning, but that night it increased to an entire gale. The words just referred to had, therefore, fearful and substantial import; as had this disabled schooner not met with her salvors then and there, she must, under the circumstances, have been driven on the *Saltees*, for she had not sufficient ground tackle, even had she had the ground, to ride out that gale at anchor. From that great peril her rescue was complete; and here is the first element of salvage proper. It does not appear to the Court that so great a merit is diminished, because it has been accomplished without loss of life or limb to the salvors. At the same time, it is not to be denied that it might be enhanced by such undesirable accompaniments, not in its intrinsic value to the owner of the rescued property, but in the amount of the reward then so justly to be increased by the salvors. The time occupied was short, but was effective, and all the more so when the change of weather that night is borne in mind. The Court in all such cases will ever keep in view the fact, that steampower—the cause and the forerunner of so many important and beneficial changes in all things connected with its influences—has, in regard of salvage, effected two great boons in favour of navigation and the world of commerce—namely, the saving of human life and property, with nearly entire immunity and with almost certain success. The petitioners in this case are the owners of a steamer of high value, and were the carriers at the time of a full cargo—all was risked in the service in question, and the voyage itself delayed. These in themselves are ingredients in their favour, and are to be weighed along with and against other circumstances. The admitted value of the *Rothsay Castle* and her stores is £1500, and, according to the law of salvage, a just proportion of that sum—just to owners equally as

salvors—is now to be awarded. The Court, then estimating the services of the salvors in this case, but as ordinary services in respect of personal risk or daring, or of labour, and in regard of the object achieved, that it was achieved with skill, good conduct, and complete success—keeping also before it the policy of encouraging in such enterprises the aid and co-operation of great steampacket companies, will award to the petitioners one-fourth of the value of this vessel and her stores, being a sum of £375, with the costs of suit.

Proctor for the petitioners—Mr. Hamerton, Q.P.
Proctor for the defendants—Mr. Lee.

Court of Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

PETTY BAG SIDE.

THE QUEEN v. SWAN.—Nov. 26.

Motions on the Petty Bag side of the Court of Chancery must be made in term.

The Petty Bag side of the Court of Chancery, is not a court of common law within the meaning of the Common Law Procedure Act.

William Croker King moved for an order to substitute service of a writ of *scire facias*, tested on the 12th November, 1864, on Joseph Swan, who is living out of the jurisdiction, by serving same on John Faria, and by transmitting a copy of said *scire facias*, and of the order by a registered letter addressed to Joseph Swan, 17 Red Lion Square, London. [The Lord Chancellor.—I fear I cannot entertain this motion to day; it is a term motion and should have been moved yesterday, the last day of term; this is an application on the law side of the Court; and the Court has no jurisdiction to hear it out of term.] The motion is at the common law side of the Court; and the Common Law Procedure Act enables the Common Law Courts to sit and dispose of business out of term, and the Petty Bag side of this Court is a Court of Common Law, and therefore your lordship has discretion to entertain this motion.

THE LORD CHANCELLOR.—I do not consider the Petty Bag side of the Court of Chancery is a Common Law Court within the meaning of the Act.

Holls Court.

[Reported by John Monroe, Esq., Barrister-at-Law.]

THE ATTORNEY-GENERAL, AT THE RELATION OF THE PROVOST, FELLOWS, AND SCHOLARS OF TRINITY COLLEGE, DUBLIN; AND THE SAID PROVOST, FELLOWS, AND SCHOLARS OF THE SAID COLLEGE v. THE KING AND QUEEN'S COLLEGE OF PHYSICIANS IN IRELAND.—Jan. 15, 17, 19, 21, & 22.

Authority to grant medical degrees—Jurisdiction Parties.

Where, by the charter of the College of Physicians, powers were given to the president and fellows to

make such statutes, decrees, and ordinances, for the regulation of the faculty of physic, as to them might seem necessary, and to grant testimonials to all candidates presenting themselves for examination, as they might seem entitled to receive them—Held, that this did not imply the power to grant DEGREES, and that between a license and a degree there was a well-recognized distinction.

Held also, that, in case any corporate or other body usurp the privilege of granting degrees without express authority, proceedings are properly taken in the name of the Attorney-General.

Sed quære, whether one body to whom the privilege has been granted, can file a bill against another body which has usurped such privilege, without having first established its right at law.

THE petition in this case was in the nature of an information and bill. In 1592, letters patent were granted by Queen Elizabeth, whereby the provost, fellows, and scholars of Trinity College were incorporated, and the College established as the mother of a university, for the instruction of students in the arts and faculties. It was therein ordained that no one should, in any other place, make public profession of, or teach the liberal arts, within the kingdom of Ireland, without special license from the Crown, and it was enacted, that the students in the said College should have the liberty and privilege of obtaining the degrees of bachelor, master, and doctor, after suitable periods, in all the arts and faculties. These letters patent were somewhat modified, but in the main confirmed, by the charter granted by Charles I. in 1637. Since the granting of these letters patent, the provost and fellows used and enjoyed the privilege thus conferred on them, and, amongst others, granted degrees in the faculty of medicine to candidates who had complied with the regulations of the College, and paid the required fees. Graduates obtaining such degrees were styled respectively bachelors and doctors of medicine, and were entitled to use respectively the initial letters, M.B. and M.D., these degrees and initial letters being by law and usage confined to those who had obtained a degree of that rank in any of the arts and faculties. Since the granting of these letters patent, the provost and fellows of Trinity College were the only body who had the privilege of granting degrees in Ireland, till the establishment of the Queen's University in 1850, and it was required by them that, in order to obtain the degree of doctor of medicine, the candidate should have previously graduated in the faculty of arts, and gone through a course of instruction in the College, with that view, for a period of five years. In the earlier part of the seventeenth century the provost and fellows of Trinity College granted to one John Stearne, a doctor of medicine, a fellow of the College, the use of certain premises, then called Trinity Hall, for the sole and proper use of physicians. Subsequently, on the 8th of August, 1667, letters patent were granted by Charles II., whereby John Stearne and several other persons therein named were erected and formed into a corporation, by the name of the President and Fellows of the College of Physicians in Dublin. To the provost and fellows of Trinity College was given the right of choosing the president of the College of

Physicians from among its members, and of electing into the membership of the said College of Physicians such persons practising medicine as they should consider fitted therefor. It was further thereby provided, that within the city of Dublin, and seven miles therefrom on all sides, no person should practise the faculty of medicine without having been admitted to it by letters testimonial under the seal of the said College of Physicians. In 1692 these letters patent were surrendered, and new ones granted, whereby Doctor Patrick Dun and thirteen others were incorporated under the title of the President and Fellows of the King and Queen's College of Physicians in Ireland. It was provided by this charter that the fellows of the said College should be chosen out of the most learned and experienced physicians, who should have, before that time, been examined and approved of by the said College, and that, at a meeting to be held in their Common Hall, the presidents and fellows for the time being should elect any one or more of such eminent, learned, and experienced physicians to be a fellow, or fellows, of the said corporation in the place or places of so many of the said fellows of the said College as should then be dead or removed. The letters patent further contained a delegation of general powers and authorities to the said College of Physicians, authorising them to make wholesome and reasonable laws, ordinances, and constitutions, binding on themselves and their successors, for the redress of abuses, and the proper management of the corporation. They further contained a prohibition forbidding any person thenceforth to exercise the faculty of physic within the city of Dublin, or seven miles from it, unless he should have been first admitted, or licensed to do the same by the president and fellows of the said College. Jurisdiction was also given them over all physicians, and apothecaries, and druggists, within the same limits, and provision was made for licensing persons desirous to practise physic beyond those limits, to whom the College was authorised to give letters testimonial. The letters patent further contained the following provision—"That no person or persons whatsoever, except he or they be a graduate or graduates in physic in one of the Universities of Cambridge, Oxford, or Dublin, which have or hath accomplished all things from his or their favour, without any grace, shall, do, or may, from henceforth exercise or practise in the said art or faculty of physic in any part or parts of this our realm of Ireland, without our said city and limits aforesaid, until he or they respectively shall be examined and approved of as aforesaid, and have and receive a testimonial thereof," under pain of incurring certain penalties to the College of Physicians. "Provided always, that all graduates in physic in the University of Dublin, having performed their full acts, shall from time to time, upon their application, be immediately admitted into the College of Physicians in Dublin, without further examination, he and they paying the usual fees." This proviso was repeated by stat. 40 Geo. 3, c. 84. At a meeting of the King and Queen's College of Physicians in October, 1695, three years after the granting of the charter, the following order was made—"That whosoever is to be a fellow of this society is first to be admitted doctor of physic in the University of Dublin, on account that

there is entered in the registry of the said University an order, that whoever takes a degree in the faculty of physic, do give timely notice to the president and fellows of the King's and Queen's College of Physicians, that they may be present at the performance of the exercises and acts, to make a judgment accordingly whether they be duly qualified for such degrees." The College of Physicians, acting under their charter, were in the habit of holding public examinations, and granting letters testimonial to successful candidates in the following form—"Omnibus ad quos literæ præsentantes pervenerint salutem. Nos, Preses et Socii Collegii Medicorum Regis et Reginae Hiberniæ ——— quum examinatione solenni, de more institutâ, se doctum et rei medicæ peritum probasset, *licentiam medicinæ* exercendæ, quamdiu se bene gesserit, legibusque hujusæ Collegii obtemperaverit plenus quantum in nobis est, permisimus, et auctoritate Regiarum chartarum nobis in istum finem concessum, confirmavimus, quod sigillo nostro communi affixo, et nomini-bus nostris subscriptis testamur." In 1860 the College of Physicians published the following advertisement in the daily papers—"The College of Physicians, having had before them the opinion of the Attorney-General for Ireland, and the Solicitor-General for England, that the fellows and licentiates were legally entitled to the degree and title of doctor of medicine, and that they were legally entitled to embody such in their diploma, have adopted the following form into their bye-laws—"We, the president and fellows of the King & Queen's College of Physicians in Ireland, having duly and deliberately examined A. B. in the principles and practice of medicine and the accessory sciences, and having found him well-versed therein, do, by these presents, grant to him license to practise in the faculty of physic, and do certify that he has obtained, and is hereby entitled to, the degree, title, and qualification of doctor of medicine, and licentiate of the College. In testimony," &c. In 1862 this form was changed, and the following form of diploma was substituted—"We, the president and fellows of the King and Queen's College of Physicians in Ireland, having duly and deliberately examined A. B. in the principles and practice of medicine, and the accessory sciences, and having found him well-versed therein, grant him a licence to practise in the faculty of physic, and do certify that he has obtained, and is hereby entitled to, the title of doctor of medicine, and the qualification of licentiate of said college. In testimony whereof," &c. The petitioners submitted that the order of October, 1695, was strong evidence to show that at that period the College of Physicians did not claim any right or privilege of granting degrees, or of admitting to the title of doctor of medicine independently of the said University of Dublin; that the letters testimonial did not, in any manner, purport to confer upon the person to whom the same were granted, any degree or any right to use the title of doctor, or to append the letters M.D. to their names; that the variation in the last-mentioned form of certificate was merely a colourable attempt to avoid the use of the word "degree," while it purported to confer a title and degree in medicine. The Attorney-General, by way of information, submitted that the granting of admissions testimonial or diplomas in the forms set

forth, or any form analogous thereto, whereby the title or degree of doctor of medicine was purported to be conferred by the said College of Physicians, upon the persons to whom the same were granted, was an act in excess of the corporate power vested in the said college by their charter; the right to grant degrees being vested in such bodies only to whom such power has been granted expressly by the Crown, as the fountain of all honour: that it would be a mischievous and dangerous practice, and one tending to lower the standard of attainments in the arts and sciences, to permit a public body not authorised by their charter, to grant degrees in any of the arts and sciences, or to grant testimonials and certificates purporting to give the holders thereof the right to assume the titles which were by law and usage recognized as belonging to graduates of a university in the said arts and sciences: that by so doing the College of Physicians were assuming to themselves the exercise of the prerogative of the Crown. The Provost and Fellows of Trinity College, the petitioners, submitted that the number of candidates presenting themselves for degrees in the University of Dublin, and consequently the amount of fees received would be greatly diminished in the event of the said College of Physicians being suffered to grant titles purporting to be degrees or testimonials in the form aforesaid, without requiring the candidates previously to undergo any university education, or obtain a degree in arts. The petition, therefore, prayed for a decree declaring that the King and Queen's College of Physicians were not legally authorized, by virtue of their charter or otherwise, to admit any person to the degree of doctor of medicine, or to grant or issue any license, diploma, or letters testimonial, purporting to admit to the degree of doctor of medicine the person or persons to whom the same might be granted, or certifying by such license or diploma that such person or persons were, by virtue thereof, entitled to the degree of doctor of medicine, or purporting to give the persons to whom such letters testimonial were granted the right or privilege to use the title of doctor of medicine or the initial letters M.D., and an injunction was prayed for accordingly.

To this information and petition the respondents put in an answering affidavit, sworn by Lombe Atthill, Esq., Registrar of the College of Physicians. They relied on the several charters granted by Charles II. and William and Mary, and the statutes in that behalf regulating and defining the powers and authority of the college. They denied that the first charter was surrendered, and submitted that it remained in full force, so far as the second charter was not repugnant thereto or inconsistent therewith. They averred that, for the last two hundred years, the several persons who had, from time to time, received their diploma, or letters testimonial, authorizing them to practice physic, had been publicly known or designated as doctors of medicine and doctors of physic, and that they were so called and recognized in and by several public Acts of Parliament; and that such distinction and title were an important part of their qualification and privilege. They denied that, since January, 1862, they had used any other form of diploma than that above set out as having been then adopted. They submitted that, by this form, they had not purported

to confer any *degree* of doctor of medicine, or doctor of physic, but, they submitted, that they had a full right and power to grant licenses and diplomas, in the form or to the effect aforesaid, to all persons to whom they were empowered to grant a license and authority to practice physic or medicine generally; and that such persons to whom such diplomas or licenses were granted had a right to teach the art or faculty of physic and to assume the title of doctor of medicine, although such persons had not obtained any degree in Trinity College or the Queen's University, or any other university. They denied that the title of doctor was by law or usage, exclusively attached to, and used by, persons who had obtained degrees of the rank of doctor of medicine conferred by a university, since such title had been by usage attached to all persons who had obtained the diploma or license of the College of Physicians. They denied that the order of October 2, 1695, afforded any evidence to show that at that period the College of Physicians did not assert any right or privilege of granting degrees or of admitting to the title of doctor of medicine, independently of the University of Dublin; since, as they submitted, the order, as alleged in the petition, applied to the admission of fellows and not of licentiates of said college, and was an order within the scope of the authority of said college to have made, as well as to rescind, and which was afterwards rescinded by a further order of the said college, and could not have operated to prevent the admission, as of right, as a licentiate of said college, of a person who had obtained a degree of bachelor of medicine, although such person had not obtained the university degree of doctor of medicine; and that this order and several others were matters of arrangement between said Trinity College and the College of Physicians, and determinable by either college at its discretion. They denied that the granting of the testimonial, in the form adopted in 1862, was an excess or violation of their charters, or of their corporate power or authority, or that they professed to have thereby conferred a degree of doctor of medicine. They denied that the form of the certificate was a mere colourable attempt to avoid the use of the word degree, or that it purported to confer a degree in medicine, as implying a university degree, admitting that it purported to confer the title of doctor of medicine of the College of Physicians only, and not otherwise, and which title they submitted the persons to whom such a diploma was granted had a right to assume. They denied the statements in the petition, that the power to confer a title of doctor of medicine was not granted to the college by their charters or otherwise, and that it would be a mischievous and dangerous practice, and one tending to lower the attainments in the arts and faculties, to permit the College of Physicians to grant testimonials, purporting to give the holders thereof the right to assume the title of doctor of medicine. They denied that they were assuming the exercise of the prerogative of the Crown to grant degrees, or at all, or that any injury would be sustained by the public by the licentiates in medicine of the College of Physicians being styled or called doctors of physic, or by the granting of such certificates as are now granted by the College of Physicians, the standard of medical education required by said

college being quite as high or higher than that required by the medical school of Trinity College, as evidenced by the fact that some of those who had obtained the degree of doctor of medicine in Trinity College had been afterwards rejected by the said College of Physicians. They submitted that the College of Physicians were more competent to judge of the qualifications of physicians than the universities: that the persons to whom diplomas had been granted in the form set out, were entitled to use the title of doctor of medicine, although they had no university degree of doctor of medicine: that they were not liable for so doing to a prosecution under the Medical Act, 1858, s. 40; and that proceedings should have been taken under that Act, if the assumption of such title by such persons, were unauthorised or unlawful. They submitted generally that the petitioners had stated no case entitling them to any relief, and that the petition should therefore be dismissed with costs.

The Solicitor-General (with whom were *Brewster, Q.C., Lloyd, Q.C., and Dames*) stated the petitioners' case. The Crown is the foundation of all honour, and no person or corporation is at liberty to grant honorary titles or distinctions, unless so expressly authorised by the Crown. Such authority was expressly given to Trinity College by its several charters. Pursuant to the authority thus given, the Provost and Fellows laid down certain rules to be followed by those who sought to obtain degrees in the several arts and faculties. A course of study was required to be passed through in the university by those who sought for degrees in medicine; and the candidates were required to have previously obtained a degree in arts. Prior to the establishment of the Queen's University in 1850 no other body possessed, or sought to exercise, the right of granting degrees in any of the arts or faculties, including the faculty of medicine. The College of Physicians was at first a mere offshoot of Trinity College, the Provost and Fellows having granted the use of Trinity Hall for the peculiar cultivation of the science of medicine. The persons to whom these premises had been granted subsequently obtained a charter of incorporation, enabling them to grant licenses to practise physic to those whom they might deem competent, and certain privileges were thereby granted to those who should obtain such license. This license was very different from a university degree, and gave no authority to those who had obtained it to assume the title of doctor of medicine. This distinction was recognized by several Acts of Parliament, and down till the year 1860 the College of Physicians never claimed any right under their charter to grant the degree of doctor of medicine. In 1695, three years after the granting of their charter, an order was entered on their books requiring that any one who required to be a fellow of their society should first be admitted as doctor of physic in the University of Dublin. On the 21st February, 1736, a bye-law was passed by the College of Physicians which directed "That no man receiving from this college a license to practise physic shall have the title of 'doctor' given him, unless he shall first have received the said title in the Universities of Dublin, Cambridge, or Oxford." This is conclusive against the present claim of the College of Physicians. The form of diploma adopted

in 1862 is only a colourable attempt to avoid the use of the word "degree." Without going through a prescribed university curriculum no person can obtain a degree, and without a university degree no person is at liberty to use the title of doctor. The College of Physicians, therefore, in seeking to grant a degree or to grant a title—the use of which a degree alone can give, have gone beyond their corporate powers.

Such being the case this is the proper court in which to seek relief, and the Attorney-General is the proper person to claim it. The public are entitled to protection, and where a privilege, the right to exercise which the Crown alone can grant, has been usurped, the Attorney-General is called on to interfere. In this case the relators have an interest, though that is not necessary—*Att. Gen. v. Vivian* (1 Russ. 226), and seek for relief themselves as petitioners. If this were a mere private right which was interfered with, proceedings at law should be taken first, the rule, however, is different where the rights of the public are concerned, as here—*Stockport Waterworks Co. v. Mayor, &c., of Manchester* (9 Jur., N.S. 266). See also *Rex v. Whitworth* (5 T. R. 85); *Rex v. Archdall* (8 A. and E. 281).

Serjeant Sullivan (with whom were *J. E. Walshe, Q.C., and William Smith*) stated the respondent's case.—The proceeding here by information and petition is erroneous. Recourse should first have been had to a court of law. The public interests are not in the least degree interfered with; it is a mere question of interest between rival corporations. If the College of Physicians has exceeded its rights as against the rights of Trinity College, an action on the case is the proper remedy, just as in the case of a violation of the rights of a toll collector. No public injury can be effected by the College of Physicians allowing its licentiates to take the title of doctor. The public are only interested in having properly qualified persons to practise physic; but what title such properly qualified persons may assume is to them a matter of indifference. It is rather for the benefit of the public that licentiates should be called "doctors," lest the public should labour under the misapprehension that the latter are superior to the former. In the case of *The Attorney-General v. Sheffield Gas Co.* (3 De Gex. Mac. & Gord. 304), the proceedings were by information and bill for an injunction to restrain the defendants from laying down gas pipes in the streets, whereby the right of passage of the public might be obstructed and the works of the relators (a rival company) interfered with. The Court there held that as the injury to the public was doubtful, the private company should first have established its rights at law. No relief can therefore be granted here, even if public rights have been interfered with; for proceedings by information and bill have no higher character than by a bill simply—*Attorney-General v. Electric Telegraph Co.* (31 L. J., N. S., 329.) It was sought in this case to obtain an injunction against the continuance of a nuisance. The Court, however, refused to interfere till the right was established at law either on the part of the public or a private individual. The information and bill were ordered to stand over that the Attorney-General might take such steps at law as he might think fit, or to enable the plaintiff to bring

such action as he might be advised. If the Attorney-General thought fit to interfere in this case, the proper course to take was by a *quo warranto* (Com. Dig. vii. 192). In the case of *The Attorney-General v. College of Physicians* (1 John. & Han. 589), the Vice Chancellor said: "The matter is too doubtful to justify the interference of this Court. Lord Cottenham more than once said he would not interfere with any public body supposed to be acting in contravention of the powers intrusted to them by the Legislature when the matter was so doubtful as to afford serious ground for contending that there was a *bona fide* proceeding in the exercise of their powers." And in *Gatliffe's case* (3 M. & G. 155) it was said, "This Court will not interfere by injunction when the right can be ascertained through the medium of a court of law."

But even if proceedings had been taken in the proper form no relief could have been obtained, since the College of Physicians have not gone beyond their chartered rights. No doubt, the right to grant degrees flows from the Crown; and unless the respondents possess such right under their charter, the petitioners must eventually succeed. The question, then, is, do they possess such right? The College of Physicians is no mere off-shoot of Trinity College. It is a chartered body itself, and has rights paramount to the other. The privilege which graduates in physic of the University of Dublin had of being admitted into the College of Physicians without further examination, was taken from them by 40 George III. c. 84, s. 45. The 20th section of their charter provided that no person should exercise the faculty of physic within the city of Dublin, or seven miles therefrom, without having obtained a licence from the College of Physicians; and the object of the several Acts of Parliament on the subject seems to be to constitute the respondents as the sole governing body to determine who were to be admitted to the faculty of medicine. If that be so the respondents must prevail. There is no magic in the word "degree." A "degree" is nothing but a licence to hold a certain status in a faculty. Where a body get paramount jurisdiction to give a qualification to practise, it may give any degree it thinks proper. It is argued that universities alone can grant degrees. That is not so. Anyone has a right to confer a degree who gets such power from the Crown. Trinity College itself was incorporated as a college and not as a university. So the Archbishop of Canterbury can grant degrees in medicine. The title of barrister-at-law is not given by a university, and yet it is a good degree. If the power to admit to a faculty be given, this is nothing more or less than the power to admit to degrees. In a Scotch case before the Privy Council (separately reported*) the controversy was regarding the powers of the Scottish University Commissioners. They had granted to a Scottish university authority to grant the new degree of Master in Surgery. This power was questioned before the Privy Council, and allowed, since they had paramount jurisdiction over the faculty. The College of Physicians, therefore, having jurisdiction to admit

to the practice of medicine, have a right to grant what degrees in medicine they may think proper. Their licentiates are called "physicians" in the 21st section of their charter. For a period of 200 years they have always been styled "doctors," and had such title engraved on their doors; and in *Bonham's case* (8 Co. R. 107, 114) members of the College of Physicians in England are called "doctors" by the Lord Chief Justice. There may have been a slight intermission in the use of the title after the passing of the bye-law of 1736. That rule, however, soon became, and has continued to be, obsolete. The fact, however, of the bye law having been passed is evidence to show that at the time, a practice existed of licentiates who had no university degree using such title, and that the college then exercised a right to withhold or retain the use of such title.

Dames for petitioners.—The first question in this case has regard to the form in which it has been brought before the Court. The proceeding by information is the proper one. Here Trinity College is the grantee of a portion of the Crown's prerogative, and the Attorney-General is bound to protect any infringement of that prerogative. The cases cited on the other side do not in the least conflict with these propositions. In the case of *The Attorney-General v. Sheffield Gas Co.* (3 De Gex, M. & G. 304), it was considered that the injury to the public was extremely doubtful. This was the ground on which the decision rested; and it was never sought to contend that if the injury had been a public one, the proper course of procedure was not by way of information and bill. The same observation applies to *The Attorney-General v. Electric Telegraph Co.* (31 L. J., N. S., 329.) In these cases the name of the Attorney-General was not used *bona fide*; but it was sought through him to serve a mere private interest. Here, however, there can be no question as to the public interests being involved. If so, the king has the undoubted privilege of suing in any court he pleases.—Chitty on Prerogative, 244; *Agar v. Candish* (Cro. Eliz. 327); *Burgess v. Wheate* (1 W. Black. 132). In the *Attorney-General v. Vernon* (1 Vern. 276), a bill was filed to set aside letters patent obtained by fraud; and though it was argued that the title by letters patent was a purely legal title, and determinable there, the bill was allowed. When the prerogative of the Crown attaches, it makes no difference that the Crown proceeds as trustee, provided the proceeding be *bona fide*.—*Rees v. Bailey* (4 Ir. Eq. 142). In *The Attorney-General v. Scott* (1 Ves. Sr. 418), it was held that an information was not to be dismissed, whether what was prayed was properly prayed or not. To the same effect are *Attorney-General v. Vivian* (1 Russ. 226); and *Attorney-General v. Bolton* (3 Arms. 820).

The second question is more important; viz., whether the College of Physicians have exceeded their corporate powers in attempting to grant the degree of Doctor of Medicine. It is not sought to be argued that no body except a university can grant degrees. It is only argued that none can grant degrees but those to whom such powers have been delegated by the Crown; and in this country such power has been delegated to universities alone. Such grant must be clearly proved. No such grant has been shown by the College of Physicians.

* This report is out of print, and the reporter has been unable to obtain a copy.

It receives authority merely to grant a "license," as is manifest from the recital in the 2nd charter of the surrender of the first. No doubt, it might appear that because in the 3rd section of the 2nd charter the members of the College of Physicians are referred to as doctors of physic, there might, therefore, be some ground for supposing that a power was given to the College of granting doctors' degrees. This argument, however, would extend to the same language in the first charter, when there were no doctors of the College of Physicians. Those mentioned in the second charter must therefore have referred to the survivors of those mentioned in the first, and who had already attained degrees elsewhere. If the College of Physicians had power to grant the degree of Doctor of Medicine, why enact the bye-law of 1695, declaring that no person should be elected to a fellowship of the College unless he had attained the degree of Doctor in Trinity College or some other university? In 1 Geo. III., c. 14, s. 1, it is provided that the King and Queen's College of Physicians "shall have full power and authority to enlarge the number of their body by admitting into the fellowship of their body such and so many other learned and worthy DOCTORS OF PHYSIC as the said president and fellows shall from time to time judge necessary. From this it is argued that doctors other than graduates might be admitted to fellowship, and therefore the College of Physicians may have had the power of granting the degree of doctor. It must be remembered, however, that the bye-law of 1695 was then in existence, which prevented any but graduates of a university from being fellows. The distinction between graduates and licentiates is recognised in several Acts of Parliament. By 40 Geo. III. c. 84, it was enacted that the professorship of the University of Dublin should be open to Protestants of all nations, "provided they shall have taken *medical degrees*, or shall have obtained a *license* to practise from the said College of Physicians, in consequence of a testimonium under the seal of Trinity College, Dublin." Here the distinction is clearly taken between degrees and licenses, and is subsequently recognised in 2 & 3 William IV., c. 75, ss. 1, 10, 14. During all this legislation the College of Physicians merely claimed the right of granting licenses; and in 1736 enacted the bye-law providing that no man receiving from the College a license to practise physic shall have the title of doctor given him unless he shall have first received the said title in the Universities of Dublin, Cambridge, or Oxford. No doubt, the public may give the title of doctor to a licentiate of the College of Physicians; but it is one question whether the public may call a person by a certain name and another whether a corporate body shall be allowed to go beyond the powers of their charter. Again, the distinction between a degree and a license is recognised in the Medical Act, 21 & 22 Vic. c. 90, schedule A and schedule D. So also in the Stamp Act, 5 & 6 Vic. c. 82, where different duties were imposed, and in 18 & 19 Vic. c. 82, repealing the stamp duties upon degrees of Trinity College, and 22 & 23 Vic. c. 36, s. 2, repealing the duties on licenses from College of Physicians. The question was fully argued before the Court of Queen's Bench in *Reg. v. Steel* (13 Ir. C. L. 410); and though the matter was extra judicial, two

of the judges of that Court intimated a strong opinion that the College of Physicians had no right whatever to grant degrees under their charter.

J. E. Walsh, Q.C.—Two propositions are mainly contended for on the part of the respondents. First, on the true construction of the charter the College of Physicians have been erected into a corporation for the purposing of instructing in a faculty, and that this empowers them to give degrees or titles of honour in that faculty; and second, that no such suit as the present can be maintained against any member of the community doing as the College of Physicians have done. 1. By the terms of the first charter the College of Physicians was described as a lasting community or permanent College empowered to make and ordain statutes and regulations in regard to the faculty of physic. A university is a "communitas" or corporation instituted to preside over a certain faculty or faculties, and to decide who are properly qualified to receive *testimonia* in such faculties. By the second charter full powers over the faculty of physic are given to the College of Physicians. The second charter is expressed (sec. 2) to be given for the purpose of remedying the defects of the former charter in this respect. In the 3rd section its members are spoken of as "Doctors of Physic." By the 13th section power is given them to examine and approve of candidates for fellowship. By the 17th section persons are appointed to administer oaths to the president and fellows. By the 19th section the president and fellows are empowered to treat, confer, consult, and consider of articles, statutes, acts, and ordinances, and to make such decrees and ordinances as to them may seem necessary. By the 20th section all persons are forbidden under certain penalties to practise the FACULTY OF PHYSIC within certain limits unless licensed by the said College. In the 21st section its members are spoken of as "physicians." By the 26th section the president and fellows are empowered to grant *testimonia* to all candidates presenting themselves for examination whom they may consider entitled to receive them. The 27th section extends the jurisdiction referred to in the 20th section. The 28th and 29th sections have been referred to as supporting the inference that "graduates" of a university held a different position from those obtaining the testimonium of the College of Physicians. The inference is rather the other way. These sections merely indicate that those who had obtained such degrees did not require the testimonium. They were excluded from the "illiterate persons" described in the charter; and it may therefore be fairly concluded that the testimonium was to be something very similar to this University degree. These wide powers of regulating the faculty of physic necessarily imply the power of granting degrees. Degrees have been given by incorporated schools of a similar character without any special provision. In the charter of the University of Durham, granted in pursuance of their Act of incorporation, 2 & 3 Wm. IV. c. 19, there is no provision enabling degrees to be granted, and yet they have been granted. The framers of the charter of the College of Physicians in Edinburgh had the doctrine, that the incorporation of a body with such powers would *per se* give the power to grant degrees, so fully before them, that a special

provision was introduced to rebut the presumption. It might be difficult to show when the Universities of Oxford and Cambridge got the power to grant degrees. There are analogies in other branches of law which favour this argument. When the king grants part of his prerogative the rights attaching to it are not curtailed. The newly-created peer, *e.g.*, enjoys the full rights which belong to his position. There is nothing peculiar in the term University as distinguished from College. A University is but a plurality of persons associated for a continued purpose—(1 Burn. Ecc. Law, 431 note x; Hamilton's Essays, 479). The word University does not imply the necessity of a universal teaching. The University of Salerno taught medicine only: and in the London or Queen's Universities there is no theological chair. In the case of *The University of Edinburgh v. Provost, &c. of Edinburgh* (1 Macq. H. L. 485, 501), where the discussion turned on the absurdity of allowing a university to grant degrees, and the common council to prescribe the form of studies, no weight or peculiar significance was attached to the term "University." Some of the judges seemed to think that the mere appointment of professors gave the College, from the fact of their appointment, the power of conferring degrees (p. 511); and the charter of the College of Physicians authorizes them to appoint professors. A University is nothing but a corporation presiding over a faculty. The word "faculty" is sometimes held to be tantamount to the science or the branch of learning over which the incorporated body is to preside; and sometimes it is peculiarly applied to "physic."—(Ducange's Philosophy, F.; 1 Burn. Ecc. Law, 431 b, note c; Hamilton's Essays, 496). The College of Physicians, therefore, presiding over the faculty of physic should be held to have peculiarly the power of granting degrees. In the older Universities masters and doctors were alone called "graduates," and they were obliged to teach. In the charter of the College of Physicians there is no such word as "licentiates;" and yet, at that time "licentiate" was recognised as a title (Spelman's Glossary, *ad. verb.*) But even if the word had been found there the argument would be little weakened, since "licentiate" was well recognised as a good degree itself—*Corpus Juris Canonici*, iii. 125, and *vide* Bonham's Ca. Co. R. Several statutes have been cited on the other side in order to show the distinction which has been generally taken between graduates and licenciates. Stat. 1 Geo. II., c. 14, s. 15, is rather against their argument. Doctors are there divided into two classes—1. graduates, and 2. licenciates; and both are classed together as "physicians." The 20th section has been much relied on by the petitioners. This, however, does not provide that none but graduates are to be doctors. It merely provides that in order to practise medicine persons must be either graduates or licenciates; and that if graduates, their prescriptions are to be signed with the degree attached to the name. The stat. 25 Geo. III., c. 42, and 40 Geo. III. c. 84, carry the argument no further than this,—that graduates in medicine of the University of Dublin are to be doctors; but *non constat*, but that others may be so denominated. The Anatomy Act (2 & 3 W. IV., c. 75) by no means implies that graduates are to be confined to

the Universities, but quite the reverse. Stat. 21 & 22 Vic. c. 90, seems to imply by the column of "title" in schedule D that besides the qualifications recognised by that Act it contemplated the possibility of having a "title" which was not a qualification. It must therefore have been a title of dignity or complimentary epithet to which they would have been entitled besides their registerable qualification; and certainly no prosecution could be sustained under this Act against any licentiate of the College of Physicians taking the title of doctor—*Ellis v. Kelly* (6 H. & N. 222). Degrees granted by the Archbishop of Canterbury are not a registerable qualification; and yet he could not grant the degree of "doctor," a power now taken from him by the Medical Act. No argument can be drawn from the distinction in the Stamp Acts. It was intended to impose a stamp duty; and the schedule described *testimonia* or degrees as they were properly known. No weight can be attributed to the argument derived from the bye-law of 1736. The true meaning of that bye-law was, that the College of Physicians then possessing the power to grant the degree of "doctor," did not wish to exercise it; but the fact of making such a bye-law rather proves that the power existed. If they did not possess the power, or regard themselves as possessing it, the provision in the bye-law would be altogether futile.

2. This bill is not maintainable, as the remedy is at law. The petitioners seem to rest their case on either or both of two grounds (1.) That Trinity College, as a patentee, can come into Court against any person interfering withher market, as in the case of a grantee of a toll. (2.) The right of the Attorney-General to interfere for the public good. Under the first view the proper remedy is at law, and the proper form of procedure would be a *quo warranto* (Grant on Corporations, 295, 301). Another remedy would be by a visitation. Large powers are given to the visitors by the 32nd section of their charter. Visitors are, no doubt, generally intended to settle internal disputes; but if the connection between Trinity College and the College of Physicians is so intimate as that contended for this would be just the proper tribunal. In *Calcraft v. West* (8 Ir. Eq. 74) a bill was brought by a patentee to whom had been granted the exclusive right of establishing a theatre in Dublin, against another who had infringed that right; and it was held that he had no right to bring such bill till he had established his claim at law by an action on the case. The injury to the public is of too doubtful a character, to say the least, to justify the Attorney-General in interfering; and where such public injury is so doubtful no relief will be given in equity till the rights of the relators have been established in a court of law—*Attorney-General v. College of Physicians* (1 Johns. & Hem. 585, 589, 595); *Anon.* (2 Ves. Sen. 414); *Attorney-General v. Sheffield Gas Co.* (3 De G. M. & G. 311, 312, 321, 324.)

William Smith followed on same side.

Brewster, Q.C., in reply.

April 26.—THE MASTER OF THE ROLLS now delivered judgment.—In this cause, he said, a petition, by way of information, had been filed in the name of the Attorney-General at the relation of the provost, fellows, and scholars of Trinity College, Dublin; and there was also a petition on the part of the said pro-

vost, fellows, and scholars. The respondents were the King and Queen's College of Physicians. The proceeding was in the nature of what, previous to the Chancery (Ireland) Regulation Act, 1850, had been an information and bill. The petition prayed that the Court might declare that the respondents were not legally authorized, by virtue of their charter or otherwise, to admit any person to the degree of Doctor of Medicine, or to grant or issue any licence, diploma, or letters testimonial, purporting to admit to the degree of M.D. the person to whom the same might be granted, or certifying by such licence that such person was by virtue thereof entitled to such degree, or implying that such person was, by virtue thereof, entitled to that degree, or otherwise purporting to give the person to whom such testimonial was granted, the right or privilege to use the title of M.D. or those initial letters; and an injunction had been prayed accordingly. His Honor having reviewed the material facts of the case, having stated the charter of Trinity College, the charters, ordinances, and proceedings of the College of Physicians, and the nature of the defence set out in the answering affidavits, proceeded thus:—"The result of the strange and ill-advised defence set up by the respondents, and which is destitute of all colour of foundation, is that because licentiates of the College of Physicians thought fit, in direct violation of the bye-law of 1736, to assume and usurp the title of Doctor of Medicine, not given to them by the Crown, the effect of such usurpation is to show that the College of Physicians is entitled to rely upon that most unwarrantable proceeding, and to assume, in 1860, a right never exercised by the College of Physicians from 1692 down to 1860, and confer the degree or title which admittedly is not expressly given by their charter. If there had been a usage to issue licences or diplomas in the form recently adopted, possibly the respondents might have relied on such usage in construing their charter, if they could have satisfied the Court that the terms of the charter are ambiguous; but no usage will avail against plain language. In the present case it is, in my opinion, absurd to say—having regard to legal principles—that licentiates having unwarrantably assumed the title of Doctor of Medicine is to be used to construe the charter, and establish the right of the College of Physicians to grant licences in the form recently adopted. The defence set up by the affidavits made on the part of the respondents is, in my opinion, destitute of all foundation in point of law, and has not been pressed by Serjeant Sullivan, the senior counsel for the College of Physicians. The questions which arise in this case, which are not those raised by the application made on the part of the respondents, are two in number:—First,—Whether the College of Physicians have power upon the true construction of their charter, to confer the degree or title of Doctor of Medicine? The second question is, whether the proceeding by petition in this case, in the nature of an information and bill, is a proper proceeding? Serjeant Sullivan, on the part of the College of Physicians, has fairly admitted that he does not seek to draw any distinction between the form of the licence or diploma issued by the College of Physicians in the year 1861, and the form adopted in 1862. By the form issued in 1861 the

College of Physicians granted to A.B. "licence to practice in the faculty of physic, and do certify that he has obtained, and is hereby entitled to, the degree, title, and qualification of Doctor of Medicine and Licentiate of the said College." The College of Physicians altered the form in 1862, having, no doubt, been advised that they had no right or authority to confer the degree; and the licence or diploma, thus altered, concludes thus: "And do certify that he (A.B.) has obtained and is hereby entitled to the title of Doctor of Medicine and the qualification of licentiate of the said College." The College of Physicians cannot properly contend that they have any power to confer the degree or title of Doctor of Medicine unless such power was given them by their charter; but counsel insist that a power to confer degrees follows from a power to grant licence to practise medicine, and that the degree of doctor is but a licence to practise in the faculty, and that the licence confers that status in the faculty. The 20th clause of the charter of the College of Physicians (fourth year of the reign of William and Mary, 1692), upon the construction of which clause the whole question turns, ordains "that no person or persons whatsoever, of what condition or quality soever he or they be, being no member of the corporation, nor licensed under the common seal of the said College of Physicians, do or shall from henceforth use or exercise the said faculty of physic within our said city of Dublin, or within seven miles any ways in circuit thereof, unless such person or persons shall be first admitted or licensed to do the same by the president and fellows of the said College for the time being assembled in court or convocation aforesaid, and such their licence or admittance be attested by letters testimonial of the said president and fellows of the said College for the time being, sealed with the common seal of the said College;" and then follow penalties in case any person should exercise the said faculty, being not admitted or licensed thereto as aforesaid. The clause, it is said, impliedly conferred upon the College of Physicians authority to confer degrees. If it did, why was the power never exercised from 1692 to 1861, and why did the College make the bye-law of 1736? The 27th clause grants to the president and censors of the College of Physicians, and, in the absence of the president to the vice-president and the censors of the College for the time being, or any four of them, whereof the president, or, in his absence, the vice-president to be one, from time to time "to receive, send for, and call before them all and every such person and persons that is or shall be willing or desirous, or shall begin or venture to exercise or practise in the said faculty of physic within any part of this our realm of Ireland, without the city and limits aforesaid, and them and every of them faithfully and exactly examine and make trial of their several and respective qualifications and abilities as to the said faculty of physic, and the exercise and practice thereof; and to allow, license, and approve of such and so many of them as shall be by the said examiners respectively, as aforesaid, adjudged, able and qualified for the profession, and thereupon to make and give unto them and every of them so approved of, as aforesaid, a testimonial in writing, under the hands of the examiners

respectively, as aforesaid." There is not the slightest colour of ground for saying that that clause gave greater authority to the College of Physicians without the limits prescribed by the 20th clause than the 20th clause gave within the limits therein mentioned. From the date of the charter (1692) down to the year 1861, the College of Physicians acted in conformity with their charter; and the licence was a mere licence to practise physic; and no right was claimed to confer the degree or title of Doctor of Medicine for 169 years after the date of the charter. The College of Physicians in England have the power of granting licence to practise physic; but so far from seeking to usurp a power which they do not possess, one of their bye-laws provides that "no fellow, member, or licentiate of the College shall assume the title of Doctor of Medicine, or use any other name, title, or designation or distinction implying that he is a graduate in medicine of a University, unless he be a graduate in medicine of a University." I have already stated the similar bye-law of the College of Physicians in Ireland, dated in 1736. The Act of the 21 & 22 of Vic. c. 90, appears to recognise the distinction between doctors of medicine and licentiates. The 18th section provides that the several colleges and bodies of the United Kingdom, mentioned in schedule A. to the Act annexed, should from time to time, when required by the general council, furnish such council with such information as they may require as to the course of study and examination to be gone through in order to obtain the respective qualifications mentioned in schedule A. Schedule A. then states:—1st. Fellow, member, licentiate, or extra-licentiate of the Royal College of Physicians of London. 2nd. Fellow, member, or licentiate of the Royal College of Physicians of Edinburgh. 3rd. Fellow or licentiate of the King and Queen's College of Physicians in Ireland. The schedule then refers to fellows, members, or licentiates of the Colleges of Surgeons of England, Edinburgh, Glasgow, and Ireland; to licentiates of the Society of Apothecaries, London, and of the Apothecaries' Hall, Dublin; and 10thly,—doctor, or bachelor, or licentiate of medicine, or master in surgery of any University of the United Kingdom, or Doctor of Medicine, or doctorate granted prior to "the passing of this Act by the Archbishop of Canterbury," and then follows a statement as to doctors of medicine of any foreign or colonial University or College. The statute provides for the registration of persons possessing the qualifications in schedule A.; and the 51st section of that Act and the second section of the 23 & 24 of the Queen, s. 66, authorize the Crown to grant a new charter to the College of Physicians in Ireland; and, if the College had been properly advised, it would have been open to them to have applied under the said section for a new charter, authorizing them to confer degrees, instead of usurping a power which, in my opinion, there is no colour of foundation for their having exercised, having regard to the provisions of their charter. The register made out under the Act states the qualifications of the several persons in the register mentioned, and recognizes the distinction between doctors, licentiates, &c. The power under which the Archbishop of Canterbury conferred degrees, and which is referred to in the said schedule A., is referred to in 1

Blackstone's Commentaries, 381. Some dicta have been referred to in the report of the proceedings before the Privy Council in England relative to the ordinances of the Scottish University Commissioners; but some of their dicta are, in my opinion, contrary to law, and none of them govern this case. It has, however, been argued that it is inherent to the authority of a College to confer degrees. No person ever thought of so strange a proposition when the Queen's Colleges were established; and until the charter creating the Queen's University the power was not given or exercised. It has, however, been stated by counsel that the University of Dublin conferred degrees without any authority contained in their charter. I have read the Dublin charter and the documents therein referred to, and it is perfectly clear, in my opinion, having regard to the provisions of the charter and the documents therein referred to, and especially to a statute of the Dean and Chapter, dated the 20th of July, 1835, that the charter did empower the University of Dublin to confer degrees. The copy of the Dublin charter and the documents therein referred to are contained in "The Dublin University Calendar, with Almanack," for the year 1860, which I have before me, and I suppose that the Dublin Calendar for this year also contains them. Sir G. Cornwall Lewis was, I think, mistaken in the observation made by him in page 228 of the Scotch book I have referred to, and which observations the respondent's counsel have relied upon. The Stamp Act, 55 Geo. III., c. 184, extended to Ireland by the 5 & 6 Vic. c. 82, under the head "admission" in the schedule, recognized the distinction between the licence "to exercise the faculty of physic, or practise as a licentiate," and admission to a degree. Those provisions have been repealed, but that does not affect the argument. The 20th section of the 40 Geo. III. c. 84, recognizes in clear terms the distinction between the real degrees and a licence to practise granted by the College of Physicians. That clause is in these words:—"And be it enacted by the authority aforesaid, that the said Professorships of the Institutes of Medicine, of the practice of medicine, of the materia medica, and pharmacy, and of midwifery, on the foundation of Sir Patrick Dun, shall be open to all persons professing their faith in Christ; and the said Professorships of the University of Dublin to Protestants "of all nations provided they shall have taken medical degrees, or shall have obtained a licence to practise from the College of Physicians, in consequence of a testimonium under the seal of Trinity College, Dublin." It is unnecessary I should occupy public time further in this case. I decide the case upon the construction of the charter of the College of Physicians. Under that charter the person who practises physic must obtain a licence under the common seal of the College, to use or exercise the faculty of physic, and the College is authorized to grant such licences; and I am of opinion that the power given to the College of Physicians to grant such licences did not give them the power of conferring the degree or title of Doctor of Medicine. The alteration by the College of the form of licence in 1862, omitting the word "degree," shows their consciousness of having usurped a power they did not possess. Their leading counsel, Serjeant Sullivan,

fairly and candidly admitted that he drew no distinction between the two forms of licence of 1861 and 1862; and that if the College had not the power of conferring the degree of Doctor, they had no right to confer the title of Doctor. I entirely concur in the propriety of that admission; and I am clearly of opinion that the College of Physicians had no right, under the provisions of their charter, to confer either the degree or the title. The question was considered, but not decided, in the Court of Queen's Bench, in *The Queen v. Steele* (13 Ir. Com. Law Rep. 398). It is surprising that a body of such high character and great respectability as the College of Physicians should have allowed themselves to be so misled as they have been in this case. But I trust it will be understood that, so far from suggesting that there is any distinction, except in name, between a physician who has obtained the university degree of doctor, and a licentiate of the College of Physicians, I believe I only express the opinions of the public in stating that a licentiate of the College of Physicians stands quite as high in their estimation as any gentleman who may have obtained the degree of doctor. If the College of Physicians had read their charter without the aid of legal spectacles, they would have found how plain, clear, and unambiguous the language of it is. A question of form was raised in this case, that the proceedings should have been at law. The petition is in the nature of an information and bill. So far as the petition is in the nature of an information the Crown, by its prerogative, may sue in the Court of Chancery, and therefore I am bound to make a decree against the respondents, as sought by the Attorney-General. So far as the petition is the petition of the provost, fellows, and scholars of the Holy and Undivided Trinity, it is very doubtful whether it is sustainable. But no particular relief is sought by the prayer in respect of their rights or alleged rights. I do not, therefore, think that if the suit is unsustainable on their petition, it is unsustainable on the information of the Attorney-General. I shall therefore make the decree sought by the prayer, and I shall order the respondents to pay to the Attorney-General the costs of the suit.

Court of Exchequer.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

LAMBERT v. M'DONNELL.—Nov. 3.

Landlord and tenant—Sub-tenant—Surrender by act and operation of law.

A verbal agreement between an under-tenant and the owner of the reversion, made contemporaneously with a formal surrender of the interest of the mesne lessee, and which agreement was proved to have been acted upon, to the effect that the sub-tenant should thenceforward remain in possession of part of the premises as caretaker, Held to operate as a surrender by act and operation of law, although no actual change of possession took place at the time.

O'Donnel, Q.C. (with Flood) appeared in this case on the part of the plaintiff, to shew cause why the conditional order of the 16th of April last should not be made absolute, but should be discharged with costs. The conditional order was, "That the verdict had for the defendant, at the last assizes for the county of Kilkenny, be set aside and instead thereof a verdict be entered for the plaintiff, pursuant to the leave reserved by the learned judge at the trial, or that the said verdict for the defendant be set aside, and a new trial had on the ground of the misdirection of the judge, unless," &c. The action was one of ejectment on the title for a house and lands in New Grove, in the county of Kilkenny. It appeared from the evidence on the trial that the plaintiff's father being seised in fee of the lands of Ballynakill, executed a lease bearing date the 13th November, 1828, to one John Bryan, of part of said lands and containing seven and a half Irish acres, for the life of Daniel Bryan, the eldest son of John Bryan, or for twenty-one years from the 25th March, 1828, whichever should last longer, at the yearly rent of £9.—Said lease having been read in evidence for the plaintiffs, proof was given that John Bryan died, and that said Daniel Bryan, his eldest son, was in possession of said lands for five years previous to the year 1849; that in said last-mentioned year Daniel Bryan, having owed an arrear of rent to the plaintiff, agreed to surrender the said premises which he then did, by endorsement signed by him on the said lease, bearing date the 6th November, 1849. This Bryan, before he had so surrendered, had let a portion of the premises to an under-tenant, viz., the defendant. The plaintiff then gave the following evidence to shew that the defendant was fully aware of the surrender by endorsement, and further that he fully acquiesced in same:—

"I am the plaintiff; I recollect the endorsement of the 6th Nov. 1849. My father then got possession of all the lands of said lease of November, 1828, except the house in question of which the defendant then was in possession. I went to defendant that day and I told him that Daniel Bryan had given up possession of the farm, and I asked him was he satisfied? He said, *yes*; but that he hoped my father would not charge him rent as Bryan did, as he (the defendant) was a poor man. I told him that instead of charging him rent, my father and I would leave him caretaker until such time as he would provide himself with a house elsewhere, and I asked him was he satisfied to take it on those terms, and he said *he was*, and that he would do anything we wished. He was then my father's ploughman at five shillings per week, and was actually ploughing that day. Within a year after that he asked me when I was going to give him the slated house elsewhere? I said we would give it to him as soon as we had it built. My father dismissed defendant from his employment in March, 1851, and defendant was out of employment for about three years and a half. He came back to it again in 1854 or 1855, and he again asked me when we would give him the house elsewhere. In 1857, after my father's death, I wanted him to go to another house which I pointed out to him, but he said he would not take it. I then offered him another and a far better house, and he

declined to take it, and I therefore dismissed him from my employment. This was in 1862. I demanded possession in 1863 and defendant refused it." On cross-examination plaintiff admitted that he did not get possession from defendant, and that he never demanded it until 1863. The only two questions that were left to the jury were—First, "Whether at and immediately previous to the date and execution of said endorsement of November, 1849, defendant held the premises in the ejectment, as yearly tenant of Daniel Bryan. Second—whether defendant, at the time of the execution of such endorsement, agreed to said endorsement by Daniel Bryan, and agreed that he (the defendant) would remain in the house in question as a *caretaker* to the plaintiffs father, the late Ambrose Lambert, and his son (the present plaintiff) until such time as they could provide him with a house elsewhere." The jury found on both those issues in the affirmative. Thereupon the learned judge directed a verdict for the defendant, reserving (by consent of defendant's counsel) liberty for plaintiff to move the Court to enter instead thereof a verdict for the plaintiff, if the Court should be of opinion that upon the evidence, and upon the finding of the jury as to the two questions, the plaintiff should be entitled to it.

The narrow question for the Court to consider was, whether or not the endorsement above-mentioned operated as a surrender in law of the defendant's tenancy, and it is submitted on the part of the defendant that the verdict cannot be disturbed, because the endorsement in truth did not operate as an extinguishment of the defendant's tenancy; assuming that surrender affected Bryan's lease and nothing more, yet it could not disturb the interests of defendant. The defendant was a stranger to the plaintiff and no privity whatever between them. A surrender divests the estate out of the surrenderor and vests it in the surrenderee.—*Thompson v. Leach* (2 Salk. 618); it is in the words of Co. Lit. 337, B, the yielding up of an estate for life or years to him who hath the remainder, or to use the language of Shep. Touch. 300, the estate of the surrenderor is drowned in that of the surrenderee. It is said in Co. Lit. 338 B., that between the parties to a surrender the estate is absolutely drowned, but having regard to strangers the estate hath, in consideration of law, a continuance.—*Pleasant, devisee of Hattan v. Benson* (14 East. 234, 238). The surrender of an immediate tenant does not affect the right of an undertenant, per Bayley. The defendant it was found by the jury was tenant from year to year to Daniel Bryan, and defendant was therefore entitled to notice to quit.—*Mitchell v. Kelly* (2 Jones, 19). The defendant's estate has never been surrendered either by note or memorandum in writing, as provided for by the statute of frauds, nor by act and operation of law. The verbal agreement between the landlord and tenant could not alter the position of their undertenant. As to surrender by operation of law, vide *Lyon v. Reed* (8 Jurist, 762, and 13 M. & W. 306). "In order to constitute the surrender of a particular estate by act and operation of law, the owner of the particular estate must be a party to some act, the validity of which he is afterwards by law

estopped from disputing, and which would not be valid if his particular estate had continued to exist. In all such cases the law attaches to the act done the legal consequence of a surrender; the mere consent of the owner of a particular estate to an act done by the reversioner is insufficient, at least in cases of such things as pass by deed." No act then, either in fact as by serving notice to quit or in law, had been done whereby the undertenant's tenancy had determined, and therefore the verdict must be upheld. It is sought here to push the doctrine of surrender by act and operation further than it was ever carried before. *Jones v. Murphy* (2 Jebb and Symes, 323) will be relied on on the other side, but in all the cases in the books surrender have been invariably followed by a change of possession.

John E. Walsh, Q.C. (with *P. White*) were heard in support of the conditional order. The tenancy of the defendant was put an end to—firstly, by defendant's knowledge of the agreement between the plaintiff and his tenant, Daniel Bryan; secondly, by defendant's acquiescence; and thirdly, by defendant's acts. His agreement to Bryan's surrender, followed by his acceptance of the office of caretaker, was in itself sufficient to put an end to the tenancy, over. *Peter v. Kendall* (6 B. and C. 703) is a case on the doctrine of surrender by operation of law. There the owner of a ferry demised it to A, by parol, at a certain annual rent; the latter at the end of a few weeks finding it unprofitable, proposed to become the servant of the former as boatman, and to account to him for all money received from the passengers, on being allowed daily wages, and it was there held that there was a surrender of A's interest in the ferry by act and operation of law; and Bayley then makes use of an observation applicable to the question now before the Court—namely, that "A became the servant of the owner of the ferry and not the tenant." Here the defendant became our servant, the jury having found that the defendant accepted the office of caretaker, and thus put an end to his tenancy.—*Nichols v. Atherstone* (10 Ad. & EL N. S. 944). The acts of the plaintiff and not alone his mere acquiescence is sufficient to conclude him against now averring the non-termination of Daniel Bryan's lease; and the opinion of the jury was that he was well aware of the endorsement. *Jones v. Murphy* (2 J. & S. 323) was a case where an ejectment was brought against a widow of a deceased tenant from year to year, who continued in possession of the premises occupied by him, it appeared that a proposal had been made to her by the agent of the plaintiff to give up possession and resume it again as a caretaker, on condition of her getting another house. That proposal was accepted by her son in her presence and with her acquiescence, and possession was given up by him. The defendant at the trial put the plaintiff upon proof of their title, which they proved otherwise than by shewing the defendant's tenancy. The judge nonsuited the plaintiff, because (as in the case before the Court) no notice to quit had been proved, and it was decided by the Court of Queen's Bench in this country that the non-suit was wrong, as there was evidence of a surrender by operation of law. The case now under the consideration of the Court differed from *Jones v. Murphy* in this, that here there was no delivery

of possession, while in *Jones v. Murphy* there was; but it is submitted that the acts done by the defendant—namely, his becoming the caretaker and servant of the plaintiff was sufficient to operate as a surrender by act of law.—*Lynch v. Lynch* (6 Ir. Law, 131) was where L., a lessee, *pur autre vie*, assented to a new letting by the landlord of a part of the demised premises to M, who thereupon entered into possession, but there was no surrender in writing of L's. interest, yet nevertheless it was held that this constituted a valid surrender by act and operation of law within the Statute of Frauds (7 Wm. III. ch. 12, Irish).

Nov. 5.—FITZGERALD B. having recapitulated the facts of the case, said—The only question for the consideration of the Court is, whether or not there is a surrender of the defendant's tenancy by act and operation of law? The jury were asked and gave it as their opinion that the execution of the endorsement by Bryan on his lease was agreed to, and was acquiesced in by the defendant; and the jury further found that the defendant, before that endorsement, was a yearly tenant of Daniel Bryan's, and that he, the defendant, having agreed to said endorsement, became a caretaker to the plaintiffs. It is urged that this agreement between the plaintiff and the defendant was not such an act as would operate as a surrender by operation of law. There is, however, something more than a mere naked agreement; it is an agreement followed by acts; it is an agreement acted upon by the defendant, who thereupon became, and was, the servant and caretaker of the plaintiff. We are, then, of opinion that this agreement between the lessor and lessee, which agreement was within the knowledge of the sub-lessee (the defendant), and which was agreed to by the sub-lessee, and which was subsequently acted upon by him, was sufficient to constitute a surrender by act and operation of law, and therefore judgment must be for the plaintiff.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

ROSSITER v. ROSSITER.—*Nov. 16, 25, 1863;*
Jan. 28, 1864.

Marriage articles—Construction—Trusts executory and executed—Statutes of Limitations—Laches.

By marriage articles J. R., the intended husband, in consideration of the marriage and of the fortune of E. O'M., the intended wife, agreed to convey lands held under a lease of lives renewable for ever to trustees, in trust for himself for life, and in the event of E. O'M. surviving him, "to the use of the E. O'M. and the child or children of the said intended marriage; and if no child of the said intended marriage, then to the use of E. O'M., her heirs, executors, administrators, and assigns for ever."

Held, that a settlement in pursuance of the articles should give an estate for life to E. O'M., with remainder to the issue of the marriage.

On the 24th of October, 1812, lands held under a lease of lives renewable for ever were conveyed by A. R. to the use of himself for life, with remainder to J. R., his second son, in quasi fee. J. R., who did not appear ever to have gone into possession of the lands, by marriage articles, dated the 9th of October, 1813, agreed to settle the lands on himself for life, remainder to his wife for life, remainder to the petitioner. In 1814 A. R.'s eldest son and heir-at-law took out a renewal of the lease, in which he was stated to be the assignee of A. R.'s interest. In 1827 J. R. died, and in 1851 J. R.'s wife died, and the petitioner's right accrued. The heir-at-law of A. R. and those claiming under him remained in uninterrupted possession of the lands from 1814 until 1862. There was some evidence, not altogether satisfactory, that A. R. died some time in 1814, and a letter was produced which proved that he was alive on the 28th of September, 1813. Held, that as his son, J. R., was married on the 9th of October following, there was a presumption that A. R. survived the date of the marriage, and that the petitioners' rights under the marriage articles were not barred by the Statute of Limitations.

By an indenture of lease, dated the 3rd of March, 1788, the Right Honourable Charles Earl of Drogheda demised to Anthony Rossiter all that house in the town of Monasterevan, late in the possession of Edward M'Donough and his assigns, together with the yard and offices in the rear thereof, as delineated in a map annexed to the said indenture, to hold for the lives of Anthony Rossiter, George Prince of Wales, and the Bishop of Osnaburg, subject to an annual rent of £22 late currency. This indenture contained a covenant for perpetual renewal on the payment of a peppercorn fine.

Anthony Rossiter having entered into possession of the premises, by a lease dated the 9th of July, 1788, demised them to John Cassidy for a term of 9999 years, at a yearly rent of £42.

By an indenture dated the 24th October, 1812, made between Anthony Rossiter of the one part, and Joseph Rossiter (his second son) of the other, after reciting that Anthony Rossiter was seised of the said premises amongst others, described as held under a lease from the Earl of Drogheda, and set to John Cassidy, Anthony Rossiter granted and assigned to Joseph Rossiter, his heirs, &c. the premises, to hold to Joseph Rossiter, his heirs, &c. upon trust to permit Anthony Rossiter during his life to enjoy the same, and to receive the rents and profits, and after the death of Anthony Rossiter and subject to certain annuities, to be to the exclusive use of Joseph Rossiter, his heirs, &c.

Joseph Rossiter, by indenture dated the 14th of December, 1812, granted the premises by way of mortgage to James Doyle and Philip Doyle to secure the repayment of £317 1s. 5d., with interest.

By articles of agreement dated the 9th of October, 1813, entered into in contemplation of the marriage of Joseph Rossiter with Elizabeth O'Meara,

and made between Joseph Rossiter of the first part, Elizabeth O'Meara of the second part, and John Abbot and Richard O'Meara, trustees, of the third part, after reciting the then intended marriage between Joseph Rossiter and Elizabeth O'Meara, and reciting the deed of the 24th of October, 1812, made between Anthony Rossiter and Joseph Rossiter; and further reciting that in consideration of the intended marriage and of the sum of £2000, the fortune of Elizabeth O'Meara, Joseph Rossiter had agreed to convey to the said trustees the lands therein mentioned (which included the Monasterevan premises), it was witnessed that Joseph Rossiter, for the considerations therein mentioned, "hath agreed, and by these presents doth agree, to convey to the said John Abbot and Richard O'Meara, their and each of their heirs, &c. the said hereinbefore recited lands, &c. (including the Monasterevan premises), and all his, the said Joseph Rossiter's, right, title, and interest therein, in trust, to permit and suffer the said Joseph Rossiter to receive the rents, issues, and profits thereof for the term of his natural life; then upon this further trust, in the event of the said Elizabeth O'Meara, his intended wife, surviving him, then to the use of the said Elizabeth O'Meara, and the child or children of the said intended marriage; and if no child of said intended marriage, then to the use of the said Elizabeth O'Meara, her heirs, executors, administrators, and assigns for ever."

The marriage was subsequently solemnized, and of it there was issue the petitioner, Elizabeth Rossiter, and two other children, who died infants and unmarried. No formal deed of settlement was ever executed pursuant to the agreement in the articles of the 9th of October, 1813, but both the indenture of the 24th of October 1812, and the marriage articles were registered.

Anthony Rossiter died, leaving Ignatius Rossiter, his eldest son and heir-at-law, and Joseph Rossiter, his second son. The petition stated that the date of Anthony Rossiter's death was subsequent to the execution of the articles, but previous to the 27th of August, 1814, and that it took place in 1813, "as the petitioner has heard and believes." The petitioner, however, expressed herself unable to fix the exact day, and no direct evidence was given at the hearing in the Court below as to the time of the death.

There was no evidence of the deeds of the 24th Oct. 1812, and of the 14th Dec. 1812, except attested copies of the registered memorials; nor was there any evidence save the mortgage of the 14th Dec. 1812, that Joseph Rossiter or those claiming under him had ever been in receipt of the rent payable out of the premises demised by the lease of the 9th of July, 1788.

Joseph Rossiter having fallen into embarrassed circumstances, left Ireland, and died in Scotland in the year 1827. Elizabeth Rossiter, his widow, died in the year 1851, leaving the petitioner, Elizabeth Rossiter, the sole surviving issue of the marriage.

On the 27th of August, 1814, Charles Marquis of Drogheda granted a renewal of the premises to Ignatius Rossiter. This renewal misrecited the date of the original lease, but the identity of the premises was established and ultimately admitted by the respondents. It also recited that Anthony Ros-

siter had assigned his interest to Ignatius Rossiter, and recited the fact of Anthony Rossiter's death. On the 10th of January, 1841, Ignatius Rossiter assigned the premises to his son, John Rossiter, senior; and on the 20th May, 1848, a further renewal was granted by the Marquis of Drogheda to John Rossiter, senior, and a fee-farm grant, under the Renewable Leasehold Conversion Act, was afterwards made to him. John Rossiter, senior, died in 1861, leaving the respondent, John Rossiter, a minor, his eldest son and heir-at-law, and the respondent, Mary Rossiter, his widow, who took out administration to him. In 1854 Robert Cassidy, in whom the estate of the lessee in the sub-lease of the 9th of July, 1788, was vested, assigned his interest to the Marquis of Drogheda, who was also entitled to the reversion of the lease of the 3rd of March, 1788; and from that time down to his death the difference between the rents reserved by the two leases was paid to John Rossiter, senior, by the Marquis of Drogheda.

The petition prayed that it might be declared that on the death of Elizabeth Rossiter, the petitioner's mother, the petitioner became entitled to the premises for all the estate and interest granted by the lease of the 3rd of March, 1788, and the renewals and the fee-farm grant thereof; and that John Rossiter, junior, might be ordered to convey the premises to the petitioner accordingly, and might be declared a trustee for the petitioner; and the petition further sought an account of the rents from the death of the said Elizabeth Rossiter, received by John Rossiter, senior; and that the petitioner might be declared entitled to be paid such sum as should be found due as against the assets of John Rossiter, senior; and if necessary for that purpose, for an administration of the real and personal estate.

The cause having come on for hearing before the Master of the Rolls by an order of the 27th of April, 1863, the petition was dismissed with costs.* From this order the petitioner now appealed.

J. E. Walsh, Q.C. (with whom was *Richey*), for the appellant.—The questions involved in this case are reducible to two: first, the true construction to be given to the marriage articles of the 9th of October, 1813; and secondly, the effect of the Statute of Limitations and lapse of time on the petitioner's rights. With regard to the first of these points it is to be noticed that these articles are essentially executory in their nature; and being so, will be moulded by the Court in such a manner as to carry out the presumable intentions of the parties. The passage of the articles upon which the controversy arises is that in which a limitation is made—"in trust in the event of the intended wife surviving him (the intended husband), to the use of the said intended wife and the child or children of the intended marriage; and if no child of the intended marriage, then to the use of the intended wife, her heirs and assigns." Now, on behalf of the respondent it is alleged that under this she, as one of the issue of the marriage, took an estate as tenant in common, or joint tenant along with her mother, or else that her mother took an estate in quasi tail in the premises; but by analogy to the

* *Rossiter v. Rossiter* (14 Ir. Ch. Rep. 247).

other cases on executory trusts we contend that the Court, in executing these articles, would construe such language as giving to the mother an estate for life, with remainder to the petitioner. It is well known that words, which in an executed settlement would convey an estate tail, have been frequently held in marriage articles to imply the terms of a strict settlement. The principles which distinguish executory from executed trusts, and executory trusts in wills from those in marriage articles are fully discussed in the notes to *Lord Glenorchy v. Bosville* (1 W. & T. Lead. Ca. 20-21); and *Blackburne v. Stables* (2 V. & B. 369), and *Deerhurst v. St. Albans* (5 Mad. 260) are also leading authorities on this subject. In marriage articles there is an *a priori* inference from their object that it is intended to provide for the issue of the marriage, and that neither of the parents should have the power of destroying that provision; but in a will, as a testator may give arbitrarily what estate he pleases, there is no presumption that he means one quantity of interest more than another—an estate for life more than an estate tail. In *Rockfort v. Fitzmaurice* (2 Dr. & War. 18), Lord St. Leonards says—“If a man agrees before his marriage to settle lands on his wife and children, it would be a manifest absurdity to execute that settlement by limiting to himself an estate tail which he might defeat the very next day; an estate which in the view of the law gives him the entire ownership of the property. That, indeed, would be a settlement in form but not in substance. The Courts, therefore, have rationally held that in these cases the intention is to divest the husband of his old dominion and to place the estates of the children out of the power of the father to defeat them.” That the Court would not execute the articles in the present instance by giving an estate in *quasi* tail to the petitioner's mother is evident from the authorities already cited, and from the doctrines laid down in *Davies v. Davies* (4 Beav. 54); *Seale v. Baxter* (2 B. & P. 485); *Parker v. Bolton* (5 L. J., N. S., Ch. 98); *Sweetapple v. Bindon* (2 Vern. 586). *Taggart v. Taggart* (1 Sch. & Lef. 88), on the other hand shews that an estate in joint tenancy would not be given to the children along with the mother; and as to the question of a tenancy in common, if the mother survived the father, having a number of infant children, she would have no jointure, and would be compelled to make the children wards of Court, and to apply to this Court for some provision for their maintenance. Besides the succeeding clause of the articles is plainly opposed to the idea of a tenancy in common or joint tenancy. It must, therefore, be held that the petitioner's mother was intended to take an estate for life, with remainder to the children of the marriage.

The next question to be discussed is, whether the petitioner's right to recover the premises is barred by the Statute of Limitations. Under the deed of the 24th of October, 1812, Anthony Rossiter took an estate for life in the premises conveyed, with an absolute remainder to Joseph Rossiter. By the articles of the 9th of October, 1813, the premises were limited, as we maintain, to Joseph Rossiter for life, with remainder to his wife for life in the event of her surviving him, and with remainder

to the petitioner. Unless, therefore, Anthony Rossiter died before the execution of the marriage articles of the 9th of October, 1813, and the adverse possession of those under whom the respondents claim existed during the interval between Anthony Rossiter's death and the execution of the articles, the petitioner's rights could not be barred. The respondents are, therefore, driven to prove that Ignatius Rossiter entered into possession before the 9th of October, 1813, and subsequently to the death of Anthony Rossiter. Again, the title of the respondents, if any, was acquired before the commencement of the 3 & 4 Wm. 4, c. 27, and the old law did not apply to courts of equity. As to *laches*, lapse of time would not bar the petitioner's rights if the strict application of the statute did not do so. The respondent, coming here with a title under the Statute of Limitations, must be prepared to shew the date of entry; and as the possession was under the old statute, 10 Chas. 1, c. 2, must prove that the possession was adverse. Now, *Eyre v. Walsh* (10 Ir. C. L. Rep. 336) decided that a party entering into possession under a tenant for life, and holding over, was not in adverse possession within the meaning of the statute; and this question is also discussed in the notes to *Nepean v. Doe* (2 Smith's Lead. Ca. 583). Returning to the question of *laches*, in a large proportion of the cases on executory marriage articles the interval of time between the date of the articles and the proceedings in equity was fully as great as in the present case. Here the articles were drawn up in 1813; the tenant for life, Joseph Rossiter, died in 1827; and the petitioner's rights accrued in 1851, on the death of her mother. In *West v. Erissey* (2 P. W. 349) the articles bore date 1684, the settlement 1685, and the decree of the Court was made in 1722, after a lapse of thirty-eight years. In *Trevor v. Trevor* (1 P. W. 322) the articles were entered into in 1669, and the decree was pronounced in 1719, after an interval of fifty years. Again, in *Streatfield v. Streatfield* (Cas. temp. Talb. 176), the articles dated from 1677, and the decree was in 1735. In *Davies v. Davies* (4 Beav. 54) there was a lapse of sixty-nine years; and in *Rockfort v. Fitzmaurice* (2 Dr. & Warr. 1), there was an interval extending from 1760 to 1839.

Brewster, Q.C. (with whom were *F. Walsh, Q.C.*, and *Beytagh*) for the respondents.—As to the case of *Eyre v. Walsh* (*ubi supra*), cited in the argument on the other side, there was no express decision on this point in the case; and even if there had been, it was a decision upon wholly different grounds, and upon a different Act from that which we are now considering. The premises held by Anthony Rossiter from Lord Drogheda were sublet by him to John Cassidy for a term of 9999 years, and all that Anthony Rossiter could have from the date of that sub-demise was a rent. This, therefore, brings the case within the 9th section of the 3 & 4 Wm. 4, c. 27, which enacts that when rent shall be paid under a lease to a person wrongfully claiming to be entitled to it, the right of the person lawfully and rightfully entitled to the rent shall be deemed to have first accrued at the time when the rent was for the first time wrongfully received. But in the present case there is no pretext for saying that Joseph Rossiter ever received any rent

out of the premises; and, on the other hand, it is in evidence that immediately after his father's death Ignatius went into the receipt of the rent, and obtained a renewal of the lease from the head landlord. In considering the deed executed by Joseph Rossiter in contemplation of his marriage, it is worthy of remark that this deed reserves no life estate to Anthony Rossiter, but conveys the lands to the trustees in trust to permit and suffer Joseph Rossiter to receive the rents, issues, and profits during his life. Now, this points to an immediate enjoyment of the rents and profits of the lands by Joseph Rossiter; and as the conveyance of the 24th of October, 1812, from Anthony Rossiter to Joseph Rossiter reserves a life estate to the former, we may reasonably infer that he was dead at the time of the execution of the marriage articles. With regard to the construction of these articles, the Court, if it were called on to execute them, would give either an estate in tenancy in common or joint tenancy to the petitioner with her mother or would give an estate tail to the mother. In any of these cases the petitioner's right would have long since been barred by the Statute of Limitations—*Wild's case* (6 Rep. 17); *Cholmondeley v. Clinton* (Turn. & Russ. 107); *Boswell v. Dillon* (Drury, 291). *Richey*, in reply, cited—*Crawford v. Trotter* (4 Mad. 361); *Vaughan v. Headfort* (10 Sim. 639).

Cur. adv. vult.

Nov. 25th.—THE LORD CHANCELLOR.—This case comes before us on an appeal from the decision of the Master of the Rolls, who held that in the events that have happened, and having regard to the time at which the petition has been filed, the petitioner is not entitled to obtain the relief she has prayed for. The statement of the facts of the case is briefly this. By a deed of the 24th of October, 1812, Anthony Rossiter conveyed this estate to his son, Joseph Rossiter, to the use of himself (Anthony) for life, with remainder to Joseph Rossiter in fee. Joseph Rossiter appears to have executed a mortgage of the premises some time shortly afterwards, but there is no further evidence of any enjoyment or possession of the interest in these lands on his part. On the 9th of October, 1813, articles of agreement were entered into in contemplation of the marriage of Joseph Rossiter with Elizabeth O'Meara, and a most important branch of the case turns upon the construction to be put on these articles. The question first arises as to whether they are in their nature executory, and then we are called on to consider what estate the petitioner has taken under them. The substantial question is to enforce, not the articles, but the deed of October, 1812, for so far as the articles are concerned, there is no occasion now to execute them. Although, during the lifetime of Elizabeth Rossiter, the petitioner's mother, some difficulties might have arisen in reference to the construction of the articles, and it might have become necessary to remodel them by some further instrument, now that the mother is dead, the articles may be said to have reformed themselves, and the fact of their being executory or otherwise does not directly arise. But a question has been raised as to whether the petitioner's right to recover these premises is barred by the Statute of Limitations, and as

the operation of the statute depends on the time at which the petitioner's title accrued, it becomes a point of great importance to determine the nature of the petitioner's estate in the premises, and in this way the construction and interpretation of the marriage articles a/e brought before us. The real point of the case in fact is, whether the petitioner's right to sue has been taken away by the effect of the Statute of Limitations. This estate having been turned into a rent on the making of the sub demise to John Cassidy, *prima facie* the title of those under whom the petitioner claims would commence from the date of the deed of October, 1812. They would then be entitled to receive the rent, and under the provisions of the 2nd section of the 3rd and 4th Wm. IV, c. 27, if no steps were taken to recover the rent or land for twenty years the petitioner's right would be barred. Thus, in fact, after October, 1812, the current of the statute could not have been disturbed by any subsequent act of Joseph Rossiter if time had already commenced to run. However, this state of facts has been alleged on behalf of the petitioner. Under the deed of October, 1812, Anthony Rossiter took an estate for life, and under the marriage articles of the 9th of October, 1814, it is contended that Joseph Rossiter took an estate for life, with remainder to his wife, Elizabeth Rossiter, for life, in the event of her surviving him, with remainder to the petitioner. It is also stated that Anthony Rossiter did not die until after the execution of the articles of October, 1813, and thus, by reason of these successive tenancies for life, the operation of the statute has been averted. On the other hand, the respondent, in her answering affidavit, maintains that Anthony Rossiter died in the interval between the execution of the deed of the 24th of October, 1812, and the date of the marriage articles, or that, even if this were not so, although Anthony Rossiter and Joseph Rossiter took successive estates for life, Elizabeth Rossiter took an estate in *quasi* tail, or the petitioner took an estate as tenant in common or joint tenant along with her mother, and thus the petitioner's rights have been long since destroyed by the effect of the Statute of Limitations. The question arises then as to when Anthony Rossiter died. The petitioner has only stated the date to the best of her belief, and as it was not part of the respondent's case to give any evidence of it, this critical point is involved in the greatest obscurity. Now as to the petitioner's title, if she took an estate on coming of age in the lifetime of her mother, or if her mother took an estate in *quasi* tail, her rights are barred, but if, on the other hand, Anthony Rossiter survived the date of the articles, and the petitioner's mother took a life estate, with remainder to her issue, the Statute of Limitations would not apply. The Court being left to speculate on the vague words of this instrument, we are first called on to determine whether the trusts comprised in it are executory within the meaning of being an imperfect exposition of the testator's intentions. My attention has been directed to the case of *Boswell v. Dillon* (Drury, 291), but there is nothing in the present case to warrant me to apply to it what was said by Sir Edward Sugden in his judgment there. On careful consideration I cannot but think that on this part of the case the Master

of the Rolls has come to a right decision, and that the construction put by him on the limitations is the correct one. There is no case in marriage articles, it is true, of an exactly similar nature, so the case must be determined by what the Court would consider was the intention of the parties to the instrument. As to considering this limitation as creating a joint tenancy, *Taggart v. Taggart* (1 Sch. & Lef. 84) is an authority that where the words in executory articles would, if occurring in a more formal disposition, create a joint tenancy, the Court will rectify the articles and give such an interpretation as will give a tenancy in common. If, again, the children in the present case should be considered as taking estates as tenants in common, the effect of that would be that each child would take an estate as tenant in common on its birth, which on its death in its father's lifetime would vest in the father as heir-at-law in fee. Passing this by and considering what was the real provision intended for the wife, it would seem very extraordinary that she should be cut down to a small share in the event of her having a large family; and we can hardly conceive that so unlikely a provision was within the intention of the parties as that with a family of eight or nine children, the wife should receive during her life but one-ninth or one-tenth of the rents and profits of the lands. Her fortune is £2,000, and there is a recital in the marriage articles that it is intended to make a provision for her on the bankruptcy or insolvency of her husband. In fact, the case comes round to the question, what would be a reasonable arrangement. The Master of the Rolls has come to the conclusion that the limitation is to be carried out by giving to the wife an estate for life, with remainder to her issue, and this Court should be fully satisfied that this decision was wrong before it would undertake to reverse it. Now, on the other hand, we find that this Court has laid hold of slight words to relax the stricter rule of construction applied to wills; and in a case before the Master of the Rolls, *Sir John Romilly, Audsley v. Horn* (26 Beav. 195), where a question was raised as to whether the doctrine of *Wild's case* (*ubi supra*) applies to personalty, it was held, as it is expressed in the marginal note, that "when both a parent and his children are objects of a bequest of personalty, the tendency of modern decisions is to construe the limitations as a gift to the parent for life with remainder to his children." The words of the will in this case were—"I leave Hansard Place, Blackfriars, to my daughter, Mary Rossiter, during her life, and at her death to her daughter, Amelia Rossiter, and Amelia Rossiter's children," and at p. 199 Sir John Romilly states, "Upon a review of the whole of the cases upon this subject I think that, setting aside some contradictory decisions which it is not very easy to reconcile, the tendency of modern decisions has been, in cases like the present, to hold that in personalty the bequest gives an interest for life to the mother, with an interest in remainder to the children. Thus in *Crawford v. Trotter* (4 Mad. 361), a bequest to one and her children was held to give an interest for life to the mother, with remainder to her children; and in *Morse v. Morse* (2 Sim. 485) a bequest of a sum of money to the testator's daughter and her children was held to give an interest for life to the

daughter, with remainder to her children. I certainly cannot say that cases are not to be found in the books which it is not easy entirely to reconcile with this view of the subject; but I think that the view I have stated is that which is most consistent with the line of modern cases and their tendency, and generally most in accordance with the spirit and intention of the testator in these cases." This case afterwards came before the Lord Chancellor, Lord Campbell, on appeal (1 De G. F. & J. 226), and the decision of the Master of the Rolls was affirmed. On the whole of this part of the case it appears to me that the decision of the Court below was right, and more in accordance with the spirit of what a Court of Equity should do than any of the other suggested constructions. By this construction all the objects of the articles are satisfactorily provided for, and the mother has such an estate as will enable her to keep up and maintain her family without any difficulty. No doubt, it may be said that if it was intended that the mother should take an estate for life, with remainder to the issue of the marriage, it might have been stated explicitly. But the parties have given but an imperfect and unscientific expression to their intentions, and all that is expressed can be reconciled most satisfactorily with the view taken by the Master of the Rolls. As the Statute of Limitations, therefore, did not begin to run until 1851, the question of *laches* is not applicable to this case. If some one claiming under Joseph Rossiter were now before the Court, it might be necessary to consider this point. This is, in fact, but an ejectment suit, and if the petitioner is not barred by the operation of the Statute of Limitations, she is not barred by *laches*. The decision in this case turns upon the answer to the question, when did Anthony Rossiter die? Although it is very undesirable to have any further expense incurred in this case, it is highly unsatisfactory to have no other source from which to determine the date of this death than mere conjecture. Anthony Rossiter does not appear to be a party to any instrument subsequent to the indenture of the 24th of October, 1812, and there is a strong presumption that he died very shortly after its execution. In the marriage articles of the 9th of October, 1813, the estate is not conveyed subject to any life estate to Anthony Rossiter, and this would lead us naturally to suppose that he must have then been dead. The eldest son, Ignatius Rossiter, on the other hand, appears as far as the evidence goes, not to have entered into possession of the lands until 1814: he claimed under a prior deed and not as heir-at-law. But the first evidence we have of an act of ownership on his part, is the taking out of the renewal from the Earl of Drogheda, on the 27th of August, 1814. Joseph Rossiter executed a mortgage in December, 1812, a couple of months after the conveyance from his father. This was an act of dominion and presumptively an act of possession, but, although from the memorial of this mortgage deed, it appears very plain that Anthony Rossiter was alive at that time, there is nothing to prove that he was still living at the date of the marriage articles.

J. E. Walsh, Q.C.—We shall be very willing to undertake any further inquiry on this point, if your Lordships will allow us.

F. W. Walsh, Q.C.—We have come here to defend our possession and our rights, and it was not any part of our case to produce evidence of the time of the death of Anthony Rossiter.

THE LORD CHANCELLOR.—It is very difficult and very unpleasant to be compelled to adjudicate on rights, leaving this important point without any direct evidence. If I am obliged to decide this case now, I cannot see why I should not affirm the decision of the Master of the Rolls.

THE LORD JUSTICE OF APPEAL.—I coincide with the Lord Chancellor's opinion in this case. With reference to the effect of the marriage articles of October, 1813, the question is, whether there was designed to be an immediate provision for the children, or whether they were to be postponed to the wife's estate. There is a presumption in settlements that natural obligations will provide for the issue of the marriage out of the proceeds of the life estate, and it would be an anomalous disposition that each child should become at its birth a tenant in common or joint tenant along with its mother, not effecting the real purposes of the settlement, but depriving the parent of all control over the children's fortunes. We must affirm the decision of the Master of the Rolls.

J. E. Walsh, Q.C.—If your Lordships will permit us to make further investigation and enquiry, we may be able to get satisfactory evidence of the time of the death of Anthony Rossiter.

THE LORD CHANCELLOR.—On the whole, it would be better and safer to allow the parties to collect more evidence on this question, and for that purpose we shall let the case stand over until next term.

Jan. 28, 1864.—The case came on to be heard on further evidence as to the date of Anthony Rossiter's death.

J. E. Walsh, Q.C., (with him *Richey*) read the affidavits of Catherine Byrne, C. F. O'Meara, Judith Bray, and Laurence Egan. The witnesses were cross-examined by *Brewster, Q.C.*, and *Dowse, Q.C.*

Catherine Byrne, who was the niece of Daniel Kelly, the son-in-law of Anthony Rossiter, deposed that she went from Dublin on a visit to her uncle, Daniel Kelly, to the county Carlow, in the latter end of the year 1813; that she remained there about nine months, and during that time frequently saw Anthony Rossiter who lived in the immediate neighbourhood; that shortly after her return to Dublin she heard of Anthony Rossiter's death. The witness was cross-examined at some length by *Brewster, Q.C.*, but her evidence was not materially shaken.

C. F. O'Meara produced several letters which he had found amongst his father, Richard O'Meara's, papers. Three of these were from Daniel Kelly to Richard O'Meara, and bore date, respectively, the 7th of August, the 16th of August, and the 28th of September, 1814. In the first of these "Mr. Rossiter" was alluded to; in the second mention was made of "a joint bond payable after Mr. A. Rossiter's death;" and in the third "Mr. Rossiter's family" was spoken of. Richard O'Meara had not been in any way related to Anthony Rossiter.

Judith Bray and Laurence Egan deposed to the death of Anthony Rossiter in 1814, but these wit-

nesses, on cross-examination, were unable to give any satisfactory reasons for fixing the date, and their evidence was not altogether consistent with their affidavits.

Dowse, Q.C., on behalf of the respondents, objected to the admissibility in evidence of the letters produced by C. F. O'Meara, and contended that, even assuming that they were admissible, the appellant had not established more than that Anthony Rossiter was alive in September, 1813. Parol evidence obtained *post litem motam* was always to be distrusted.

Richey, for the appellant, urged the improbability of the son, Joseph Rossiter, marrying on the 9th of October, 1813, if his father had died in the interval between that and the 28th of September preceding, when he was alluded to in the letter of Daniel Kelly.

THE LORD CHANCELLOR.—On the evidence which has now been given in this case, when we come to estimate the balance of testimony, we find it all in favour of the fact that Anthony Rossiter was living at the date of the execution of the marriage articles of October, 1813. Amongst other circumstances, the letter of the 28th of September, 1813, appears to show that Mr. Rossiter was then alive, and we find the son marrying a few days afterwards—namely, on the 9th of October. All this revolts against the notion that the father died in the interval, and in the absence of any contradictory evidence we must consider that there is a presumption of his being alive at the date of the marriage. There is great difficulty no doubt in dealing with parol evidence on such a point after the great lapse of time, and some of the witnesses, though evidently endeavouring to speak the truth, have left the matter in a state of great uncertainty. On the whole of the case my mind is forced to the conclusion that Anthony Rossiter survived his son Joseph's marriage.

THE LORD JUSTICE OF APPEAL.—I concur in the judgment of the Lord Chancellor. I cannot say that I have the least doubt that Anthony Rossiter was alive at the time of the execution of the marriage articles, ten or twelve days after we have from Mr. Kelly's letters evidence of his existence.

Order below reversed. Decree for the petitioner, with an account of the rents and profits from the date of the filing of the petition. No costs on either side.

WOODROOFE v. GREENE AND OTHER MATTERS.

SADLEIR v. GREENE AND OTHER CAUSES.—Nov. 17, 1863.

Priority—Mortgage—Docketted and undocketted judgments—Dismissal for want of prosecution—81st General Order of March, 1843.

Where an undocketted judgment is followed by a mortgage with a redocketted judgment intervening, the priority of the undocketted judgment is not

affected, if no claim be made on foot of the mortgage.

A receiver was extended to a mortgage suit, and continued in receipt of the rents. Several interlocutory orders were made in the cause, but it was never brought to a hearing. Held, that after the expiration of ten years from the filing of the original bill it stood dismissed under the 81st General Order of March, 1843.—*Mara v. Tibeando* (7 Ir. Eq. Rep. 556) commented on and distinguished.

WILLIAM HASTINGS GREENE being entitled to an estate for life in the lands of Grenane and Jerpont, in the county Kilkenny, a receiver was appointed over his life estate in the lands in June, 1849, in the matter of *Woodroofs v. Greene*, and was subsequently extended to other matters and causes. The claim of the petitioners in the matter of *Nixon v. Greene*, was, in respect of a judgment of Easter Term, 1826, recovered against William Hastings Greene; and the claim of the petitioners in the matter of *Martin v. Greene* was, in respect of a judgment of Michaelmas Term, 1827, against the same respondent. The plaintiff in the cause of *Sadleir v. Greene*, claimed on foot of two mortgages of the 15th of April, 1848, and of the 25th of November, 1850, respectively, whereby William Hastings Greene, the tenant for life, and William Warren Hastings Greene, the first tenant in tail, conveyed these lands to James Sadleir, the trustee and public officer of the Tipperary Joint Stock Bank, to secure, the first, a sum of £1000, and the second, the said sum of £1000 and the further sum of £200, with interest. On the 4th of January, 1848, a bill was filed by James Sadleir to foreclose the mortgages of the 15th of April, 1848. The bill was amended in 1850, and the receiver was extended to this cause on the 4th of June, 1849. Sums of money having been brought into court from time to time by the receiver, an order of reference to allocate these funds was made in the year 1853 in the several matters and causes, and an allocation report was made by Master Murphy on the 23rd of June, 1853. By this report the Master ascertained the priorities of the parties who up to that time had appointed or extended the receiver, and found that the principal sum of £1000, together with large arrears of interest, was then due to James Sadleir on foot of the mortgage of April, 1848. There was no appearance, however, for the plaintiff in the cause of *Sadleir v. Greene* before the Master on this order of reference, nor was there any charge filed on his behalf. The Master's report was confirmed, and an order was made for paying out the funds then in Court, but no payment was made to James Sadleir on foot of the mortgage. The receiver was extended to the matter of *Nixon v. Greene* on the 18th of April, 1857; and further rents having been brought in by the receiver on the 1st of March, 1858, an order of reference was made in the matters and causes to enquire and report who were entitled to the funds then in Court, and to allocate the same. Under this order Master Murphy made his report on the 22nd of May, 1861, and thereby allocated the funds to the parties who had obtained judgments *puins* to the judgments vested in

the petitioners in *Martin v. Greene* and *Nixon v. Greene*, on the grounds that the judgment in the first of these matters had not been duly redocketted, and that the judgment in the latter had not been redocketted at all before the mortgage of the 15th of April, 1848. The petitioners in these two matters having applied to the Master of the Rolls to vary the Master's report, on the 6th of July, 1861, an order was made referring the matter back to the Master, with a declaration that the judgment in *Martin v. Greene* was duly redocketted, and ordering the Master, in reconsidering his report and reallocating the fund, to enquire and report whether there was any, and if so, what sums due for principal and interest respectively on foot of the mortgage of the 15th of April, 1848, and to whom due.* Pending the proceedings before the Master, George M'Dowell, the official manager of the Tipperary Bank, in whom the mortgage of April, 1848, was vested, on the 14th of January, 1862, entered into an agreement with the petitioners in the matter of *Nixon v. Greene*, to withdraw all claims on the funds then being allocated, and thus prevent the natural priority of the unredocketted judgment in the matter of *Nixon v. Greene* from being affected by the mortgage of 1848. George M'Dowell accordingly filed a charge on the 7th of February, 1862, whereby it was stated, amongst other matters, that there was due on foot of the mortgage the sum of £1,200 principal, and £963 Os. 6d. interest; but that by reason of the agreement of the 14th of January, 1862, which was referred to, no claim was then made upon the funds in Court to the credit of the matters and causes. By the leave of the Master a charge was also filed by William Warren Hastings Greene, by which he charged that he had joined in the deeds of mortgage of the 15th of April, 1848, and the 25th of November, 1850, solely as a security for his father, William Hastings Greene; and he submitted that the life estate of the latter should be primarily liable for the payment of the several judgments in exoneration of the inheritance in the said lands. On the 15th of April, 1863, the Master made his amended report, and found, amongst other matters, that there was due for principal on foot of the mortgages of the 15th of April, 1848, and the 25th of November, 1850, the sum of £1,200, and for interest, up to the 5th of February, 1862, the sum of £903 Os. 6d.; and he further found that George M'Dowell had made the agreement of the 14th of January, 1862, and had made no claim on the fund in Court; and that the petitioners in *Martin v. Greene* and William Warren Hastings Greene had objected that George M'Dowell, by reason of the deeds of mortgage and the proceedings in the cause of *Sadleir v. Greene*, and after the allocation orders, was bound to establish his claim on foot of the mortgage; and the Master submitted for the judgment of the Court whether George M'Dowell was at liberty to decline to make his claim, and whether the allocation should be conducted irrespective of the mortgage or regarding it as an existing charge on the funds. The matter having come before the Master of the Rolls on a

* *Woodroofs v. Greene* (12 Ir. Ch. Rep. 478).

motion on behalf of the petitioners in *Martin v. Greene*, and a cross-motion on behalf of the petitioners in *Nixon v. Greene*, for an order to transfer to them respectively the sums found due by the Master's report, by an order dated the 27th of June, 1863, it was ordered that as George M'Dowell made no claim on foot of the mortgage of the 15th of April, 1848, the funds in Court should be transferred and paid in accordance with the schedule appended to the Master's report; that is, in accordance with the natural priority of the several judgments.* From this order John H. C. Martin and John Greene, the petitioners in *Martin v. Greene*, and William Warren Hastings Greene now appealed, the funds in Court being insufficient to satisfy the judgment in *Martin v. Greene* if it were held *pari passu* to the judgment in *Nixon v. Greene*.

Brewster, Q.C., (with *Exham*) for the appellants.—Under the provisions of Moore's Act (9 Geo. 4, c. 35) the judgment vested in the respondents, Henry Nixon and Arthur Browne, being unredocketed is null and void as against the mortgage of the 15th of April, 1848; and therefore the intervening redocketed judgment of the appellants is entitled to be paid off in priority.—*In re Huthwaite* (2 Ir. Ch. Rep. 54; s. c. 4 Ir. Jur. 61). We submit, therefore, in the first place, that by a rule of law if money be due on foot of the mortgage, the prior unredocketed judgment must be postponed; nor can any agreement, such as that entered into between Mr. M'Dowell and Messrs Nixon and Greene, affect the legal priorities of the judgments. In the next place this collusive agreement to defeat the appellants' rights will not be allowed to stand in a court of equity. Mr. M'Dowell appeared all through the proceedings in the Master's office, and also on the Rolls' motion, when the order of the 6th of July, 1861, was made, and it is not competent for him now to prevent the carrying out of that order. Again, William Warren Hastings Greene was only a surety in the mortgage of the 15th of April, 1848, his father, William Hastings Greene, being the principal debtor. And it is unjust and contrary to the principles of this Court that Mr. M'Dowell should be permitted to give up his rights against the estate of the principal debtor to the prejudice of the estate of the surety. The receiver was extended to the suit instituted for the purpose of raising this mortgage; and a large sum of money has been found to be due on foot of the mortgage by a report in the cause. The funds brought in by the receiver are now in Court, and should be allocated according to the strict rights of all the parties entitled to them.

The Solicitor-General (with *O'Donnell, Q.C.*) for the respondents, Henry Nixon and Arthur Browne.—The cause of *Sadler v. Greene* is not in Court, but was dismissed long since by the operation of the 81st General Order of the 27th of March, 1843. The bill was filed in the year 1848, and amended in 1850; and as the cause has never been brought to a hearing, and more than ten years have elapsed, it stands dismissed by the terms of the Order. The fact that a receiver was extended to it will not be sufficient to keep it alive.—*Young v. Wilton* (10 Ir. Eq. Rep. 10). Nor is the case of *Mara v. Tibeaud* (7 Ir.

Eq. Rep. 556) at all inconsistent with this. That was an annuity cause, and on that account clearly distinguishable in principle. But granting, even for the sake of argument, that this suit is not dismissed, why should this agreement between my clients and Mr. M'Dowell not be carried out? Why should the artificial priority be retained when no claim on the funds in Court is made by the mortgagees? The agreement was made fairly and openly, and was approved of by Master Murphy, whose sanction in such matters is necessary under the Winding-Up Acts of the Tipperary Bank. The authorities too show that when such an arrangement is perfectly valid, and that when no claim is made on foot of a mortgage, no conflict can be considered to exist between it and a prior unredocketed judgment.—*Murtagh v. Tisdall* (Fl. & Kel. 20; s. c. 3 Ir. Eq. Rep. 85); *In re Scott's Estate* (14 Ir. Ch. Rep. 57); *Sparrow v. Cooper* (1 Jo. 72). As to Mr. William Warren Hastings Greene, he is not a party to any suit in Court, being only a respondent in the dismissed cause of *Sadler v. Greene*; but even if he were here, he has not put forward any equity to prevent the carrying out of this agreement.

O'Donnell, Q.C., for the same parties.

Lawless, Q.C., (with *Meldon*) for George M'Dowell.

Exham in reply.—The bill in *Sadler v. Greene* was filed in December, 1848; the receiver was extended to the cause in June, 1849; and the order of reference under which the funds are now being allocated was made in March, 1853. The rents were brought in by the receiver in this suit in an existing cause in which for nine years the receiver has been acting. The order of reference and all the subsequent proceedings in the Master's office were proceedings taken in this suit; and both in the Master's office and at the Rolls Mr. M'Dowell appeared and was represented by counsel. This case is very different in its facts from *Young v. Wilton* (*ubi supra*). [*The Lord Chancellor*.—You cannot contend that the order appointing a receiver is tantamount to a decree. If such were the case a receiver might continue for an indefinite time.] *Mara v. Tibeaud* (*ubi supra*) is an express authority that where a receiver is appointed the 81st General Order of 1843 is inoperative. [*The Lord Chancellor*.—That was an annuity cause, and the order appointing a receiver is in the nature of a decretal order. The case never comes back again into Court.] In 1861, when my clients applied to the Master of the Rolls to vary Master Murphy's report, this point was never made by the respondent, Mr. M'Dowell, and the parties were consequently involved in considerable litigation and expense in maintaining the validity of the redocketing of their judgment. It would have been unnecessary to do this if Mr. M'Dowell had then consented to abandon his claim. The amended bill in the cause of *Sadler v. Greene* was filed in 1850; a further amendment was made in January, 1853, and the general replication was filed in June, 1853. Under such circumstances, and considering that the receiver has continued all this time in receipt of the rents, the cause is not dismissed under the Orders of the Court. In *Young v. Wilton* there were no funds brought in in the cause, and nothing was done for more than ten

* *Woodroofs v. Greene* (14 Ir. Ch. Rep. 224).

years; therefore it is by no means a parallel or similar case to the present.

THE LORD CHANCELLOR.—In this case the order of the Master of the Rolls must be affirmed. It appears that an allocation order having been made in these several matters and causes, a report of Master Murphy was made on the 22nd of May, 1861, by which he allocated the funds then in Court to the parties who had obtained judgments subsequent to the judgment of Easter Term, 1826, now vested in the respondents, Henry Nixon and Arthur M. Browne, and that of Michaelmas Term, 1827, vested in the appellants, John H. C. Martin and John Greene, on the grounds that the judgment of Easter Term, 1826, was unredocketed, and the judgment of Michaelmas Term, 1827, was not duly redocketed, and both were therefore null and void as against the mortgage of the 15th of April, 1848. An application was made to the Master of the Rolls to vary the Master's report; and an order was accordingly made, by which it was referred back to the Master to reconsider his report, having regard to a declaration to the effect that the judgment of Michaelmas Term, 1827, was duly redocketed. And it was further ordered that the Master should enquire and report what sum was due for principal and interest on foot of the mortgage of the 15th of April, 1848. While matters were in this stage, and before any definitive step was taken, an arrangement was entered into by which the claim on foot of the mortgage was withdrawn, and the parties were restored to their natural priorities. Now, this Court will not be very astute in discovering grounds for changing the primitive equities of the parties, considering that this agreement is entered into openly, and at a time before any of the money has been advanced or paid out. There is no principle—no equity—that will compel a man to allow his claim to stand, or that will prevent him from renouncing it when no final report has been made. It is said that the order of the Master of the Rolls of the 6th of July, 1861, was based upon this artificial priority; but it is evident that the present is a perfectly just arrangement, a perfectly valid and legitimate transaction, and one whereby the rights of the parties are left as they originally stood.

Again, it is alleged that Mr. William Warren Hastings Greene has some equity which should prevent the sanctioning of this agreement, inasmuch as his inheritance will be prejudiced thereby. But if his interests have been in consequence damaged, this must be made the subject of a separate substantive suit. What that damnification may be passes my comprehension, but it is certain that it cannot be disposed of by an interlocutory judgment.

As regards the suit of *Sadleir v. Greene*, it appears to me that it was dismissed under the 81st General Order of March, 1843. The case of *Mara v. Tibeaud* (*ubi supra*) was cited, but that was an annuity cause, and the payment of the annuity keeps the suit alive. The order appointing a receiver in an annuity cause is equivalent to a decretal order, and nothing more is done in the suit. The words of the 81st General order are: "That if at the expiration of ten years after the filing of an original bill the cause shall not have been heard by the Court upon the pleadings, the same and all

supplemental bills and bills of revivor shall at the expiration of such ten years stand dismissed out of Court without costs, unless upon application to the Court by motion before such period the Court shall think fit to allow the plaintiff further time to prosecute his cause." Here there have been only supplemental bills and interlocutory orders, and they will not prevent the operation of the rule. But it is urged that even if the cause be dismissed, this could not affect the money brought in during the pending suit, and that the cause *quoad* this is still in existence. This, however, comes round to this question, that Mr. George M'Dowell makes no claim whatsoever on these funds, and his right to do so cannot be controverted. If the parties choose I shall have it taken down upon the order that they may be at liberty to take any other proceedings they may be advised, founded on the supposed equity I have before alluded to.

THE LORD JUSTICE OF APPEAL.—In this case I also am of opinion that we must sustain the decision of the Master of the Rolls. A mortgage was executed in April, 1848, which, no doubt, would have rendered null and void a prior unredocketed judgment; but whatever rights this conferred on the appellants, they must relinquish them if no claim is advanced on foot of the mortgage. It was quite competent for Mr. M'Dowell to renounce his claim on the funds in Court, and it was quite competent for the parties to deal with one another for these securities for their mutual advantage. Nor can this agreement be considered in the view of this Court as an inequitable one towards the remainderman.

Order below affirmed.

Court of Exchequer.

Reported by Oliver J. Burke, Esq., Esq., Barrister-at-Law.

LYONS v. KELLER.—Nov. 4.

Practice—Application to stay proceedings in an action of detinue.

An application by the defendant to stay proceedings in an action of detinue, on the terms of the defendant giving up to the plaintiff the goods detained, and of paying all costs, and also a certain sum named by defendant for damages, was held to be defective in not leaving it optional to the plaintiff to proceed or not at his own risk.

Jellet, Q.C., on the part of the defendant, moved, in the terms of the notice of motion, "That the action may be stayed on the terms of the defendant giving up to the plaintiff the lease mentioned in the first and second counts of the summons and plaint, and paying to the plaintiff one shilling damages for the conversion and detention complained of, and the plaintiff's costs in this case when taxed and ascertained." The summons and plaint contained two counts, the first for

the conversion by the defendant to his own use of the title deeds of a house and premises in the town of Kanturk, that is to say, a certain deed bearing date the 2nd September, 1859. The second count was for the detention of the said lease.

Philip Keogh opposed the motion being granted in the terms of the notice, inasmuch as too much was asked. The defendant sought to stay proceedings without giving the plaintiff any option to proceed, at his the plaintiff's own risk. In every case reported of motions of this class there was always the option given. Applications of this kind were not frequent in this country. In *Phillips v. Haywood* (3 Dowl. P. C., 362) the Court made an order putting the plaintiff under terms if he insisted on proceeding. That was an action of detinue for certain deeds, and the Court, it was there said, will, on delivering up of a portion of them, either stay proceedings or put the plaintiff under terms if he insists on proceeding. In like manner in *Peacock v. Nicolls* (8 Dowl. 367) which was an action in trover, the Court will, on application of the defendant, stay proceedings on the delivery of a portion of the goods, and payment of costs and any damages, and in the event of the plaintiff refusing such terms, the Court will permit the defendant to deliver up the goods, the plaintiff to pay the costs incurred subsequently to such delivery; in the event of his not recovering in respect of some other articles than those delivered up, or more than nominal charges in respect of those delivered up.—*Pickering v. Trust* (7 T. R. 53). Again, a plea of payment of money into Court to an action of detinue, in satisfaction of the value of the goods will be bad.—*Allan v. Dunn* (1 Hurl. & Nor. 572, 1857); and yet this motion seeks to pay money into Court, and had there been a plea to that effect, it would be demurrable.

Philip Keogh.—We now consent to stay proceedings; but the defendant having asked too much in his notice, he must pay the costs.

Jellet, Q.C., replied.—*Earl v. Holderness* (4 Bingh. R. 462)—was an action in detinue for a quantity of letters. The defendant was allowed to stay proceedings as to one of them, upon delivering same up and paying costs.

FITZGERALD, B.—The defendant here seeks too much; he seeks to stay proceedings, without giving the plaintiff any option to proceed at his own peril. he defendant must pay the costs of the motion.

Reported by John Monroe, Esq., Barrister-at-Law.

[BEFORE PIGOT, C.B., FITZGERALD, B., HUGHES, B., AND DEASY, B.]

GALLAGHER v. NOLAN.—Nov. 16.

Practice—Detinue—Stay of proceedings.

In detinue and trover the Court will, on application of the defendant, stay proceedings on the delivery of the goods and the payment of costs up to the time of the delivery; and in the event of the plaintiff refusing such terms, the Court will permit the defendant to deliver up the goods, the plaintiff to

pay the costs incurred subsequent to the delivery in the event of his not recovering more than nominal damages in respect of the detention.

THIS was a motion for an order declaring that all proceedings in the case should be stayed on the terms of the defendant giving up a certain discharge in the summons and plaint mentioned on payment of all costs properly incurred up to the time of the said delivery when taxed and ascertained, and on payment of 1s. for nominal damages; or that the plaintiff be at liberty to proceed with the action only on the terms of his undertaking to pay all costs of action unless he shall recover more than nominal damages, and for the costs of the motion. The action was brought by a farm labourer against his former employer to recover a certain discharge which the plaintiff had given to the defendant on entering his employment. There was a count in detinue and one in trover; and in the latter it was alleged, by way of special damage, that by the conversion the plaintiff had been kept out of employment and prevented from earning his support. The defendant now sought leave to deliver up the discharge on condition that he should pay all costs up to the time of delivery, and to lodge a nominal sum to meet the claim for special damage.

Osborne, for defendant, in support of the motion.—The motion is necessitated by the provisions of the Common Law Procedure Act, 1856, which enables the plaintiff, if he think proper, to have judgment for the delivery of the goods claimed. Money, therefore, cannot be lodged in Court; and the object of the motion is to put the defendant in the same position as if such a course could be adopted. The terms offered are most fair. All proper expenses are to be paid up till the time of delivery. A nominal sum is lodged to meet the claim for special damage, then plaintiff proceeds at his peril. The order asked for has been often made in England.—*Phillips v. Haywood* (3 Dowl. P. C. 362); *Peacock v. Nicholls* (8 Dowl. P. C. 367).

D. C. Heron, Q.C. (with him *O'Moore*)—The cases alluded were those where title deeds were withheld, and where their delivery up completely satisfied the object of the action. This case is different, since special damage has been caused by the detention. Under such circumstances the order sought for will not be made.—*Stephens' Practice*, by Lush. 750. At all events it being a matter of favour to defendant, the plaintiff must get his costs of appearing on the motion.

Pigot, C.B.—On the authority of *Peacock v. Nicholls* we must grant this motion in the terms asked for. Costs of the motion to be costs in the cause.

Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

NORTON AND ANOTHER v. CASEY.—Nov. 7.

Abatement of suit—Death of defendant—Fourteen days.

In case of the death of a defendant pending suit, the Court will not, within fourteen days from his death,

allow a citation to issue, on behalf of the plaintiff, to the defendant's next of kin to accept or refuse letters of administration.

C. Palles, moved on behalf of the plaintiff for liberty to issue a citation directed to the widow and next of kin of Robert Casey, deceased, who was the sole defendant, and who had died on the 26th October last. The deceased in the cause had died on the 20th June last, having by a will nominated the two co-plaintiffs and the defendant his executors. The defendant was the only son of the deceased, and he had lodged a caveat, and had appeared on the 22nd July. The declaration was filed on the 5th August, and the defendant had pleaded on the 18th August want of capacity and undue influence. The defendant had left a widow and a sister, his sole next of kin. The property depending on the result of the trial was considerable; and it was desirable to raise a personal representative as soon as possible to the defendant.—*Staines v. Stewart* (2 S. & Tr. 320). That was the case of a plaintiff dying, but there is no case reported of a defendant.

KEATINGE, J.—Until the fourteen days are out I will certainly not do anything. There may be a will in the case, and parties cannot be forced to lodge it until the fourteen days are out.

No rule.

CANNON v. M'ENTYRE.—12th Nov.

Practice—Legitimacy cases—Petition.

In cases by petition, questioning the legitimacy of a person who had taken out letters of administration as a next of kin, the proper course is, when an answering affidavit has been filed, and an issue raised, to apply to the Court for its directions to the mode of trial of that issue, and not to file additional affidavits.

Dr. Miller, for the plaintiff, moved for an order that the matters in issue be tried either by affidavits or by a *viva voce* examination of witnesses. The petition was filed by the plaintiff, and sought to set aside and have revoked a grant of letters of administration obtained by the defendant as an alleged daughter and next of kin of Amelia Cannon, deceased. The petition alleged that she was not a lawful child of said Amelia Cannon, and was not one of her next of kin, and averred that the plaintiff was her lawful son and one of her next of kin. The petition was verified by affidavit. An affidavit was filed in answer alleging that the defendant was the lawful daughter of the deceased, and born after her marriage to one John Cannon.

Dr. Townsend, for the defendant, asked for a *viva voce* examination of witnesses.

KEATINGE, J.—As an issue has been raised I think it would be improper and a useless expense to file affidavits in support of the petition; and I consider the issue to be a peculiarly proper one to be tried by a *viva voce* examination in open Court. I therefore order the case to be tried before myself without a jury.

KELLY v. DUNBAR.—Nov. 14, 1864.

Practice—Citation of legatees under a former will.

Where a suit was pending at the suit of the executor in a will to establish it, and the validity of the residuary and executorial clauses was disputed by one of the legatees, the Court directed a motion to fix the mode of trial to stand over to allow time for such legatees to cite the legatees in a former will, lodged in the registry, to see proceedings, in order to bind them.

Dr. Townsend, for the plaintiff, moved for an order to fix the time and mode of trial. The suit was instituted by the plaintiff, as an executor in the will of Jane Catherine Seale, deceased, dated the 4th day of November, 1863. The deceased died the 15th June, 1864. The defendant was a legatee in that will, and also one of the next of kin, and had pleaded as to the residuary and executorial clauses, a plea of undue influence exercised on the deceased by the plaintiff and others under his control.

Dr. Ball, Q.C., for the defendant, submitted that as a former will, made in 1860, was lodged in the registry, which gave legacies to different persons from those named in the later will, in some respects to a large amount, and in some cases to minors, such legatees should be cited in this suit to see proceedings, in order to bind them. The present plaintiff was not named at all in the former will. *In Gamble v. Robinson* and *Geraghty v. Geraghty* (not reported) in this Court, a similar course was adopted.

Dr. Townsend.—No caveat has been lodged by any of these legatees, and the plaintiff is not obliged to cite the legatees in, it may be, fifty prior wills.

KEATINGE, J.—The will referred to has been lodged, and though in England in all cases an affidavit to lead a citation is necessary, yet in Ireland an affidavit is only required in two cases, viz.:—when it is necessary to cite an heir-at-law, and when a citation to accept or refuse letters of administration is required. In this case, I think, that it would be desirable that the legatees claiming under a former will should be cited to see proceedings, but the obligation is not thrown on the plaintiff to do so. I shall, however, let the present motion stand for some days to allow the defendant to do so. The motion to stand for Saturday week.

FLINN v. FLINN.—15th Nov.

Costs at quarter sessions—Extra costs—Jurisdiction.

Semble, the Court of Quarter Sessions has not a discretion as to costs in cases sent there by the Probate Court, but must award costs according to the Civil Bill Acts to the successful party. The Probate Court will not give additional costs beyond what the Chairman had jurisdiction to award.

THIS case was, by an order made by the Probate Court, sent to the Quarter Sessions of Carlow, the property being within the jurisdiction of that tribunal; and the Court by that order expressly reserved the question of costs. The case was tried accordingly before the Chairman of Carlow, who gave a decree establishing the will, and awarded to the defendant, who had propounded the will, the sum of £7 odd costs against the plaintiff. A motion now was made by the defendant for administration, and for the costs incurred in this Court and the Court below, as well as for some extra costs at the Quarter Sessions, occasioned by a special retainer of counsel there, only £1 1s. being allowed by the rules for counsel. A cross-motion was also moved on behalf of the plaintiff to be allowed his costs here and at the sessions out of the assets.

H. Concannon, for the plaintiff, submitted that the chairman had a discretion, and ought to have given his client his costs. Two questions arise: first,—a question as to the general costs in the cause; and a second,—as to the costs of a decree in the Court below—whether they necessarily followed it. The Probate Act of 1857, section 58, confers the jurisdiction on the Assistant-Barrister. [*Keatinge, J.*—That section is repealed by the Act of 1859, s. 6, which is substituted for it.] And by that section the chairman is to have the *same contentious jurisdiction and authority* in such cases as the Court of Probate; while by the 60th sec. of the former Act the chairman is to have, subject to the rules and orders made under that Act, all the jurisdiction, power, and authority to decide the same and enforce judgment therein, and enforce orders in relation thereto, as if the same had been an ordinary action in the Court of the Assistant-Barrister; and by the 14 & 15 Vic. c. 57, s. 111, a decree or a dismissal in the County Court is to be *with costs*. Then the 25th rule of the Quarter Sessions (Probate) directs the decree to be in the form in the schedule annexed, or as near thereto as the circumstances of cases permit. And the 27th rule says that the enactments, practices, and forms in force, and used in the Court of the Assistant-barrister in respect to civil bills shall, subject to the foregoing rules and orders, be adopted as to proceedings in the Assistant-Barrister's Court in matters of probate or letters of Administration so far as the same are applicable, *mutatis mutandis*. Thus the 111th sec. of 14 & 15 Vic. c. 57 is antagonistic to the 58th section of the Probate Act, and the form of order for costs in the schedule of the quarter sessions rule is an independent order; "it is further ordered." Whereas the decree under the Civil Bill Act is merely "with costs." Counsel argued that on the merits of the case he would in the Court of Probate, though defeated, be entitled to costs.

Dames, for the defendant.—The chairman by the 6th sec. of the Act of 1859, has in cases sent to him the same jurisdiction as the Probate Court as to the grant or revocation of probate or letters of administration; but as to costs, he is regulated by the 60th sec. of that Act and the rules made under it. The 27th rule emphatically refers to "enactments," and evidently points to the 111th sec. of the Civil Bill Act, under which the chairman must award costs, and therefore has no discretion. Then a special form of

decree is given awarding costs, and it is intended to apply to each of the preceding forms of decrees. The chairman could not allow more than one guinea for counsel, and the extra costs ought to be allowed to the defendant as administrator's costs.

KEATINGE, J.—As to the costs incurred in this Court, a question might arise as to whether any of the parties should get any costs up to date of the order sending the case to the quarter sessions. My general rule in such cases is, that in such cases each party should abide their own costs. In this case it would be a waste of time to order costs against the plaintiff, but I order that the decree of the assistant-barrister be acted on, and that the defendant do have out of the assets so much of the costs awarded as shall not be paid by the plaintiff; but I cannot give him any extra costs; I think the rules do not allow me to do so.

NOTE.—In England, the County Court Act gives the judge of the County Court a discretion as to costs—9 & 10 Vict., c. 95, s. 88, and there is a rule (13 Eng.) exactly similar to the 27th of the Irish rules, among the English County Court rules as to probates. In *Thomas v. Crowther* (2 S. & T., 501), the learned judge, Sir C. Cresswell, condemned the plaintiff in costs, in a case which had been tried in the County Court, and in which issues had been sent there; but how it happened that issues were so sent, or that the Court above had jurisdiction over costs, does not appear.

Court of Bankruptcy & Insolvency.

[Reported by John Levy, Esq., Barrister-at-Law.]

[BEFORE LYNCH, J.]

RE CLARK, AN INSOLVENT.

Post nuptial settlement of wife's property when the husband is in debt—Discharge of order for hearing to compel trustee to reassign—Remand.

Although an insolvent may obtain property by his wife after marriage, he has no right to put it in settlement for the benefit of herself and children if he have creditors at the time. The Court, in order to compel the trustee of such settlement to reassign for the benefit of creditors, will discharge the order for hearing and not grant a new one until such assignment is made. But if the insolvent is in custody only at the suit of one creditor to whom a small sum is due, he will be remanded for two years at the suit of his creditors, with an intimation that if the trustee submits to the jurisdiction of the Court the insolvent will be discharged.

THE insolvent came up for discharge. *Levy* opposed for three creditors, on the ground that the insolvent had assigned all his property, which principally consisted of a leasehold interest in certain houses and

cottages in the neighbourhood of Dublin. It appeared that the insolvent had been in America for some time, and his wife carried on business in one of the houses in question, and that she obtained the property under the will of her father. The insolvent, on his return to Ireland, had a post-nuptial settlement prepared, by which all was put in settlement and vested in a trustee for the benefit of his wife and children. It appeared in evidence that he boasted of the property being his, and in fact got credit on the strength of these representations.

Levy submitted that, under the 220th section, he was guilty of fraud upon his creditors by placing beyond their reach all the property he had, and that for doing so he was liable to be remanded for two years; but a remand would not do speedy justice to the creditors. He submitted that the proper course would be to discharge the order for hearing, accompanied by a rule that no new order should issue until the property was reconveyed and returned on the schedule for the benefit of his creditors.—*Re Margaret Duffy* (30 Law Times) was a case precisely in point.

Heron, Q.C., contended that the settlement in question was a proper one to make under the circumstances. The property was left to the wife for the support of herself and her children, and for that purpose and no other was it settled. The wife had equities that the Court ought to uphold, and nothing was done with regard to that settlement but what a Court of Equity would do to protect the rights of the wife and children. [*Judge Lynch*—A Court of Equity would no doubt take proper care of the interests of the wife and children, if the property was sought to be taken from them, but this is a wholly different case. The insolvent voluntarily makes away with it after getting credit on the strength of it.] It could not be said to be a voluntary settlement. The friends of the wife insisted on it being made after the insolvent had returned from America, and he believed her brother was the trustee named in it. The debts due by the insolvent were of a trivial character, and the property was very small. The insolvent believed *bona fide* that he was doing nothing but what was fair and legitimate, and the intention was always the criterion whereby to judge of the offence. With regard to the case of *Margaret Duffy*, he never heard of such a case before, and he believed the Court could not make something to be done by a third party over whom neither the insolvent nor the Court had control, a condition to entitle an insolvent to be heard on his petition.—[*Judge Lynch*—I intend to act on it, unless I see something to alter my opinion.]

Mr. Stewart, solicitor, said the case cited by Mr. Levy would be a good precedent to act on if the insolvent could be detained in custody at the suit of all his creditors; but suppose the order for hearing were discharged he would be in custody merely at the suit of his detaining creditor, whose debt was of very small amount, he would settle with him and be discharged out of custody, and no doubt go back to America. It would be better, therefore, to give him a long remand at the suit of all the creditors.

JUDGE LYNCH said he believed, if in custody only at the suit of the one creditor whose debt was small, he would pay it and leave the other creditors to find him if they could. He looked upon the case as a very bad

one—a case of plain fraud. He got credit on the strength of the property; he got time by renewal of bills; and in the meantime the settlement was made, as he said, to protect the rights of his wife and children. He had no right, whatever, to make such a settlement. The property was his. He was indebted to his creditors upon whom he committed a gross fraud. He (*Judge Lynch*) thought he might compel a reassignment of the property by giving the insolvent a long remand, intimating at the same time that if the trustee brought in the title deeds and submitted to the Court with regard to the property, and have it returned for the benefit of the creditors generally, they would all give him a discharge. He would remand the insolvent for two years, with liberty to the trustee to bring in the title deeds and submit to the jurisdiction of the Court.

Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

GRAVES v. DAVIES.—Nov. 12, 1864.

Practice—Administration suit—Claimants after final decree.

The Court of Chancery will permit parties having demands against a fund, of which it has possession, for the purpose of administration, to come in and prove against the same, after and notwithstanding a previous final decree, and that, too, where said parties were open to the charge of gross negligence in not so coming in in due time.

THIS case came before the Court upon an appeal from a decretal order of the Right Hon. the Master of the Rolls, of date the 22nd of April, 1864. The petitioners were the Rev. Richard Hastings Graves and Arabella Graves, spinster; and the respondents, Caroline Holt, Caroline Davies, Mary H. Davies, Edith Davies, and Thomas Davies. The suit was for the administration of the real and personal estate of Henry Davies, deceased, and the cause was referred to Edward Litton, Esq., one of the Masters of the Court, under the 15th section of the Chancery Regulation Act (Ireland), 1850. The Master made his final order on the 16th June, 1863; the real or personal assets, however, had not as yet been distributed; nevertheless, on the 19th January, 1864, a motion was made before the Master on behalf of Mr. Gilbert W. Moss, in effect praying that he might then be at liberty to file his charges and proceed as the Master might direct: the Master made no rule upon that motion, and thereupon Moss appealed to the Master of the Rolls, before whom the matter was deliberated, and thereupon the following order was made:—"That the order of Edward Litton, Esq., the Master in this matter, signed the 19th January, 1864, whereby the said Master declared, *no rule* upon the application therein mentioned, be varied and set aside;

and instead thereof it is ordered and declared that notwithstanding that the final order in this matter has been signed by the said Master on the 20th of July, 1863, the said Gilbert Winter Moss be at liberty to file a claim in the office of the said Master on foot of the demand of Moss and Company against the said testator, and proceed to prove same and obtain a separate report; and the Court doth reserve the question of costs to prevent any unnecessary costs being incurred in the investigation of the claim of the said firm of Moss and Company. And it is further ordered that the said Master shall be at liberty, if he shall so think fit, to reconsider the claims if any, of the parties who have proved, if their claims were unopposed by reason of the claims of Moss and Company not having been sooner brought forward." From this order the present appeal was now brought by the appellants, the petitioners. The facts of the case were shortly these. The usual advertisements and postings for creditors having appeared in the public newspapers in compliance with the 8th General Order of the Master of the 11th of February, 1851, the solicitor for the petitioner was on the 25th of April, 1862, furnished by Messrs. Hallows and Hamilton, solicitors for Messrs. Moss and Company, of Liverpool, with a claim for £13,706 15s. 6d.: this claim was embodied in an affidavit, of which the following is a transcript:—"I, Gilbert Winter Moss, of Liverpool, in the county of Lancaster, banker, make oath and say as follows: First,—Henry Davies, the testator in the proceedings in this matter named, and William Davies, now also deceased, carried on business up to the date of the death of said Henry Davies, in partnership in Liverpool, as sharebrokers, under the firm of Henry Davies & Co. Second,—Prior to the death of said Henry Davies I and Thomas Edward Moss carried on business in co-partnership with John Moss and William Henry Moss, both now deceased, during their respective lifetimes, as bankers, at Liverpool aforesaid, under the firm of Moss & Company; and for some years prior to the death of the said testator Henry Davies, our said firm of Moss and Company had dealings with and acted as bankers of the said firm of Henry Davies & Co., and received and paid monies for them; and also from time to time advanced money to them, and on their account; and the said firm of Davies and Company had, prior to the death of the said testator, deposited with my said firm certain shares in the stock of several public companies, as security for the balance which should from time to time be due from them to my said firm on said banking account. Third,—At the time of the death of the said testator Henry Davies (that is to say, on the 7th January, 1857), his said firm of Henry Davies and Company was justly and truly indebted to my said firm of Moss and Company in the sum of £23,044 7s. 2d. on the balance of said banking account. Fourth,—After the death of the said testator, Henry Davies, calls were from time to time made on some of the shares so deposited as security with my said firm, which calls were advanced by my said firm; and some dividends were also, since the death of the said Henry Davies, received by my said firm on account of said shares; and some of the said shares have been sold by my said firm pursuant

to a power given to them in that behalf by the said testator, Henry Davies, and William Davies, his partner, the proceeds of which dividends and sales have been allowed in account by my said firm; and certain sums were subsequently to the death of the said testator, Henry Davies, paid to my said firm by the said William Davies in his lifetime; and by means of such payments and receipts, the balance which was due to my said firm, and secured upon said shares at the death of the said testator, Henry Davies, as aforesaid, has been from time to time varied and reduced. Fifth,—The paper writing here now produced and shown to me, marked A, is and contains a full and correct account and statement of the said banking account from the commencement thereof on the 20th September, 1848, to and inclusive of the 21st April, 1862, and all the entries in said account, as well on the credit as on the debit side thereof, are true and correct in every particular, and every item and transaction which ought to be included in said account is included therein to the best of my knowledge and belief; and I say that the charges for interest and commission included in the said account are fair and reasonable, and such as are usually charged by bankers. Sixth,—It appears by the said account, and the fact is, that the balance of £23,044 7s. 2d. which was owing to my said firm by the said Henry Davies and Company at the death of Henry Davies, is now reduced to £13,706 15s. 6d.; and I say that the whole of the said last-mentioned sum is now justly due and owing to my said firm on the balance of my said account as it now stands. Seventh,—Save as it appears by the said account, I have not, nor hath any person or persons by my order or to my knowledge or belief, received any moneys whatsoever in reduction or liquidation of said banking account. Eighth,—The following shares deposited with my said firm by the firm of Henry Davies and Company as aforesaid still remain in their hands as security for the balance owing on the said banking account, namely, 100 Demerara Railway shares, 50 Magnetic Telegraph shares, 144 Grand Trunk scrip, 20 Ince Hall Company, 1470 Royal Swedish Preference, and 30 Dutch Rhenish; and upon payment of the sum which shall be found due to my said firm on the said banking account, I submit to dispose of such shares as the Honorable Court may think fit." A copy of the account referred to in the affidavit was furnished to Mr. John Litton, the solicitor for the petitioners, on the 17th May, 1862.

On the 4th of June, 1862, a notice was served through the notice office on Messrs. Hallows and Hamilton, the solicitors for the said Gilbert Winter Moss and Thomas Edward Moss. The notice, which was entitled in the cause, was addressed to Messrs. Hallows and Hamilton, solicitors for the claimants, and was as follows: "Sirs,—The claimants, Gilbert Winter Moss and Thomas Edward Moss, are hereby required, within one week from the date hereof, to furnish me in writing an account, verified by affidavit, setting forth the shares and securities which from time to time were deposited with them, or with the firm of Moss and Co., by Henry Davies and Co., as security for and to cover the balances shown by the account furnished in this cause by said claimants, with dates cor-

responding to those balances, down to 14th August, 1857; and also setting forth when, where, to whom, and at what price, such shares and securities were sold by them, or how otherwise applied and disposed of; and in default of such account being so furnished, this notice will be made such use of hereafter against said claimants as counsel shall advise. Dated this 4th June, 1862." This notice was signed by the solicitor for petitioners, and directed to Messrs. Hallows and Hamilton, solicitors for said claimants. No reply whatever was given to the said notice, though admitted to have been received; and the appellants caused the following notice, which was duly initialed by the proper officer in that behalf, to be served on the said Messrs. Hallows and Hamilton, through the said notice office, on the 20th day of June, 1862, and also entitled in the cause:—"Sir,,—Inasmuch as the claimants, Messrs. Moss and Co., have neglected and refused to comply with the terms of my notice of the 4th June, inst., to furnish to petitioners the particulars of the securities deposited with them by the firm of Henry Davies and Co., by reason whereof petitioners have not been able to examine and investigate the claim of said Moss and Co. furnished by you: Take notice that the said claim has been disallowed by the petitioners, and petitioners will refer to said claim in the charge to be filed by them in this matter, and will state that same is disputed as above." This notice was likewise signed by the solicitor for the petitioners, and directed to the solicitors for Messrs. Moss and Co. That notice, it was alleged by Messrs. Hallows and Hamilton, though regularly stamped with the notice office stamp and initialed by the notice office clerk, never reached them and never was received by them, being, as it was alleged, lost or mislaid by one of their clerks, and consequently no answer was given thereto. However, though said notice giving intimation of the disallowance by the petitioner of the claimant's claim was lost, still, however, it appeared that between the month of April, 1862, and June, 1863, the cause was actually twelve times inserted in the *Legal Diary*, in the list of causes to be heard before the Master, and which *Legal Diary* it was admitted that the appellants' solicitors, the Messrs. Hallows and Hamilton took; that on the 16th June, 1863, the said Messrs. Hallows and Hamilton saw the name of the cause in Master Litton's list in the *Legal Diary*, and accordingly they went in before the Master and struggled to prevent him from signing the final order: this Master Litton refused; but it appeared that the said Master stated that Messrs. Moss should, if so advised, serve a distinct notice of motion for liberty to file a charge and take a separate order at their own expense. The petitioner, Richard Hastings Graves, stated in his affidavit that he did not dispute the claims of the trustees of the marriage settlement of William Davies, deceased, which he would otherwise have disputed; and now, if the claim of the said claimants, Messrs. Moss and Co., was omitted, the funds would be wholly insufficient.

Mr. Nalty, who was the acting man of business of Mr. Neilson, the solicitor of the respondents, stated in his affidavit that Moss and Company filed a bill in the Court of Chancery in England on the 27th Nov.

1860, against the minor respondents and Thomas Davies, praying for an account of the sum due to them on foot of their claims, and for the administration of the assets of Henry Davies. It appeared that by an order made by Sir John Romilly certain accounts were ordered to be taken, and liberty was given to Moss and Company to go in and prove what was due by the estate of said Henry Davies. The Messrs. Moss, however, thought it better to make their claim good by affidavit in the suit in Ireland where the real estate would be realized.

Serjeant Sullivan (with him *F. Walsh, Q.C., Parker, and George Foley*) for the creditors who had proved in the cause appeared in support of the appeal. —The Master of the Rolls, by reversing the order of Master Litton, allows the claimants, the Messrs. Moss, to come in after the most unaccountable negligence to make at the last moment their claims. The first point in the case is, had the solicitor notice of the proceedings? It was not denied that the solicitor (with the exception of one notice, and that notice, too, transmitted through the notice-office,) had notice of all the proceedings. The *Legal Diary* was taken by those solicitors, and for twelve times during a little more than a year the case was in that paper; and yet, at the moment when the whole case was actually being wound up, they come in to seek to disturb all that had been doing through the year. Reverse the decision of the Master of the Rolls and you encourage a looseness of practice that will have the most disastrous consequences. It is submitted that the order of Master Litton was correct. Assuming, then, that the appellants had notice of the proceedings they will now be bound thereby.—*Murtagh v. Tisdall* (Flanagan & Kelly, 38). In that case an application similar to that now made to the Court was made by a Mr. Newburgh, who had been a party to the several orders under which the priority of the parties had been made the subject of decision, and Sir Michael O'Loughlen, the Master of the Rolls, there said—"I cannot allow him who had full notice of the proceedings, to attempt to alter by his application the priorities adjudicated upon." In *Gurney v. Lord Oranmore* (5 Ir. Ch. 447) it was held that when an incumbrancer, made a party to a suit, permits a decree *pro confesso* negating the facts on which his claim depends, and afterwards permits a final decree to be taken which does not provide for his rights, he cannot be permitted to come in and file a charge and obtain a separate report respecting his claims. In *Sawyer v. Buckmore* (1 Keene, 391) it was held, that though the distribution of an intestate's estate under a decree of the Court among persons found to be next of kin, does not conclude the rights of persons who may have a paramount title, yet the Court will not assist other next of kin who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims. This decision was, however, afterwards reversed by Lord Cottenham (2 Mylne & Cr. 612); and he let them in, but if he did it was on the clear and distinct grounds that a knowledge of the pending of the suit was not brought home to the plaintiffs.—*Knox v. Waters* (5 Ir. Ch. 430). All the above cases decide, that when notice is brought

home to a party, the Court will not assist him who has been inactive in prosecuting his own claim.—Here everything concurs to show that the Messrs. Hallows and Hamilton were aware of the proceedings; that they had notice through the notice-office is clear, and the presumption is, that when the notice has been transmitted through the office and left at the solicitor's office, it has reached the hands of the solicitor. Better abolish the notice office at once, if a defence like this can be set up. [*The Lord Chancellor*.—Suppose it did reach the hands of one of the clerks in the office who burned it, would you in such a case presume that it reached the solicitor's hands, and would the client be bound by that service? *The Lord Justice of Appeal*.—Is there any case, that decides that a notice through the notice office is binding?] What we say in answer to the Lord Chancellor is, that a notice served through the office is binding, and further that that service in an attorney's office is service on the party himself; if the clerk of the notice office leave the notice it is *prima facie* evidence of the delivery of the notice. Observe too, that the solicitors do not say they have not got the notice; all that is said is they don't remember having got it. Couple, then, the facts that one notice of the 4th day of June is left unanswered, and the other notice, it is alleged, never received; and the case appearing over and over, in the *Legal Diary* for more than a year, does not the strongest presumption arise of the knowledge by the solicitors that the case was being heard which they now pretend they know nothing about? That notice of the 20th of June was quite as strong as if the claimants were mere parties to the cause petition. The Messrs. Moss were bound under the orders to come into the office within a given time to file a claim or charge, by the form of advertisement for creditors under the 8th of the Master's orders (Blackham, Ch. P. 607), and by that notice was quite as much a party as if he was made a party to the cause petition, and Moss was obliged to come in and prove his claim thereunder. The solicitors for Messrs. Moss, in their affidavits, a month after they had seen the case in the *Diary*, come in, and the Master declines to admit them. Why? Because he had evidence amounting to demonstration that Moss's solicitor had knowledge of the proceedings. A motion was made before Master Litton and he has made no rule on that motion; and no rule on a motion is precisely as strong as if the motion were refused. [*Brewster*, Q.C.—I never heard that no rule on a motion is equal to a refusal. There is no case on the books to support such a construction.] It is a refusal. The practice of the Courts of Law and Equity are uniform on this subject, and a decision lately made in one of the Courts at the other side of the Hall, on this subject is in point—*Hargrave v. Meade* (9 I. C. L. Ap. xlv.). Chief Justice Monahan there says—"If we held that a motion where 'no rule' had been pronounced might be again discussed, the number of motions upon one question might be infinite." In *De Montmorency v. Pope* (2 Ir. Jur. 213) it was held that when the Court of Queen's Bench has pronounced "no rule on the motion" the party will not in general be permitted to mend his hand; and a subsequent application grounded upon an affidavit supplying the previous de-

ficiency, will be refused *with costs*. If this Court confirm the order of the Master of the Rolls, such a decision will infect the community with a looseness of practice; all that was done is to be undone, and we, who at considerable expense have established our claim for £14,000, will have to go all over the same ground again.

Brewster, Q.C. (with *Norman*, Q.C. and *T. H. Synges*) appeared to sustain the order of the Master of the Rolls.—Master Litton's order, if left undisturbed, would shut out Moss and Company. *Gillespie v. Alexander* (3 Russell, 130) was a suit for the administration of a testator's assets; after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in Court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the Masters subsequently reported a debt to be due to him; but, in the meantime, the fund had been apportioned and part of it had been paid over, while the remainder had been carried to the account of particular legatees, and it was there held by Lord Eldon that the creditor who thus came in at the eleventh hour to claim his demand was entitled to receive out of the funds remaining in Court, not the whole debt but a part of it, bearing such a proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will. Now, here is a case not nearly as strong as that decided by Lord Eldon,—we claim to be entitled to an enormous sum of money, and are we to be shut out from proving our claim before the Master? *Cattell v. Simons* (8 Beav. 243) was where a bond creditor proved his debt under a decree in a creditor's suit, and he also claimed to have an equitable mortgage for the amount: the matter stood over to amend his charge, &c., but he neglected to do so and was reported a bond creditor only: the estate was sold, and the money *actually* paid into Court, and an apportionment directed: some time after, his personal representative presented a petition for liberty to go in, and establish his mortgage, alleging that he had recently discovered that the charges had not been amended, but the party in that case was refused the liberty we now seek for. One might think that this case of *Cattell v. Simons* was against the Messrs. Moss and Co.; but no—why was that application refused? Because nine years had elapsed before he went in, and it was therefore dismissed with costs.

Warren, Q.C. (with whom was *W. M. Johnson*), replied on behalf of the petitioners.

The following is an outline of the judgment of the Master of the Rolls.—His Honour stated that it was alleged by Messrs. Hallows and Hamilton that they never received the notice from the solicitor for the petitioners disallowing their claims; but it was regularly initiated by the notice-office clerk, and stamped with the notice office stamp; and from the regularity with which that office was conducted, he must assume that the notice was duly served; although of course he did not doubt, from the allegation of Messrs. Hallows & Hamilton, that it was by some accident mislaid by one of their clerks, and did not come to their hands. It appeared,

however, that between April, 1862, and June, 1863, the cause was twelve times in the *Legal Diary*, and Messrs. Hallows & Hamilton, on the 16th of June, 1863, saw the name of the cause in Master Litton's list in the *Legal Diary*; and having appeared before the Master, they sought that he should postpone the signing of his final order; but he properly refused to postpone signing it. But it appeared from Mr. Nalty's affidavit that the Master stated that the Messrs. Moss should, if so advised, serve a distinct notice of motion for liberty to file a charge, and take a separate order at their own expense. His Honour could not assume that the notice of 20th of June, 1862, which appeared to have been served through the notice-office, was not served; and, if served, the delay of Messrs. Hallows & Hamilton was inexcusable. But, if they did not receive the notice of the 20th of June, 1862, they admittedly received the notice of the 4th of June, 1862; and they should have made some inquiry between June, 1862, and June, 1863, as to whether the claim of their clients was allowed. The affidavit of the petitioner, Richard Hastings Graves, stated that he did not dispute the claim of the trustees of the marriage settlement of William Davies, which he would otherwise have done; and that, if the claim of the said Messrs. Moss & Co. was admitted, the fund for payment of the debts of Henry Davies would be wholly deficient. Mr. Nalty stated, in his said affidavit, that Messrs. Moss & Co. filed their bill in the English Court of Chancery, on the 27th of November, 1860, against the minor respondents and Thomas Davies, praying for an account of the sum due to them on foot of their said claim, and an account of the assets, and a sale of the estate of the said Henry Davies; that an answer was filed to the said bill, alleging that, if the account between Moss & Co. and the estate of Henry Davies were taken, it would be found that no balance whatever was due to the said Messrs. Moss & Co.; that since the filing of the said answer no steps whatever had been taken by the said Messrs. Moss & Co. to prosecute the said suit to a hearing, or have the said account taken; and the affidavit submitted that the claim of Messrs. Moss & Co., which was of a very intricate character, could (the parties acquainted with the facts being on the spot) have been investigated with less expense and delay than in the present suit, if that claim was well founded. The statement in the affidavit, of the proceedings in the English Court of Chancery, was not correct. It appeared that a motion was made before the English Master of the Rolls, on the 20th of June, 1861, in the causes of *Holt v. Davies* and *Moss v. Hamilton*, for a stay of the proceedings in the second suit (which were the proceedings adverted to in Nalty's affidavit); and counsel for the defendant, Thomas Davies, and for the petitioners, Thomas Edward Moss and Gilbert Winter Moss, consenting that the motion should be treated as a motion for a decree in the said suit of *Moss v. Hamilton*, it was ordered by Sir John Romilly that certain accounts should be taken; said accounts being of the sum due to Moss & Co. from the estate of Henry Davies, and an account of the securities held by Moss & Co. to secure payment of what should be found due; and

liberty was given to Moss & Co. to go in before the Chief Clerk and prove what was due against the estate of Henry Davies, under the decree in the first suit. Sir John Romilly thus had taken a different view from the Master, and considered that Moss & Co. had a *prima facie* case. Gilbert Winter Moss thought it better to make the claim in the Irish suit, in which the real estate of Henry Davies would be realised. It was alleged by counsel that Gilbert Winter Moss was a party to the suit; but this was not the case. There had been very great neglect in this case; but as the real estate was not sold and the funds were not realised, the question was, whether, having regard to the authorities, all inquiry as to the claim of Moss & Co. should be shut out. The decision of the House of Lords, in *Montefiore v. Browne* (7 House of Lords Cases, 269) affirming *Gurney v. Lord Oranmore* (5 Ir. Chan Rep., 477), appeared to his Honor to be at variance with the Master's decision. Lord Cranworth, in giving judgment in *Montefiore v. Browne*, said:—"The only remaining question is, on a matter of form, whether, after the Master's report and the decree on further directions it was consistent with principle and practice to let in the creditor to insist on the claim under the deed. I think that may be done. The estate, or the money produced by its sale, is in the nature of a fund in Court. The practice in such cases has always been, at least in modern times, to let in all claimants, whatever decree may have been made for its distribution. This was done in *Gillespie v. Alexander* (3 Russell, 130), which appears to me to be a much stronger case than the present; for there the fund was hardly, within the meaning of the rule, a fund in Court. The decree had been made, appropriating the fund amongst the several legatees. Many of those legatees, to a large amount (above, I think, £10,000), were infants and married women; and, for some reason connected with their character, their shares of the fund were retained in Court, and carried to their separate accounts. Now, it has always been considered that, when a fund is carried to a separate account, it is, in the strongest possible way, appropriated for the benefit of the party to whose account it is so carried; and it is well known that, in order to get that fund out of Court, the person to whose account it has been carried presents an *ex parte* petition. It is entirely his own fund, and nobody else is supposed to have any interest in it. But, in that case, Lord Eldon (a judge very little inclined to deviate from the strict rules of the Court) held that, according to the practice of the Court, a prior claimant having come forward, and having established his right, it was competent to the Court to apply the fund in Court rateably with that which had been got out by other parties, in payment, *pro tanto*, of that creditor's debt; leaving him, as to that portion which had been got out of Court, to apply to the legatees to obtain payment from them. It appears to me that that is a much stronger case than the present, and one upon which your Lordships may very safely act. There can be no doubt but that relief might be had by a supplemental bill, or by a petition in the nature of a bill of review; but there can be no reason why this unnecessary delay and expense should be occasioned.

Complete justice is done by making the respondent pay all the additional costs which have been occasioned by the imperfect manner in which the claim was brought forward. It was argued that this is not the case of a person who had not come in under the decree, but afterwards sought to be let in on terms; for here the respondent, or those for whom he was a trustee, did come in under the decree, though he omitted to rest his claim on the deed of the 24th of June, 1823; but this makes no difference in principle; and, considering that the infirmity, by Denis Browne as its trustee, was an equitable incumbrancer, by virtue of the provisions of the settlements of June, 1823, and that the appellants must be considered as having had notice of that incumbrance, I think that the Court did right in admitting the respondent, as the representative of the trustee of the infirmity, to establish his priority. The result therefore is, that the appeal must be dismissed, with costs, and the cause remitted back to the Court of Chancery in Ireland, with a declaration that the respondent, as trustee for the infirmity, ought to be charged with all extra costs occasioned by the demand not having been, in the first instance, rested on the title under the deeds of June, 1823." His Honour thought the decision in that case at variance with the decision of the Master. The Master's order must therefore be set aside; and Moss & Co. must be at liberty to file a charge on foot of their demand. He would reserve the question of costs; because although, if their claim was not disputed they must pay the costs of obtaining a separate report, yet if their demand was litigiously opposed it was necessary that the Court should have control over the costs to be incurred; and the party who should file a discharge to the claim of Moss & Co. should understand that he would be fixed with any costs incurred beyond what was necessary for a fair investigation of the claim. It was surprising that the party having the carriage of the proceedings should have pressed the Master to make the order appealed from, where Moss & Co. would, from the amount of their demand, appeal to the House of Lords, if the Master's report should be affirmed; and where the House of Lords would of course follow their own decision in *Montefiore v. Browne*.]

THE LORD CHANCELLOR.—The Court has frequently permitted claimants on the assets of a deceased party, when the money is in Court or an estate unsold, to come in and establish their claims. It has been urged at the bar that the Messrs. Moss & Co. are parties to the petition, and that they became parties by the filing of their charges, or, rather, making their claim to Mr. John Litton, the solicitor for the petitioner. By the 33rd General Order of 1851, every person who shall have filed a charge in the Master's office shall be deemed to be a party to such petition as fully and effectually as if he had been made a respondent thereto and served with the notice of the petition. It strikes me that this proceeding of making the claim cannot be regarded as a proceeding in Court at all; it is external to the proceedings in Court. The notice of the 4th of June was not in Court. Well, then, no charge whatever is filed in Court though made to the solicitor. I cannot, then,

look over Messrs. Moss & Co. as parties to this suit. What is the notice of the 4th of June?—merely calling on Moss to furnish to the solicitor for the petitioner an account verified by affidavit setting forth the shares and securities which were deposited with the firm of Moss & Co. by Henry Davies, whose assets were about being administered or in the course of administration. Well, the Messrs. Moss never complied with the terms of that notice, but surely that was not a matter in Court; that was not filing a charge in the Master's Office. The notice as to the disallowance of the claimants' claims was not of any disallowance by anyone, save the executor; not a disallowance by any judicial body. Now, this large claim, is it to be disposed of in this way? is this large claim to be summarily disposed of without any hearing of the parties, and without being in any manner whatsoever adjudicated upon. That is a strong proposition, and, if final, a very severe measure. I think, then, this claim ought not to be disallowed without adjudication. No doubt, some fatality occurred whereby the second notice did not reach them. I think the order of the Master of the Rolls has so far met the justice of the case. The only question now to be considered is, who is to pay the costs of the application to the Master of the Rolls. Vary the order of the Master of the Rolls, by expunging therefrom the direction "that the Master be at liberty, if he shall so think fit, to re-consider the claims, if any, of the parties who have proved, if their claims were unopposed by reason of the claims of Moss & Co. not having been sooner brought forward," and the order of the Master of the Rolls must also be varied in so much as it reserves the question of costs. Mr. Gilbert Moss must pay the petitioner in this matter the costs of the motion before Master Litton on the 19th January, 1864.

THE LORD JUSTICE OF APPEAL entirely concurred in what had fallen from the Lord Chancellor. No one can for one moment pretend that there was any adjudication on the claims made by the parties concerned. Counsel for the petitioner, although pressed, have not cited any case to show that a service of notice through the notice office is conclusive evidence of the notice having reached the hands of those for whom it was intended. The view the Lord Chancellor takes perfectly meets the justice of the case.

Court of Queen's Bench.

[Reported by William Woodcock, Esq., Barrister-at-law.]

[BEFORE O'BRIEN AND FITZGERALD, JJ.]

WAKEFIELD v. SMITH.—June 11, 24.

Ejectment for non-payment of rent—Prior judgment in an action for the same rent—Maxim of factum transit in rem judicatam.

The recovery of a judgment and issuing of execution in a personal action for rent form no bar to a subsequent ejectment founded upon the non-payment of the same rent, where the judgment and execution have been unproductive; and the maxim of factum transit in rem judicatam does not apply in such a case.

The nature of the action of ejectment as distinguished from a personal action for rent is not altered by the Common Law Procedure Act of 1853, and it still remains an action essentially for the recovery of the possession of the land.

DEMURREE.—The action was in ejectment for non-payment of rent; and the summons and plaint complained that the defendants, John Smith and Emily Smith, held part of the lands of Rogerstown, in the barony of Balrothery East, and county of Dublin, as tenants to the plaintiff from year to year, at the rent of £478 16s.; and that the sum of £478 16s. being for one year of such rent due and ending the 1st May, 1864, was due to the plaintiff. To this the defendant, John Smith, pleaded, first, a set-off; and secondly, "that at the time of the commencement of this action there was not one year's rent in arrear in respect of the lands in the summons and plaint in this action mentioned, because said defendant says, that after the 1st November, 1863, and after the sum of £269 18s., being the first half-year's rent endorsed on the plaint accrued due; to wit, on the 3rd December, 1863, the plaintiff in this action issued his writ of summons and plaint forth of her Majesty's Court of Common Pleas in Ireland, in a certain action wherein he, the now plaintiff, was plaintiff, and the said now defendants, John Smith and Emily Smith, also a defendant in this action, were defendants; and by said writ of summons and plaint the said plaintiff complained that the said John Smith and Emily Smith were indebted to him, the said plaintiff, in the sum of £638 for money payable by said John Smith and Emily Smith to the said plaintiff for the said John and Emily's use and occupation by the plaintiff's permission of certain lands, messuages, and premises of the plaintiff, the particulars whereof were endorsed on said writ of summons and plaint. And the said defendant saith that the endorsement on said summons and plaint contained, amongst other items, an item in the words and figures following, that is to say, "Nov. 1, 1863. To half-year's rent due on this day, £239 8s." And defendant says that the lands, messuages, and premises referred to in said last-mentioned writ of summons and plaint are identical with the part of the lands of Rogerstown, dwelling-house, and offices therein described in the summons

and plaint in this action, and are not, nor is any part thereof, other or different; and that the above mentioned sum of £239 8s. so contained as aforesaid in the endorsement on the summons and plaint in said action in said Court of Common Pleas is identical with the sum of £239 8s., being the first item in the endorsement on the plaint in this action contained. And the said defendant saith, that upon the 3rd day of February, 1864, he filed certain defences in said action so pending in said Court of Common Pleas; and that upon 17th February, 1864, the plaintiff in said last-mentioned action filed certain replications to some of said defences; and that certain issues having been settled for trial, and same having been afterwards duly tried, such proceedings took place in the said cause, that afterwards, to wit, on the 19th March, 1864, it was considered that the said Francis Wakefield should recover against the said John Smith and Emily Smith the sum of £434 18s., with 6d. for his expenses and costs as found by the jury therein aforesaid, together with £89 1s. 11d. for costs, making together the sum of £524 0s. 5d. And the said defendant avers that the said last-mentioned sum so recovered as aforesaid included the sum of £239 8s., being the first item endorsed on the summons and plaint in this action; and afterwards, on the 24th March, 1864, the plaintiff caused a writ of *fiat facias* to be issued upon foot of the last-mentioned judgment, whereby the sheriff of the county of Dublin was commanded that of the goods and chattels of John Smith and Emily Smith he should cause to be levied in his bailiwick the sum of £524 0s. 5d. sterling, lately adjudged to said Francis Wakefield for debt and costs by the judgment of said Court on the 19th March, 1864, as it appeared to said Court of record; and that he should have that money, together with interest on the sum of £524 0s. 5d. at the rate of £4 per cent. per annum from the 19th March aforesaid before said Court at the Queen's Courts on the 7th day of April then next coming, to render to the said Francis Wakefield for the debt and cost and interest aforesaid; and that he should do all such other acts as by an Act passed in the 16th and 17th years of her Majesty's reign he was in that behalf commanded to do, and that he should have then there this writ. And the said plaintiff afterwards seized and took thereunder the goods and chattels of the now defendant, John Smith, to the value of, to wit, £125 3s. 3d.; and afterwards, and before the commencement of this action, the said sheriff filed his return to said writ in the words and figures following:—"By virtue of this writ to me directed I have caused to be made off the goods and chattels of the within-named defendants, John and Emily Smith, to the value of £125 3s. 3d., part of which sum, £1 6s., I have paid to James Smith, poor-rate collector of the premises in which said goods and chattels were taken for balance of poor-rate due 9th September, 1863, on said premises, and the residue of said sum of £125 3s. 3d. I have ready before our said lady the Queen to render to Francis Wakefield in part satisfaction of his debt and damages within specified. I further certify to our said lady the Queen that the said John and Emily Smith had not, at the time of the delivery of the writ, any more goods or chattels in my bailiwick whereof

I can cause to be made the residue of said debt and damages as the within writ commands." And that before the commencement of this action all times elapsed, things happened, and conditions were performed necessary to entitle the defendant, John Smith, to have the said sum of £125 3s. 3d. so levied as aforesaid and applied in part satisfaction of the aforesaid judgment." To this second defence the plaintiff demurred, on the grounds that the said defence did not sufficiently or at all confess and avoid the fact that the November rent of 1863 and the May rent of 1864 were due at the commencement of this suit, nor did it traverse the said fact; that assuming the statements and averments in the said second defence to be true, they disclosed no answer at law to the action of the plaintiff; that although said defence averred that a year's rent of the said lands was not due or in arrear at the commencement of the action, the said second defence did not shew anything to sustain that averment save argument and inference; that the allegation of the recovery, even though for rent of the premises, was not a bar to the proceeding by ejectment in respect of the same rent; that the alleged matters and things pleaded by the defendant, John Smith, for the purpose of shewing that one year's rent of the said lands was not due, did not, nor did any or either of them, disclose any such fact, and were not legally pleadable by the defendant, and could not tend to shew that a year's rent of the lands was not in arrear; and that the said second defence was otherwise bad and defective in substance. Upon the argument of the demurrer two questions arose. The first question was as to the appropriation of the sum of £125 3s. 3d. levied under the judgment. As, however, this question was disposed of by a reference to the facts as they appeared in the summons and plaint and bill of particulars in the action for use and occupation, from which it appeared that no part of the rent of November, 1863, was satisfied under the execution, it is not thought necessary to report the arguments upon it. The second and more important question was as to the effect of a judgment unsatisfied in an action for rent upon a subsequent ejectment for non payment of the same rent.

O'Driscoll and *Sidney*, Q.C., for the demurrer. The previous judgment for the rent is no bar to the ejectment.—*Rush v. Purcell* (3 Cr. & Dix. 162). In the case of a mortgage, obtaining a judgment on the covenant to pay is no bar to selling the lands. If there was an action for rent and an ejectment, could the defendant plead the pendency of the action for the rent to the ejectment? The ejectment is a remedy against the land; the action for rent against the person of the defendant.—*Furlong, Landlord and Tenant*, p. 1151. *Drake v. Mitchell* (3 East, 251); *Twopenny v. Young* (3 B. & Cr. 208).

Palles and *Serjeant Armstrong*, for the defendant. The cases cited by *Furlong* do not bear out the proposition which he lays down. *King v. Hoare* (13 M. & W. 494) puts the law on this subject on a different footing. The maxim of *transit in rem judicatam* applies here. So also *Ex parte Higgins* (3 De G. & J. 33). *Rush v. Purcell* is certainly the other way; but it is the decision of a single judge upon a civil bill appeal; and the authorities which we have cited are

opposed to it. A judgment in ejectment is now very different from what it was before the Common Law Procedure Act. It now combines two remedies; one against the land, the other against the person of the defendant.

June 24.—O'BRIEN, J.—This case was a demurrer to the defence, and was argued before my brother *Fitzgerald* and myself, on a plea to an ejectment for non-payment of rent, which has at all events the merit of novelty. An ejectment has been brought for the non-payment of a year's rent, and the ejectment describes the premises as being in the possession of the defendants as tenants from year to year, and the plaintiff brings the ejectment for two half-yearly gales of rent. To that the defendant has filed a plea of set off, and a second plea which is, that the year's rent for which the ejectment is brought includes the gales of November, 1863, and May, 1864, and that after the gale of November, 1863, accrued, in December, 1863, an action was brought by the plaintiff against the defendant for use and occupation of certain premises, being those for which the ejectment is now brought, and the plaintiff included in that action the rent of November, 1863, and recovered a judgment for the sum of £424, and issued execution under that judgment and levied the sum of £125, and that therefore he has no right to bring this ejectment. He says, "You have not only levied the money, but the money was applied in part satisfaction of the judgment." Now, there was a good deal of discussion as to the question of appropriation—namely, whether there was not a question—whether by the sheriff applying this money to the judgment the gale of November had not been satisfied and paid, and unquestionably if it had been, there was an end to the ejectment. The costs of the action were £89. The plaintiff contends that the costs should first be paid out of the levy, and that would leave only about £40; but if that £40 was applicable to the rent of November, 1863, the landlord would be defeated in his ejectment. But there was a good deal of confusion as to this, and for some time I did not see my way to get at this. I was under the impression that this action might have included wholly different demands, and that there might be a question whether the sum should not be applied rateably—namely, a portion to each demand, in which case the defendant's object would be gained. But on looking at the summons and plaint in the first action and in this case, and the bill of particulars, both of which are referred to in the plea—and we are at liberty to do that under the authority of the case of *Turquand v. Armstrong*, which is grounded on a decision of the Court of Exchequer, and where it is held that on a demurrer the Court may look at any document that is referred to in the pleadings and have it marked by the officer,—well, looking at this summons and plaint, this question of appropriation appears to be disposed of, and there is no ground for saying that any portion of the sum levied was applicable to any portion of the rent of November, 1863. But there was another ground strongly pressed by Mr. *Palles*—namely, that supposing no part of the rent was paid under the *fi fa*, yet that on the principle of *transit in rem judicatam* the plaintiff was precluded from relying on the sum as

being due for rent. The ground on which he rested was this, that it would preclude him from bringing another action, and that the existence of a judgment was a bar to his so doing. If that were so, it would affect very seriously the rights of landlords. No landlord could bring an action and prosecute it to judgment without depriving himself of the power of bringing an ejectment till two further gales of rent had accrued. Of course if the doctrine is established we should give effect to it, but it appears to us that it is not established. Before the Common Law Procedure Act of 1853 an ejectment was merely a proceeding for a condition broken. It was collateral with the other remedies of the landlord. The judgment enabled him to recover only his land in the ejectment, and the judgment in an action for rent gave him a remedy against the person. I could see no ground for its being a bar then. Of course if the judgment was paid either wholly or in part that would affect his remedy by ejectment. Now, the ground of the personal action and of the ejectment was the same—namely, the non-payment of the rent, but the remedies were different in their nature and results, and accordingly we find in *Drake v. Mitchell* (3 East. 251) that Lord Ellenborough in dealing with this doctrine puts it on this ground. He says:—"I have always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then it cannot operate to change any other collateral concurrent remedy which the party may have." Now, there was an action on the covenant for the rent. A bill had passed for the gales for which the action was brought. There was a judgment on the bill which proved unproductive, and the party pleaded this. The Court of King's Bench held it was no bar. But the case on which Mr. Pallett most relied was that of *King v. Hoare* (13 M. & W. 494) in which it was held that a judgment though without satisfaction recovered against one of two joint debtors was a bar to an action against the other, and he referred to cases in bankruptcy in which a similar principle was acted on. But there the reason of the rule is stated by Parke B. to be, because "if there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of Record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result." The question there was whether an action was brought against one of two joint contractors and the defendant relied on a judgment against the other, and Parke B. said that this maxim of *transit in rem judicatam* applied where the cause of action was joint. In the case of *King v. Hoare* the principle was held to apply where two parties had been jointly but not severally liable. Suppose a second action against either of the joint contractors, he would not have been

deprived of his right, and therefore the judgment could unquestionably have been pleaded in bar. But Parke B. expressly distinguishes between a joint and a joint and several contract in which neither could plead in abatement the non-judgment of the other. It appears to me, therefore, that the principle of *King v. Hoare* does not affect the right of the landlord to bring an ejectment after recovering a judgment in an action for rent, which judgment has proved unproductive. The only express authority on the point is that of *Rush v. Purcell*. It is true that was a decision upon a civil bill appeal, but it is the decision of a very eminent judge, and the point there was this—There was an ejectment by civil bill for non-payment of one year's rent. The plaintiff had previously obtained a civil bill decree for one quarter's rent (part of the year's rent), but had not issued execution. It was held that the decree was not a bar to the ejectment. But it was pressed upon us that the law is now altered by the provisions of the Common Law Procedure Act, 1853, ss. 205, 206, 207; and it is contended that an ejectment must now be considered as a personal action, and therefore that it could not be maintained if there was judgment in another action for part of the same sum. Now the effect of these sections was much considered in *Percival v. Dunn*. The question there was whether the plaintiff in an action of ejectment for non-payment of rent reserved by an indenture could recover more than six years' arrears of rent, or within twenty years. It was held by Perrin, J. and myself that he could not, because the ejectment was not to be considered as a personal action. The other judges were of opinion that the landlord could recover twenty years arrears, but Crompton, J. did not rest his judgment on the ground that it was a personal action. On the contrary, at p. 440 of the report, it will be found that he expressed his opinion that in the Common Law Procedure Act the distinction between personal actions and actions of ejectment was kept up; that the recovery of the land was the principal object in the ejectment, and the recovery of the rent only secondary. That may be taken as an authority for holding that the action of ejectment under the Common Law Procedure Act is not a personal action, and therefore that the power of recovering his rent could not have the effect of preventing him from bringing an ejectment. The right under the Common Law Procedure Act to recover his rent by judgment and execution, and his being enabled to enforce that further remedy to the extent of a year's rent, should not conclude him from asserting his primary right to recover the land itself. It is optional for him, but not imperative to issue execution for a year's rent. The 209th section enables him to issue different executions for the land and for the rent and costs. Suppose an action is brought for a year's rent; that then two years accrue; an ejectment is brought and there is a recovery in it. Could the tenant redeem without paying the whole three years' rent? Certainly not.

FITZGERALD, J.—I concur. The defence in the first instance was in the shape that there had been a part satisfaction of the half-year's rent, by the appropriation to that half year's rent of part of the sum levied under the judgment. It may have been doubtful

whether the defendant ought to have been permitted to rest his case on anything else but that. That was disposed of in the discussion, and I only refer to it for this, that I do not think that for the purpose of that case it was necessary to travel out of the record. I think we had a sufficient statement on the face of the pleading, but I do not express any opinion as to whether *Turquand v. Armstrong* is to be enlarged so as to include the judgment of a Court and the bill of particulars in another action. But the defendant's counsel contended that the effect of the judgment was to extinguish that half-year's rent. That was, as I understood his argument, he relied on the doctrine of *transit in rem judicatam*, and he further contended that this action was in effect an action for the same half-year's rent. The action, as already pointed out, was instituted not under the old Ejectment Acts, but under the 23 & 24 Vict., c. 154, which confers a new remedy on the landlord, and enables him to proceed by ejectment for the recovery of lands held under a tenancy from year to year, whenever a year's rent shall be in arrear. The intermediate sections between sections 52 and 66 it is not necessary to refer to. One object which the Act had in view was to enable a landlord to specify particulars of his rent, so that the tenant might settle the action by payment. One section in particular deserves to be referred to. It is the 66th of the Act which provides that "every landlord recovering possession by such judgment or decree in any ejectment for non-payment of rent, shall have the same remedy for all arrears of rent to the time of the execution of such judgment or decree, as such landlord might have had if possession had not been obtained under such judgment or decree." When the tenancy is not disputed the question seems to be whether a full year's rent remains due. That is the question which is attempted to be raised by this defence. The defendant is bound to shew that a full year's rent is not due; and in order to do that, relying on the principle of *transit in rem judicatam*, he cites the case of *King v. Hoare*. I should have said that it had nothing to do with the present case, though it is of value from the observations of the judges in the course of it, on this principle, because that was merely the application of an old principle to a new state of facts, and could be sustained on this ground. The plaintiff having obtained judgment against one of two joint contractors, he could not in an action against another deprive that other of his right to plead in abatement the non-judgment, and if he pleaded that in abatement the action could not be proceeded with. He could not have two judgments against him for the same sum. It was the application of that principle to a new state of facts. There is a good deal of observation in the course of it as to the effect of the application of this rule, which is valuable in the present case; but as I understand from the observations of Parke, B. the effect of the rule is not to extinguish the debt, but that, where a judgment has been obtained for a debt, the right given by the record merges the inferior remedy, and obviously that should be so; for it would be absurd if a party having a judgment were to institute an action to recover another judgment for the same amount; so that the effect is not that it operates as a satisfaction or extinguishment of the debt, but as

a merger of the remedy. Another case adverted to is that of *Ex parte Higgins* (3 de G. & J. 33). It is following up the case of *King v. Hoare*. Knight Bruce, L. J. there makes an inaccurate statement. He says a judgment would extinguish the debt. That is not so; and he is followed by Lord Justice Turner who puts it on the true ground, that it is the remedy which is gone. Well, now, when judgment is recovered for a debt the language of the law is *transit in rem judicatam*; but that does not in my mind import that the debt is satisfied, but rather that having obtained judgment you cannot maintain a second suit to get the same remedy, and accordingly I adopt the language of Lord Ellenborough in *Drake v. Mitchell*. As a decision, that case has little bearing on the present, but the interpretation of the rule as given by Lord Ellenborough is applicable. It seems to me that a judgment without satisfaction does not merge the debt or alter its character so as to prevent the landlord from maintaining an action to recover his lands for the same rent. The passage cited from Mr. Furlong's book shews that such was the opinion of the profession at that time. No doubt the authorities there referred to do not as matters of decision establish what he contends for, and even the case of *Rush v. Purcell* does not do so, because it is obvious that the decision of a Civil Bill Court could not be brought in a Superior Court under the maxim of *transit in rem judicatam*. Let us consider the position of the landlord as having two remedies—first, an action personal for the rent; and if he does not obtain satisfaction in that action, he has an action of ejectment to recover possession subject to redemption. The two remedies are distinct, and the statute provides that he shall have both remedies, and there can be no doubt that the remedies are concurrent. Thus an action for the rent would be no answer to an ejectment for the same rent. If the landlord recovers judgment in the ejectment, it is obvious that he may bring an action on the covenant for the rent. But the defendant says that the action of ejectment is now altered, and is both for the recovery of the possession of the land and also to recover judgment and execution for the rent, and he relied upon the Common Law Procedure Act of 1853. The sections are 195, 207, and 209. The general object of those sections was to enable the landlord to specify the particulars of his claim so as to enable the tenant to apply his defence accordingly, and to afford a remedy and obviate the necessity of having a second action for the rent. The second action is still necessary where the defendant does not appear. The action of ejectment, though thus altered, still continues to be an action for possession of the land, and not, properly speaking, an action to recover the rent at all, though in certain events the plaintiff may obtain judgment and execution for the rent due. The defence in the present case goes to the whole action, while its effect is to shew that as to the first half-year's rent the plaintiff ought not to have a second execution for it. Even taking the pleadings as they stand, though the plaintiff is entitled to the whole rent due, it does not follow that he is to have a second judgment for the same rent, nor would the defendant be without protection; for if the plaintiff got a second judgment for the same

rent, it seems to me that there would be a power in the Court to prevent an abuse of that kind. It seems, therefore, that the defence presents no answer to the action, and that the plaintiff must have judgment.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

TYRRELL v. THE IRISH SOCIETY.—May 23, 27, 1863.

Replevin—Replication—Proof of averment.

To an avowry pleaded to an action of replevin the plaintiff replied that divers persons before and at the time of the demise in the plea mentioned, were in possession, seisin, and enjoyment of a portion of the premises as tenants in fee thereof under grants thereof by the defendants prior to the said demise. Upon the trial of an issue joined upon this replication the plaintiff proved the possession of the parties, but failed to prove that they derived under grants by the defendants. The judge told the jury that it was immaterial whether the parties had derived under the defendants or not; that it was the duty of the lessors to see that they did not undertake to demise more than they had a right to demise, or to give possession of; and that if they did so demise at a gross rent and afterwards distrained for that rent, they must be defeated in the action. Held, that this was a misdirection.

THIS was an action of replevin. The summons and plaint complained that the defendants, on the 11th June, 1862, in a close called the Slob Lands of Lough Foyle, in the county of Londonderry, took the goods and chattels of the plaintiff, to the value of £978 12s. The plea avowed the taking as a distress for half a year's rent due by the plaintiff as tenant to the defendants, under a demise of the Slob Lands of Lough Foyle, on the south side, at a rent of £800 a year, payable half yearly. To this avowry there was a replication on which issue was taken, "That before and at the time of the demise therein mentioned the Wardens and Commonalty of the Mystery of Fishmongers of the city of London, and the Wardens and Commonalty of the Mystery of the Grocers of the City of London, and divers other persons, to wit, one David Kirkpatrick, Samuel Elder, James Galbraith, and Thomas Scott, and others, were, and from thence have been, and still are, in the lawful possession, use, occupation, seisin, and enjoyment of divers, to wit, 100,000 acres, parcel of the said premises in the plea mentioned, as tenants in fee thereof, to wit, under grants thereof by the said defendants prior to the said demise, whereby the plaintiff or those claiming under the said demise did not and could not enter into possession, or hold or enjoy the said last mentioned lands, as being parcel of the said demised premises in the plea mentioned, or any part thereof. And although the plaintiff and all those claiming under the

said demise have and always have from the time of making the said demise in the plea mentioned been ready and willing and desirous of entering into the possession, and occupation, and enjoyment of the said last mentioned land under and by virtue of the last mentioned demise, whereof the defendants had notice; yet from the time of making the said demise hitherto the plaintiff and all persons claiming under the said demise have, and has been, and still are, and is, kept out of the possession, use, occupation, seisin, and enjoyment of the said last mentioned lands, and every part thereof, and of all profits from the same, by the said persons hereinbefore mentioned; whereby the plaintiff has been wholly hindered and prevented from entering into and holding and enjoying the same, and from having and receiving any benefit, profit, or advantage which might and otherwise would have arisen and accrued to the plaintiff therefrom." At the trial before Hayes, J., at the Derry Spring Assizes, 1862, the plaintiff proved the possession of the parties named in the replication, but failed in proving that any of them derived title under the Irish Society. The defendant's counsel called for a non-suit, on the ground that the replication was not proved. The learned judge refused to non-suit, but reserved liberty to move to have one entered. The learned judge told the jury that it was immaterial whether the parties proved to be in possession of the portions of the demised premises before and since the demise had derived under the Irish Society or not; that it was the duty of the lessors to see that they did not undertake to demise more than they had a right to demise or to give possession of; and that if they did so demise at a gross rent, and afterwards distrained for that rent, they must be defeated in the action. The jury found a verdict for the plaintiff. The defendants accordingly obtained a conditional order to set aside the verdict and enter a non-suit, or for a new trial for misdirection by the learned judge, or that judgment should be entered for the defendants, *non obstante veredicto*, against which,

May 23—*Dowse, Q.C.*, (with him *James Hamilton*)

showed cause.—Tyrrell proved that when the lease was made to him, there was a portion under the sea water, and he built a wall to keep it out at considerable expense; and that when he did, that Galbraith and another claimed a portion of what he had walled in as theirs. They maintained their right to a considerable portion of what was given in the lease. He brought five ejectments. The question is, if there was evidence to support this plea, and if the plea be good. This is not a case of eviction either by title paramount or by lessor.—*Upton v. Townsend* (17 C.B., 75); *Gardiner v. Williamson* (2 B. & Ad. 336); *Neale v. Mackenzie* (1 M. & W. 747). Until the recent Act there was a distinction between the act of the landlord and eviction by title paramount.—(1 Furlong's Landlord and Tenant, 358). Upon the facts in *Neale v. Mackenzie*, it would have been sufficient to rely on eviction; but the reasoning did not go upon eviction but upon an original defect. Here the demise *quoad* the portion mentioned in the plea was wholly void. The Court put it far higher in *Neale v. Mackenzie* than upon eviction. So far as that was a case where the defect was created by the party himself,

that would agree with what was pleaded here; but it was not put upon that. Tyrrell never was in possession here, and so far the case is the same as *Neale v. Mackenzie*. There was an original defect in the demise as to these four parties. The rent reserved out of it is suspended. We have nothing to do with the consequences. They would make us pay the rent of the entire, and this gentleman swore he expended £70,000 in reclaiming this land. The right to distrain is gone whatever other remedies there may be. [Christian, J.—You mean to say that the right to distrain is gone for ever.] Yes. In *Ecclesiastical Commissioners v. O'Connor* (9 Ir. C. L. R. 242), *Neale v. Mackenzie* was quoted, but it was distinguished; but the authority of that case would have been followed if the facts had been the same. *Tomlinson v. Day* is referred to in the latter part of the judgment in *Neale v. Mackenzie*; but it was an action for use and occupation.—*Salmon v. Smit* (1 Wms. Saund. 202). *Mercer v. O'Reilly* (13 Ir. C. L. 153), was argued as a case of eviction. The parties did not raise the question if there was an original defect in the grant. The decision entirely depended on whether the 44th sect. of the Landlord and Tenant Amendment Act did away with the suspension of the rent and apportioned it. The words "original defect in the demise," might have been included in the sect., but they were not. The words "under grants from the said defendants," are immaterial. [Christian, J.—If you reject these words, must you not also treat as immaterial the words "tenants in fee thereof;" and if so, there will remain only the averment that they were in possession without any title. This is not an averment of a tenancy in fee-simple, but a tenancy in fee, *sub modo*.] This is not a tenancy in fee, *sub modo*, which is averred. Assuming it to be an eviction, since the Act the law is the same, whether the eviction be by lessor or by title paramount. The distinction is now of no effect since that statute, the result being that the rent is in both cases apportionable. Therefore, first, being apportionable, the rent could not be distrained for. Secondly, it was the duty of the defendants to have raised the question themselves and let the jury apportion it. In *Regnart v. Porter* (7 Bing. 451), it is said the rent must be fixed before the landlord takes the summary remedy. It is manifest that we are not bound to pay £800 for what we have not been turned out of when that is the rent to be paid for the whole.—*M'Loughlin v. Craig* (7 Ir. C. L. R. 117); 2 Coke's Inst. 503; *Bliss v. Collins* 6 B. & Ald. 876). Bac. Ab. title Rent, lays it down that the amount of rent is to be decided by the verdict of the jury. [Monahan, C.J.—And why not a verdict here deciding what was the rent? Where is your authority for saying that the parties cannot apportion; that before the distress is made it is necessary the rent should be apportioned?] The rent must be fixed in order to distrain. [Monahan, C.J.—Neither tenant nor landlord could apportion the rent; but could it not have been done in this way, by a plea, specifying an apportionment, and a replication denying that the apportionment was sufficient? It would be for the jury to say if the replication was true.] Assuming there may be a question of apportionment in this case, this replication is no more than an amplified replication of *non tenuit*, and, being so, is

good. It may be objectionable as pleading evidence, but it is nothing but *non tenuit*; it is saying that we do not hold at the rent you mention, and the slightest variance will entitle us to a verdict unless the party applied to amend, and the judge, in his discretion, thought proper to amend. The judge would not amend unless the parties came with sufficient evidence to ascertain the apportionment. They pretermitted that, and perilled the case upon the facts.—*Brown v. Sayce* (4 Taunt. 320), and *Bennett v. Holbach* (2 Wms. Saund. 312), show that the Courts hold the parties strictly to the amount. The variance there was held fatal.—*Richards v. Cornford* (Comyn, R., 42). [Monahan, C.J.—Was there any rent there due?] There was. In *Roberts v. Snell* (1 Man. & Gr. 577), Tindal, C.J., says it is at his peril the landlord distrains before apportionment. This case shows how material is the amount of rent when *non tenuit* is pleaded; an avowry must state the exact amount of the rent.—*Smith v. Mannings* (Croke, James, 160) was adjourned, and I fear we shall not now have it decided. The rent was apportioned between different lessors, but that circumstance makes no difference. It is exactly this case.—2 Coke, 503. In *Serjeant v. Chafey* (5 A. & E. 354) the defendant refused to amend, and got the facts found specially stated, and the Court would not give him liberty to amend afterwards. We could not in any way recover these cattle if the defendants were to succeed in this. The powers of amendment given to the Court will not be exercised by the judge if the parties should be taken by surprise. This record will be evidence in any future action, and that is the reason of the importance of accurate particulars.

Brooke, Q.C., and M'Causland, Q.C., contra.—There ought to be a non-suit. Or if the averment be held immaterial, then there ought to be judgment *non obstantes veredicto*. In *Neale v. Mackenzie* no rent was ever paid. [Monahan, C.J.—Was there any rent ever paid here?] It was not disputed. The demise was in 1846, and the rent distrained for was due in 1862. Besides, this is a demise under seal reserving rent. *Prima facie*, we were entitled to the whole rent; and it was for the plaintiff to show how much was due and not due: but the plaintiff took this course; he said nothing at all was due. Sometimes he says it is an eviction by us, and sometimes that it is not. If the rent be apportionable, then by his own authorities he is out of Court. In *Stevenson v. Lambard* (2 East. 579) Lord Ellenborough lays it down that the apportioned rent may be distrained for. The landlord cannot be in a worse condition if by a mistake he included what was not got possession of than if he had turned the tenant out from a portion *vi et armis*. When we distrained for half a year's rent the plaintiff might have come in under the statute or the common law, and have lodged the sum actually due. That was the practice long before the late Act.—Chitty's Archbold's Practice, 1080. [Monahan, C.J.—Those are cases where there was no question as to the terms of the tenancy, but only the amount of the rent.] The tenancy here was admitted. Archbold takes a distinction between the cases before and subsequent to the Act. [Christian, J.—Bringing the money into Court admits the

contract, and they deny the contract. They say they never held this portion; that the extrinsic facts show the tenancy to be a different one from that which appears in the instrument; so they say, whether rightly or wrongly.] Why did they not plead *non tenuit modo et forma*? [Christian, J.—They say the plea amounts to that.] The facts in *Mercer v. O'Reilly* were held to amount to eviction by title paramount. That case cannot be distinguished from this. [Monahan, C.J.—Why was not the party in *Neale v. Mackenzie* entitled to apportionment?] It would be hard to say; but there are two or three differences. [Christian, J.—Lord Denman held so, because there was no rent reserved out of the portion of which the tenant got possession.] *Neale v. Mackenzie* must be confined to its own facts. It was the case of a mere agreement. Here there was a lease under seal. [Monahan, C.J.—Much stress was laid in *Neale v. Mackenzie* on there being only a parol demise; but that was only to show it could not convey a reversion.] The 44th section of the Landlord and Tenant Amendment Act must be taken to include this case in its principle. Acts like this have always received a very liberal construction.—*Kennan v. Brennan* (7 Ir. C. L. R. 268). If *Mercer v. O'Reilly* was within the mischief of the new Act, this case is. It would be strange to hold that if the landlord were to turn out the tenant he may recover for the remainder; but that if he purported to give more than he could give he is to get no rent at all. [Keogh, J.—Your argument is that there should be an apportionment?] Yes. [Keogh, J.—Then how can there be a verdict for you? it would give you the entire.] If a party says, I do not owe you anything, he must take the consequences. This verdict ought not to stand, because on the record there is something which it is admitted ought not to be there, and which would prejudice us in going to a court of error.

James Hamilton in reply.—The only authority to show this is a plea of eviction is *M'Loughlin v. Craig*. This replication neither is a plea of eviction nor ever was intended to be one. The case is undistinguishable from *Neale v. Mackenzie*. It went on this, that there was a defect in the lease which worked a suspension of the rent. *M'Loughlin v. Craig* was an action for rent. The defendant admitted half the rent, and wanted to get rid of the other half. He pleaded that another person was in possession of the premises, and that that other person recovered judgment in ejectment against him. It was the plaintiff that demurred there. The Chief Justice, assuming it to be a plea of eviction, held the rent apportionable. But I think Crampton, J., took a wiser view of the law than the Chief Justice, and said "There is no apportionment." This question, therefore, was not raised in *M'Loughlin v. Craig*; it was raised in *Ecclesiastical Commissioners v. O'Connor*. In every Irish case in which *Neale v. Mackenzie* is cited the common law principle is recognised, that if a lessor grant what he had no authority to grant the rent is suspended and the demise is void, and the rent must be got at in some other way. [Monahan, C.J.—Was *Tomlinson v. Day* the case of a demise under seal?] No. [Monahan, C.J.—And therefore the remedy was for use and occupation.] The production of the lease would not now

defeat an action for use and occupation. [Monahan, C.J.—It would.] It would not defeat an action of debt. [Monahan, C.J.—Indeed it would, if *Neale v. Mackenzie* be law.] The effect of the Landlord and Tenant Act was to do away with the distinction between eviction by title paramount and by landlord, and to make the remedy on both now not suspension but apportionment. That, I think, was the decision of the Court in *Mercer v. O'Reilly*, and it has been acquiesced in by the whole profession. [Monahan, C.J.—We held the plea in that case bad, because it was too extensive, and that the plaintiff should have judgment for the whole; the Court of Error have reversed that.] We put it upon this replication, that this is not a plea of eviction, and we ask the Court to decide that. What both this Court and the Court of Error decided in *Mercer v. O'Reilly* was, that eviction does not operate as a suspension of the rent. [Monahan, C.J.—They claim an apportioned rent; and that is a question quite right to be decided; but what I say is, it cannot be decided but upon a true statement of facts. It could not be decided upon the record containing what is under the *videlicet*] There is no estoppel, because where there is it must be pleaded, and it is not pleaded. *Neale v. Mackenzie* has decided that a replication the same as this was not a plea of eviction, either by title paramount or by the landlord. We are to be nonsuited if we give no evidence of a portion of our plea, if that portion be material. The Court, therefore, must say if this be material.

MONAHAN, C.J.—This is a motion to enter a nonsuit or for a new trial, on the ground that the plaintiff failed to prove the plea; that there was misdirection by the judge. It is a common action of replevin. The plea was, that Tyrrell held the premises at a rent of £800 a year, and that half of this sum was due. The replication, in substance, was, that he was unable to get possession of the entire of the premises, because at the time of the making of the lease a portion was possessed by parties seised in fee under the Irish Society. It was proved at the trial that this was true, but not that they derived under the Irish Society. The only matter we have to determine is, what is the substance of the entire plea on which the plaintiff relies. It is a seisin in fee derived from the landlord who made the lease of these premises. We think the judge was wrong in holding that the plea was proved when it did not appear that the parties held under the Irish Society. We are satisfied there was a misdirection. The verdict cannot stand. But then the question is, should we at the instance of the defendants nonsuit the plaintiff, or enter the verdict for the defendants on the ground that there was a failure of proof of the plea? We might perhaps *strictissimi juris*, but we do not think, in the exercise of our discretion, we ought to do this. We shall make absolute the order to set aside the verdict and direct a new trial. That having arisen from a miscarriage of the judge, we cannot give costs to either party. Let the parties go to trial if they like or amend, and it will be then for the Court to make that amendment, in such manner as they think right.

CHRISTIAN, J.—It is to be distinctly understood that we decide nothing but this: that the averment in

the plea of the title being derived from the landlord must be treated as one entire averment.

MONAHAN, C.J.—Make absolute the conditional order for a new trial, the parties to abide their own costs of this trial and of the motion.

Rule absolute for a new trial.

Court of Appeal in Chancery.

[Reported by Edmund T. Bewley, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE ESTATE OF RICHARD BAYLEY, OWNER; EX PARTE, MARY O'CONNELL, PETITIONER.
—Nov. 25, 26, 1863.

Wife's chose in action—Reduction into possession—Voluntary settlement—Modification of husband's and wife's estates—Estate pur autre vie—Words of inheritance—When unnecessary to pass an estate in quasi fee.

A feme covert entitled to a share in a legacy payable out of real estate, with the consent of her husband, agreed, together with the other parties beneficially interested, to accept the lands in lieu of the money. The lands were accordingly conveyed by the trustee of the will to a trustee; and by a subsequent deed declaring the trusts, a portion of the land was limited to the husband and wife for their joint lives, and to the survivor of them for life, with remainder to such of their children as the husband in his lifetime, or the wife, if she survived him, should appoint.

Held, by the Lord Chancellor, (the Lord Justice of Appeal not expressing any opinion,) that the assignment of the lands to the trustee did not operate as a reduction into possession of the wife's chose in action; and that the lands into which the money was thereby converted, were subject to the same uses and trusts as the money.

Held also, by the Lord Chancellor, (the Lord Justice of Appeal not expressing any opinion,) that the modification of the prior rights and interests of the husband and wife in the lands formed a sufficient consideration in the deeds declaring the trusts to make it a deed for value.

Lands held under a lease of lives renewable for ever were conveyed by deed to a trustee. By a subsequent deed the trustee declared that the previous assignment had been accepted by him "to the uses and for the trusts following: upon trust, to permit A. and B., his wife, to hold one-third of the lands during their joint lives, and the survivor for the life of such survivor, and after the death of the survivor, to be held by such child or children of A. and B. as should be living at the death of the survivor, in such shares and proportions as A, in his lifetime,

or B., if she survived him, should appoint (if only one child, to take the whole); and as to one other third of the interest in the said lands upon trust for X., his heirs and assigns for ever; and as to the remaining third of the interest in the said lands upon trust for Y., his heirs and assigns for ever, and to no other use, intent, or purpose whatsoever."

Held (per Curiam) that as it was manifestly intended to dispose of the entire interest in the lands by this deed, the absence of words of inheritance in the trust to the children of A. and B. did not prevent A. from appointing to one of the children the quasi fee of the lands.

THIS was an appeal from an order of Judge Longfield, dated the 11th of June, 1863, whereby the cause shown by John Stannistreet against the conditional order for sale of the 27th of March, 1863, so far as it directed a sale of the south division of Shanacool, was allowed with costs, and it was ordered that the petition in this matter should be dismissed so far as it prayed for a sale of the lands of the south division of Shanacool.

The lands mentioned in this order were part only of those included in the petition for sale, and were, with other lands, held under a lease, bearing date the 6th of May, 1746, by which the then Earl of Grandison demised the entire of the lands of Shanacool, in the county of Waterford, to George Bellamy and his heirs for three lives, with a covenant for perpetual renewal, subject to the rent and fines for renewal therein mentioned. This lease was renewed upon the 10th of May, 1763, by the Earl of Grandison to George Bellamy upon the dropping of one of the lives mentioned in the lease. George Bellamy, by his will, bearing date the 3rd of November, 1756, devised the lands comprised in the lease of the 6th of May, 1746, to Daniel Gahan and Stephen Creagh Butler upon trust, to sell the same for the payment of the testator's debts, including a debt due to the testator's nephew-in-law, John Everard, the elder; and the testator bequeathed to his niece, Anne Everard (wife of John Everard), notwithstanding her coverture, the sum of £1500 out of the purchase money of the said lands, together with the residue of his personal estate, and he appointed his wife, Anne Bellamy, Daniel Gahan, and Stephen Creagh Butler, the executors of his will.

George Bellamy died shortly after the date of this will, and John Everard the elder, the husband of the legatee in the will, died in September, 1764, intestate, leaving his widow and three children, namely, William Everard, John Everard the younger, and Anne Everard the younger, him surviving.

Anne Everard the elder, the widow of John Everard the elder, obtained administration to him, and afterwards died intestate in December, 1775. Anne Everard the younger married Peter Bayley on the 31st of January, 1776. In January, 1783, Anne Bayley and William Everard, her brother, obtained letters of administration of the goods of Anne Everard the elder, and also of the goods of John Everard the elder, unadministered by their mother Anne, and thereby became legally entitled to recover the debt due by George Bellamy to John Everard, and the sum of

£1500 bequeathed by George Bellamy to his niece, Anne Everard.

By deed, bearing date the 17th of March, 1783, Stephen Creagh Butler, the surviving trustee and executor of the will of George Bellamy, with the consent of William Everard, Peter Bayley, and Anne his wife, in consideration of the sum of £1500 therein stated to have been paid to William Everard, Peter Bayley, and Anne Bayley, conveyed the lands of Shanacoolle to James Gee and his heirs for all the estate and interest under the lease of the 6th of May, 1746, and the renewals thereof.

By a further deed, dated the 18th of April, 1786, made between James Gee of the one part, and Peter Bayley, Anne his wife, William Everard, and John Everard of the other part, after reciting the last-mentioned indenture of the 17th of March, 1783, the trusts of the former deed were declared in the following terms:—"Now I, James Gee, do hereby acknowledge and declare that the said assignment executed to me by the said Stephen Creagh Butler was accepted by me to the uses and for the trusts following, that is to say, upon trust to permit and suffer the said Peter Bayley and Anne his wife to have, hold, and enjoy the one-third of said farm and lands of Shanacoolle, subject to one third of the yearly reserved rent, and to one-third of the renewal fines, for and during their joint lives, and by the survivor of them for the life of such survivor, and from and after the death, *to be held and enjoyed by such child or children of the said Peter Bayley by the said Anne his wife as then shall be living at the time of the death of such survivor of them, in such shares and proportions as the said Peter Bayley in his lifetime, or the said Anne, if she survive him, shall by deed or will limit or appoint; if only one child, to take the whole; and as to one other third of the interest in said lands upon trust, to permit the same to be held and enjoyed by the said William Everard, his heirs and assigns, for ever, subject to one-third of the yearly reserved rent and one-third of the renewal fines; and as to the remaining third of the interest in the said lands upon trust, to permit and suffer the same to be held and enjoyed by the said John Everard, brother to the said William Everard and Anne Bayley, his heirs and assigns for ever, subject as aforesaid to one-third of rent and renewal fines, and to no other use, intent, or purpose whatsoever.*" It was thereby further agreed by all the parties that a certain warehouse which had been built by Peter Bayley and then occupied by him should be enjoyed by him, his heirs and assigns for ever, freed and discharged from all rent and renewal fines. The deed also contained covenants by James Gee for further assurance, and a covenant by Peter Bayley, William Everard, and John Everard, to indemnify James Gee against any loss or damage in consequence of his interfering in the trust, or permitting his name to be made use of therein. The deed was executed by James Gee and Peter and Anne Bayley only. After their seals and signatures was the following endorsement:—"Signed, sealed, and delivered in the presence of us by the within named James Gee, Peter Bayley, and Anne his wife, the words "Peter Bayley" interlined between the third and fourth lines of said deed, before which it is agreed

that William Rea, the grandfather of the within named William Everard, shall hold and enjoy the within premises for the term of his life, subject to the rent and renewal fines in the original lease thereof contained." Then followed the signatures of the witnesses.

A partition of the lands of Shanacoolle was subsequently made, and from time to time renewals were executed of the lease of the 6th of May, 1746.

There were issue of the marriage between Peter Bayley and Anne his wife five children, of whom four only, viz., Richard Bayley, Peter Bayley the younger, Anne Sherin, otherwise Bayley, and Mary Anne Kean, otherwise Bayley, were living at the death of the survivor of their father and mother, and who were therefore the only objects of the power of appointment contained in the deed of the 18th of April, 1786.

By indenture, dated the 30th of September, 1808, made between Peter Bayley and Anne his wife of the first part, Elizabeth Sarsfield of the second part, Richard Bayley, one of the sons of Peter Bayley, of the third part, Mary Sarsfield, one of the daughters of Elizabeth Sarsfield, of the fourth part, and William Bayley and Edward Morrogh, trustees, of the fifth part, Peter Bayley and Anne, his wife, in consideration of a marriage then intended to be solemnised between Richard Bayley and Mary Sarsfield, expressed to grant and release to William Bayley and Edward Morrogh, their heirs and assigns, the south division of Shanacoolle, to hold the same with the appurtenances, unto the said William Bayley and Edward Morrogh, their heirs and assigns, for three lives renewable for ever, to the use of the said Peter Bayley and Anne his wife, up to the date of the solemnization of the intended marriage; and from and after the solemnization of the marriage to the use of Richard Bayley, his heirs and assigns, for life, and after his decease to the use that Mary Sarsfield should, in the event of her surviving her husband, Richard Bayley, receive out of the land a jointure annuity of £100 per annum for her life, and subject thereto and to the usual remedies by distress and entry for securing the same, to the use of William Bayley and Edward Morrogh, their executors, administrators, and assigns, for the term of 1000 years, upon certain trusts for securing this jointure, and subject thereto and to the trusts thereof to the use of the first son of the said marriage in tail male, with remainder to the use of the second and third sons of the marriage successively in tail male, with remainder to the use of the daughters of the marriage, as tenants in common in tail general, with an ultimate remainder to the use of Richard Bayley, his heirs and assigns.

Anne Bayley died in May, 1822, and Peter Bayley in June, 1825; and of their children the only ones living at the death of Peter Bayley were, as has been already stated, Richard Bayley, Peter Bayley the younger, Anne Sherin, and Mary Anne Kean.

John Stannistreet, the respondent in the present appeal, was the eldest son of Elizabeth Bayley, the daughter of Richard Bayley and Mary his wife.

A petition for sale in this matter was filed by Mary O'Connell on the 24th of March, 1862, in the lifetime of Richard Bayley; and on the 27th of March, 1862, a conditional order was granted for the sale of

(amongst other lands) the southern division of the lands of Shanacoolle, held under the lease of the 6th of May, 1746. The incumbrance of the petitioner, in respect of which she sought a sale, was a recognizance bearing date the 16th of September, 1806, and duly enrolled in the Court of Chancery on the 22nd of September, 1806, entered into by Richard Bayley and others in the sum of £4250, conditioned that Richard Bayley should duly account as receiver in a cause of *Buller v. Maher*, then pending in the Court of Chancery. There was no question as to the title of the petitioner to this charge, nor was it disputed that there had been default in the performance of the condition of the recognizance; but when on cause having been shown by the owner against the conditional order for sale so far as it directed a sale of the south division of Shanacoolle, a motion was made by the petitioner to have the order made absolute, a question was raised as to whether the *quasi* fee of that portion of the lands demised by the lease of the 6th of May, 1746, and its subsequent renewals, at any time, subsequent to the enrolment of the recognizance vested in Richard Bayley, so as to be bound by the recognizance. Pending this motion Richard Bayley died; and by an order of the 21st of March, 1863, it was ordered that the proceedings should be continued in the name of John Stannistreet as owner.

By an order of the 11th of June, 1863, the cause shown was allowed, with costs; and Judge Longfield, in giving judgment, expressed it as his opinion that as the trust in the deed of the 17th of April, 1786, to take effect after the decease of Peter Bayley and Anne his wife, was for the children of Peter and Anne Bayley, without the addition of any words of limitation or inheritance, an appointment of any greater estate than an estate for life to Richard Bayley was unauthorised, and that therefore the estate in remainder claimed by John Stannistreet under the settlement of the 30th of September, 1808, was derived from Peter Bayley and Anne Bayley, and not from Richard Bayley, and was not bound by the recognizance acknowledged by Richard Bayley. From this order Mary O'Connell, the petitioner, now appealed.

Brewster, Q.C. (with whom were *Flanagan, Q.C.*, and *Palles*), for the appellant.—Anne Bayley and her brother, William Everard, having taken out administration to Anne Everard the elder, and to John Everard the elder, became, as the next of kin, entitled to a portion of two sums of £1500; one, the amount of the debt due by George Bellamy to John Everard the elder; the other, the legacy payable to Anne Everard the elder. Consequently Peter Bayley, the husband of Anne, was entitled to her share of this money absolutely as being his wife's chose in action, if any act was done by him and her conjointly which would amount to a reduction into possession. In March, 1783, Stephen Creagh Butler, the surviving trustee of the will of George Bellamy, with the consent of William Everard, Peter Bayley, and Anne his wife, conveyed to James Gee and his heirs the whole of the premises comprised in the lease of May, 1746. This could not have taken place without the consent of Peter Bayley; it was turning personally into realty, the lands being taken for the debt and legacy; and this amounted plainly to a reduction into possession of

the wife's chose in action. In *Hamilton v. Mills* (29 Beav. 193) the money of a wife was, by the direction of her husband, paid to the trustees of a post nuptial settlement, which was not binding on the wife; and it was held that her right by survivorship was destroyed, the property having been by these means reduced into possession. But it is said that this was a voluntary deed, and therefore void, as against the deed of September, 1808, which was for valuable consideration. It is clear, however, that it was a deed for value. The money was the wife's, and an arrangement was made between her and her husband and the other parties by which this money was converted into land. If Mr. Gee had refused to execute the deed of the 18th of April, 1786, declaring the trusts, and proceedings had been taken in this Court to compel him to do so, the Court would not have disposed of the matter without the consent and concurrence of Anne Bayley. In *Fitzmaurice v. Sudleir* (9 Ir. Eq. Rep. 595) a wife who was entitled to an annuity under a voluntary deed, or had a right of dower, concurred in the sale of some of her husband's estates to a stranger and joined in a covenant to levy a fine, upon the consideration that certain other of his estates should be settled by articles under which the plaintiff, her grandson, claimed; and the articles were upheld against a subsequent purchaser for value. In *Hewison v. Negus* (16 Beav. 594) a post nuptial settlement of a wife's estate, whereby it was limited to the wife for her separate use for life without power of anticipation, with remainder to the husband for life, with remainder to the children, was held not to be void as against a subsequent purchaser for valuable consideration from the husband and wife. The modification by the husband of his life estate in possession, and by the wife of her inheritance, formed a good and valuable consideration. The same doctrine is laid down in *Muskerry v. Chinnery* (Ll. & Goo. 185); *Greene v. O'Kearney* (2 Ir. C. L. R. 267); and other cases.

Turning now to the other branch of this case, it appears, upon principle, that under the deed of the 18th of April, 1786, Peter Bayley had power to appoint the fee in these lands of Shanacoolle to Richard Bayley, his son. These lands were held under a lease of lives renewable for ever; and it is now settled law that words of inheritance are not necessary to pass an estate in *quasi* fee, if it appear on the face of the instrument that there is an intention to part with the entire interest. In *McClintock v. Irvine* (10 Ir. Ch. Rep. 480), lands held under a lease of lives renewable for ever were conveyed to trustees and their heirs and assigns for all the estate and interest of the lessee, to hold for the lives then in being in the lease, and for such lives as should be added from time to time. The deed contained a declaration that the names of the trustees were made use of as trustees for James W. Boyes, a minor; and that the grants contained therein were for his sole use and benefit, and for no other use, intent, or purpose whatsoever. And it was there held by the Lord Chancellor that the entire interest in *quasi* fee passed to James W. Boyes under the deed. That case is identical in principle with the present, and very similar in language. The deed of April, 1786, recites the previous deed of the 17th of

March, 1783, and then proceeds to declare the trusts of the respective thirds of the estate in the lands of Shanacooles conveyed to James Gee by the former deed. The trustee declares that the assignment from Stephen Creagh Butler was accepted by him to the uses and for the trusts which are there specifically stated, and "to no other use, intent, or purpose whatsoever." One third of the lands are limited to Peter and Anne Bayley for their joint lives, and after the death of the survivor to such child or children as shall be living at the time, in such shares and proportions as Peter Bayley in his lifetime, or Anne Bayley, if she survived him, should by deed or will appoint; "if only one child, to take the whole." The deed then proceeds to limit "one other third" of the interest in the lands to William Everard and his heirs, evidently showing that the absolute interest in one-third had been already disposed of; and finally provides for the trusts "as to the remaining third of the interest in the said lands," the *quasi* fee in which is also disposed of. All this, coupled with the concluding words, "and to no other use, intent, or purpose whatsoever," renders it impossible for anyone to contend that it was not intended that the deed should operate as a declaration of the trusts of all the estate that had been previously assigned to James Gee; and that the disposition made by it should be co-extensive with the interest he had taken. Two thirds of the estate in *quasi* fee are, beyond all doubt, given absolutely, while, in the event of Peter and Anne Bayley leaving but one child surviving, the whole of the remaining third is disposed of.—*Montgomery v. Montgomery* (3 Jo. & Lat. 47).

According to the judge of the court below Peter Bayley had only a power under this instrument to appoint a life estate to her son, Richard Bayley; but the authorities on the doctrines of powers show that words of inheritance are not essential to warrant an appointment in fee. In *Kenworthy v. Bate* (6 Ves. 793) an estate was settled by deed on such children of A as he should appoint; and Sir William Grant held that H. might give the fee-simple to any one of the children. Again, in *Sugden on Powers*, p. 400, it is laid down that "a general power to dispose of an estate in favour of a particular object will authorise the limitation of a fee although no words of inheritance are contained in the power." Upon the principle of *Brown v. Higgs* (8 Ves. 561) the donee of a power is a trustee for the execution of it, and the Court will not permit his negligence, absence, or other circumstances to disappoint the interest of those for whose benefit he is to exercise it.—*Jebb v. Tugwell* (20 Beav. 84, s. c. 2 Jur., N.S., 54).

Upon these distinct grounds, then, it is evident that Peter Bayley was empowered to appoint the *quasi* fee to Richard Bayley, and therefore the estate of the respondent, John Stanistreet, is bound by the recognizance.

Serjeant Sullivan (with *Tandy*), in support of the order of Judge Longfield.—If the deed of March, 1783, amounted to a reduction into possession of the legacy and other moneys payable to Anne Bayley, as has been argued on the other side, then the subsequent deed is voluntary. It is clearly settled that a deed disposing of the real estate of a married woman

and containing limitations that take nothing from the husband's estate, is void against a subsequent purchaser for value. Here the husband has given up nothing, and mere concurrence or acknowledgment on the part of the wife will not form a consideration. This was the ground of the decisions in *Butterfield v. Heath* (15 Beav. 408), and *Hewison v. Negus* (16 Beav. 594). If a husband is left exactly as he was originally, or if he gets more than he had, the settlement must be voluntary on his part. With regard to *Greene v. O'Kearney* (*ubi supra*), no reasons for the judgment are stated in the certificate of the judges; and it is scarcely in harmony with the decision in *Butterfield v. Heath*.

As to the question in reference to the absence of words of inheritance in the deed of April, 1786, in the remainder to such children as Peter and Anne Bayley should appoint, the tendency of modern decisions is to assimilate as nearly as possible estates in *quasi* fee to estates in fee; and it is plain that if these lands were held in fee-simple, no greater estate than an estate for life could have been appointed. *McClintock v. Irvine* (*ubi supra*) was a case decided on the very peculiar words in the instrument, while, on the other hand, in *Barron v. Barron* (8 Ir. Ch. Rep. 361), affirmed afterwards in the Court of Appeal (10 Ir. Ch. Rep. 120), it was distinctly held that the absence of words of inheritance in the gift of an estate *pur autre vie*, would prevent a greater estate than a life estate from passing. This same principle runs through a long series of cases:—*Doe v. Robinson* (8 B. & C. 296); *Hegarty v. McNally* (13 Ir. C. L. Rep. 532); *Wall v. Byrne* (2 Jo. & Lat. 118). It is evident too from the other limitations that whoever drew the deed of April, 1786, knew how to pass an estate in fee, for in the case of the other two-thirds the apt and proper words of inheritance are employed. The trustee had the absolute interest; and the expression that he had taken the lands "to the uses and for the trusts following," is merely equivalent to "no other declared use;" and the clause "and to no other use, intent, or purpose whatsoever," is plainly but a portion of the concluding limitation, and is referable to it and to it alone, and not, as has been urged on the other side, to all the preceding declaration of trusts.—*Moore v. Cleghorn* (10 Beav. 423); *Allen v. Allen* (2 Dr. & War. 307); *Crozier v. Crozier* (3 Dr. & War. 383); *Holliday v. Overton* (14 Beav. 467); *Tatham v. Vernon* (29 Beav. 604).

Flanagan, Q.C., in reply.—The deed of 1786 is not a voluntary deed. In addition to the reasons already urged, we find that one of the limitations is to the grandfather of William Everard, one of the parties. In the *testimonium* clause at the end is stated an agreement that William Rea, the grandfather of William Everard, should hold and enjoy the premises for the term of his life. The husband, Peter Bayley, gives up his life estate to this extent, and this consideration moving from him will support the deed against a subsequent purchaser for value. [*The Lord Chancellor*.—This is apparently perfectly voluntary. It is in favour of a mere stranger who is not a party to the deed.] In *Hewison v. Negus* (*ubi supra*) it was decided that the modification by the husband of his life estate in possession, and by the wife of her inheritance would form a valuable consideration.

Serjeant Sullivan.—This question should not be discussed now. This *testimonium* clause is not set out in the petition of appeal, nor was this point raised either in it or by counsel in opening the appeal. As for this so-called limitation to William Rea, it is not executed by the parties to the deed, being merely a memorandum followed by the signatures of the witnesses. It is, however, in every respect, purely voluntary.

Flanagan, Q.C.—Proceeding to the next point, it is to be observed that in arguing on the limitations of a lease for lives, whether in a deed or in a will, the question must be discussed as if it were the case of a fee simple in a will. Now, in the wills such words as "property," "lease," "assignment," &c., have been held sufficient to pass an estate in fee simple. In the deed of April, 1786, on the same principle the expression, "one-third of the said farm and lands" (especially when considered in reference to the context) must be considered as equivalent to "one-third of the interest in the lands" so conveyed to the trustee. This was no new declaration of trust but formed with the previous deed of March, 1783, a single transaction. The whole tenor of the second deed shows that it was designed to take out of the trustee by it all that had been conveyed to him by the former instrument. The words, "no other use, intent, or purpose whatever," exclude any idea of a resulting trust. The trust, therefore, to the children of Peter and Anne Bayley authorised an appointment to them of the *quasi* fee and the settlement of the 30th September, 1808, operated as an exercise of this power of appointment in favour of Richard Bayley, and a re-settlement by him of the *quasi* fee in the portion of the lands so appointed, upon the trusts of the settlement.

THE LORD CHANCELLOR.—The main question in this case is, whether Richard Bayley had an estate in these lands for more than his own life, which could be attached by the recognizance upon which the petitioner's claim is founded. This depends on the true construction of the deed of the 18th of April, 1786, and in reference to this two questions arise: first, whether this is to be considered a voluntary deed; and next, whether, supposing it to be a deed for value, the limitations contained in it are sufficient to give more than a life estate to Richard Bayley. Now, in order to understand this deed, it is necessary to consider the position of the parties at the time of its execution. If we go back to see what was the interest of Peter Bayley in these lands, we find that a legacy of £1,500 had been left by the lessee of the lands, George Bellamy, to Anne Everard, the elder, Peter Bayley's mother-in-law, and that the legacy was at this time unpaid and a chose in action. It appears further that this money being in substance a charge upon the lands, the parties came to an arrangement to take the lands instead of the legacy. A deed is executed in March, 1783, whereby the lands of Shanacoolie are conveyed by the surviving trustee of Mr. Bellamy's will to James Gee and his heirs. Subsequently, but evidently as part of the same transaction, the trusts upon which these lands were held, were declared by James Gee, by the deed

of the 18th of April, 1786, and the consequence was, I apprehend, that the lands, when taken by the trustee, were subject to the same uses and trusts as the legacy. It is, in my opinion, the converse of the case of *Scawen v. Blunt* (7 Ves. 294). There real estate was given by the will of C to A for life, in case she so long continued unmarried, but if she married, to her in fee; and in case of her decease unmarried, to her sister B in fee. A, B, and D the husband of B, joined in a sale by fine; but in the conveyance no trust was declared of the purchase money, which was paid to A, and by her invested in stock. A was never married, B survived her husband D, and bequeathed to A all her personal estate. It was held by Sir William Grant that the rights of the persons named in the will of C in the stock were the same as in the land under the same will; that the stock was in the nature of a chose in action, which not having been reduced into the possession of D, survived to his wife B, and passed by her will to A, who thereby became absolutely entitled to the money.

So in the present case the estate in these lands, into which the legacy was converted, was in the nature of a chose in action, and being such would survive to Anne Bayley in the event of its not being reduced into possession during Peter Bayley's lifetime. Consequently, she had in the lands an estate contingent on her surviving her husband, while he, on the other hand, would be absolutely entitled to the property if it were reduced into possession in his lifetime. Thus these two estates, as I may call them, existed independently; and both husband and wife join in putting the lands into settlement, whereby the two estates are blended together and their individuality destroyed. This transaction amounts to a contract between husband and wife, by which each allows his or her interest to be altered and modified. No doubt, a settlement of the wife's estate on the wife and husband and the issue of the marriage, may amount to a mere voluntary conveyance, as in *Goodright d. Humphreys v. Moses* (Wm. Blacks, 1019) and *Butterfield v. Heath* (15 Beav. 408) in which cases there was nothing but mere concurrence on the part of the wife to form a consideration. But I apprehend if anything intervenes to show that a consideration has been given by one party to the other, the settlement then ceases to be a voluntary instrument. In *Hewison v. Negus* (16 Beav. 594) there was a post-nuptial settlement of the wife's estate, by which it was conveyed to trustees upon trust to pay the rent and profits to the wife for life for her separate use, and without power of anticipation, with remainder to the husband for life, and with remainder to such persons as the wife should by will appoint; and it was held that the surrender by the husband of his right to receive the rents and profits of the hereditaments during coverture, and his giving his wife a sole and exclusive power and control over them, formed a valuable consideration sufficient to support the settlement. Mere concurrence in itself will not amount to a valuable consideration, and that is the principle upon which the decision in *Doe d. Baverstock v. Rolfe* (8 A. & E. 650) is based. There the concurrence of a necessary party to a conveyance containing certain limitations was considered not to be a good consideration, when

the limitations appeared on the face of the conveyance not to have been made at his desire or for his benefit, nor to have formed part of the contract at the time. *Greene v. O'Kearney* (2 Ir. C. L. Rep. 267) shows that where the concurrence of the husband in joining to levy a fine of the wife's property was purchased by a provision for charging the estate and an ultimate limitation to himself and his heirs, the consideration was sufficient to render the settlement valid as against a subsequent purchaser for value. It was asserted that this decision was not reconcilable with other authorities on this point; but it appears to me that the case was rightly decided, and that there is no conflict in principle between it and the other cases cited.

Here there were, as I have observed, two estates; one in the husband and the other in the wife; and there appears to me to have been such a modification of their respective estates and interests as would prevent this deed from being regarded as a mere voluntary conveyance. If there is a mutual interchange of rights, or mutual concessions, there will be sufficient consideration to sustain the deed. In *Atkinson v. Smith* (3 De G. & J. 186) a husband and wife were tenants by entireties in fee simple, and they mortgaged the lands by feoffment and fine, subject to a proviso for redemption, whereby the land was to be re-conveyed to the husband and wife and their heirs, or such persons as the husband or wife or the survivor of them should appoint. The lands were re-conveyed afterwards, and by this deed executed by the mortgagee and by the husband and wife the mortgagee by the direction and appointment of the husband and wife released, and the husband and wife appointed and released, the premises to the use of the wife for life with remainder to the use of the husband for life, with remainder to uses in favour of their issue. It was held there that the mortgage sufficiently indicated an intention to modify the wife's estate, and that her concurrence in the settlement made by the re-conveyance would support the settlement against a subsequent purchaser.

Thus, quite irrespective of the argument founded on the memorandum appended to the end of the deed, I have come to the conclusion that it was a deed for value. If, indeed, the settlement itself had been voluntary, this proviso, whereby a benefit is conferred on a person who is not a party thereto, could not have amounted to a valuable consideration.

The next question to be determined is, whether the petitioner's incumbrance is well charged on that denomination of the lands comprised in the petition of sale, known as the south division of Shanacoolie; whether, in fact, John Stannistreet's estate in remainder, under the marriage settlement of the 30th of September, 1808, was derived from Richard Bayley, or from Peter and Anne Bayley. Now, this depends upon the construction to be put on the deed of the 18th of April, 1786, which declares the trusts of the prior indenture of the 17th of March, 1783. When we read these two deeds in connection with each other, it is, in my apprehension, impossible to say that the parties to the deed of April, 1786, intended to leave any part of the interest in the lands undisposed of by it. Everything in the deed is pointed to the object

for which it was designed, namely, to declare the trusts of the previous deed which had conveyed the entire estate to James Gee. The words, "and to no other use, interest, or purpose whatsoever," which follow immediately the trusts declared, cannot fairly be confined to the last preceding limitation only, but are plainly directed to the whole preceding trusts of the deed. After a recital in the beginning of the deed that all the estate and interest under the lease of the 6th of May, 1746, had been conveyed by the deed of the 17th of March, 1783, to James Gee by Stephen Creagh Butler, to hold for three lives renewable for ever, in as large and ample a manner as Stephen Creagh Butler did, the deed proceeds in the following language:—"Now I, James Gee, do hereby acknowledge and declare that the said assignment executed to me by the said Stephen Creagh Butler was accepted by me to the uses and for the trusts following, that is to say, &c." What is the meaning of this? Is it not equivalent to saying, "all that I took by the former deed was taken for the uses and upon the trusts which are now declared by this deed?" The deed then proceeds to declare successively the trusts of the first one-third of the farm and lands of Shanacoolie; the second one-third, and what is termed "the remaining third in the interest in the said lands," and then come the words, "and to no other use, intent, or purpose whatsoever," which I have already referred to. I am of opinion that this amounts to a declaration that all the estate is to be held for the uses declared by this deed, and upon no others whatsoever; and the present case, to my mind, cannot be distinguished from *M'Clintock v. Irvine* (10 Ir. Ch. Rep. 480). That case was in many respects very similar to the present one. The words there were: "And the said Samuel Torriano and James Watson do hereby declare for themselves and each of them, their heirs and assigns, that their names are made use of as trustees for James Watson Boyes, a minor under the age of twenty-one years; and that the grants contained in these presents are for the sole use and benefit of the said James Watson Boyes, and for no other use, intent, or purpose whatsoever." I confess I cannot distinguish between these two cases, and I must hold that it was intended that all the interest in the land should go to these children absolutely. There is nothing to indicate an intention that they should take but an estate for life.

In *Doe v. Robinson* (8 B. & C. 296) the language used was "I give my daughter, Elizabeth Robinson, my two houses, situate in Bootham, nigh the city of York, and my two closes lying within the township of North Allerton." Such cases depend upon the language employed, and there it was not at all similar or analogous to that occurring in the present case. There was nothing to indicate the *quantum* of interest, nor to show that the testator intended to pass his entire estate. On the grounds I have stated, my decision must be for the petitioner, and the order of Judge Longfield must be reversed.

THE LORD JUSTICE OF APPEAL.—On the latter question in this case I have no doubt whatsoever, although on the former point I am not prepared to express myself very decidedly. I regard the deeds of 1783

and 1786 as forming entirely the same transaction; and taking the two together I cannot but come to the conclusion that it was intended to confer an absolute interest on the children.

Order below reversed.

Rolls Court.

[Reported by Ernest G. Swift, Esq., Barrister-at-Law.]

SIMMS v. QUINLAN AND OTHERS.—May 27, 28, 30, 31.

Appeal—Charitable bequests—St. 10 Geo. IV. c. 7 (the Roman Catholic Relief Act)—The Court of Chancery Regulation Act, 1850, sec. 15.

A testator by will, dated 15th November, 1861, bequeathed £500 to two Roman Catholic priests or the survivor of them, "to be applied as they shall deem best for the maintenance and education of two priests of the order of St. Dominick in Ireland;" also £500 to another Roman Catholic priest on a secret trust disclosed to him by the testator during his lifetime. Held, with reference to the former bequest (varying the Master's order) that it was a charitable bequest, but invalid, as being contrary to the policy of 10 George IV. c. 7; but that not being contrary to any express provision contained in that Act, it was to be carried out cy pres under the sign-manual and not by the Court. And with respect to the latter bequest (affirming said Master's order), that being given on an invalid trust, it was void absolutely and could not be carried out cy pres.

THIS case came on last Trinity Term by way of appeal from the decretal order of Master Brooke in this matter, bearing date 4th January, 1864.

In the present appeal *Flanagan*, Q.C., and *O'Hagan*, were counsel for the appellants.

For the respondents, *Brewster*, Q.C., *Sherlock*, Q.C., and *Dwyer*.

For the Attorney-General, *Watters*.

The particular facts and the cases cited will sufficiently appear from the judgment of the Master of the Rolls, which was given as follows:

November 3.—THE MASTER OF THE ROLLS.—“A motion has been made in this case, on behalf of the Rev. Robert White and the Rev. Bartholomew Thomas Russell, by way of appeal against the order of William Brooke, Esq., the Master in this matter, bearing date the 13th January, and signed 4th March, 1864; and a motion has also been made by way of appeal against the said order, on behalf of the Rev. Thomas Conway. The petitioner, James Richard Simms, is the residuary legatee in the will of Michael John Simms; the respondents, Jeremiah Quinlan and John Egan, are his executors. The questions which arise are—First. Whether the bequest in the will of the testator, Michael John Simms (called by mistake Matthew James Simms in the Master's order) to the Rev. Robert White and the Rev. Bartholomew T. Russell

and the bequests in the said will to the Rev. Thomas Conway, are void. Secondly. If void, are they bequests for charitable purposes, and should they be carried out *cy pres*? The part of the Master's order appealed from is as follows:—“Having regard to the statute 10 Geo. IV. c. 7 (the Roman Catholic Relief Act), declare the bequests in the will of the testator, Matthew James Simms, to the Rev. Robert White and the Rev. Bartholomew Thomas Russell, and of £500 to the Rev. Thomas Conway, as trustee, for the benefit of the Order of Dominican Friars, respectively, null and void; and being so void by the statute law, the sums thereby bequeathed form part of the residuary funds of the said testator.” The name Matthew James in the Master's order is a mistake for Michael John. I shall first consider the bequest to the Rev. Robert White and the Rev. Bartholomew Thomas Russell. The bequest is in these words:—“I bequeath £500 to the Rev. Robert White and the Rev. Bartholomew Thomas Russell, of St. Saviour's Roman Catholic Church, Dublin, or the survivor of them, to be applied as they shall deem best for the maintenance and education of two priests of the Order of St. Dominick in Ireland.” The petitioner, James Richard Simms (who was, as I have already stated, residuary legatee in the said will) filed his discharge on the 3rd March, 1863, to the charge of Jeremiah Quinlan and John Egan, the executors of the said will; and the said discharge states amongst other things, as follows:—“That by the will of the said Michael John Simms, the testator bequeathed £500 to the Rev. Robert White and the Rev. Bartholomew Thomas Russell, and the survivor of them, to be applied as they should deem best for the education and maintenance of two priests of the Order of Saint Dominick in Ireland; and dischargeant, as residuary legatee of the said Michael John Simms, and interested as such in setting aside the said legacy, avers and charges that the said Order of St. Dominick in Ireland [for the education and maintenance of two priests of which Order, the said legacy is so bequeathed as aforesaid] is a religious Order, community, or society of the Church of Rome, resident in the United Kingdom, and bound by monastic vows; and dischargeant avers that said Order consists either of persons who became and were admitted members thereof since the 23rd of April, 1829 [the date on which the Roman Catholic Relief Act came into operation], or who, being then members of the same, did not deliver to the clerk of the peace of the county where they were then residing the notice or statement required by the provisions of the statutes in that behalf; and the chargeant avers that the said Order is an illegal society, and that the said sum of £500 was bequeathed for the maintenance and benefit of said Order, and for the education of priests to be members of the said Order, and dischargeant therefore submits that the said legacy is void for illegality, and also for uncertainty.” The said Rev. Robert White, by the name of Robert Augustin White, and the Rev. Bartholomew Thomas Russell filed their charge on the 5th May, 1863, and submit to the Court that the legacy bequeathed to them is not void on any of the grounds stated in the discharge of the petitioner; and their charge proceeds thus:—“These chargeants admit

that they are members of the Order of St. Dominick, and priests of that Order, and that the Order of St. Dominick is an Order of the Roman Catholic Church, bound by religious and monastic vows; but chargeants altogether deny that the said Order consists either of persons who became and were admitted members thereof since the 13th day of April, 1829 [this is the date of the Royal Assent, but the Act did not come into operation for ten days—i.e., until the 23rd of April, 1829], or who, being then members of the same, did not deliver to the clerk of the peace for the county wherein they were then residing, the notice or statement required by the provisions of the statute in that behalf; for chargeants say that they themselves were respectively members of the Order prior to the 13th of April, 1829, and that each of them duly delivered to the clerk of the peace of the county of the city of Dublin, in or about the month of October, 1829, the notice or statement required by the 28th section of the statute of the 10th George IV. c. 7, and the schedule annexed to the said Act. And chargeants further say that there are in Ireland a considerable number of persons, members of the said Order, who were members thereof before the passing of the said Act, and who delivered to the clerks of the peace of their respective counties such notice or statement as by the said Act required. And chargeants submit, as matter of law, that the said bequest to chargeants, upon the trust aforesaid, is not invalidated by the terms of the statute; and further, that even if the Court should be of opinion that it would be illegal to apply the amount of the said bequest for the benefit of any members of the said Order, becoming such after the passing of the said Act, yet that it is competent for chargeants legally to apply the same for the benefit of the said members of the said Order who were such previous to the passing of the said Act." The chargeants then submit that if the bequest was illegal, the amount of the legacy should be applied by the Court, *cy pres*, for such legal charitable purposes as would most nearly approximate to the objects specified by the testator; and that if the bequest is illegal, a scheme should be settled by the Court. A discharge has been filed by the petitioner to the charge of the said Rev. Robert White and the Rev. Bartholomew Thomas Russell, and the petitioner submits that the legacy to them is void, even though they should establish the statements therein by evidence. An affidavit was made by the petitioner in support of his statements, which affidavit was filed on the 26th of June, 1863. I shall refer to that affidavit more particularly when considering the case of the legacy to the Rev. Mr. Conway. It has been contended on the part of the appellants (the Rev. Robert White and the Rev. B. T. Russell), that they are entitled under the will of the testator to apply the legacy of £500 "as they shall deem best for the education and maintenance of two priests of the Order of St. Dominick in Ireland;" and that it would not be illegal to apply the £500 to the education and maintenance of such priests of the Order as were such at the passing of 10 George IV. c. 7, and who complied with the terms of the statute, and that therefore the legacy is valid. I am of opinion that that is not a reasonable construction of the bequest. The priests of the Order

who were so in 1829 were advanced in life at the date of the will (15th November, 1861), which was 32 years after the passing of the statute; and I do not think that the testator can be presumed to have intended that the £500 should be applied exclusively, if at all, for the education of priests of the Order of St. Dominick, who must, at the date of the will, have been between 50 and 60 years of age. If not, the bequest is void. (*Sir B. Read's case* referred to in 4 Reports, 113.) I do not, however, concur with the Master, who by his order states that the bequest is "void by the Statute Law;" and the necessity of deciding whether the bequest is void as being contrary to the policy of the law, or void by the express terms of the statute, is, that if a charitable bequest is void by the express enactment of a statute, the bequest cannot be carried out *cy pres*; but if the bequest is void as being contrary to the policy of the law, the bequest may, according to the weight of authority, be carried out *cy pres*. There is no provision in the statute of George IV. c. 7, making a bequest in favour of persons bound by monastic vows void. The 15th section of the 7 & 8 Vic. c. 97, contains the following proviso:—"Provided always, that nothing herein mentioned shall be construed to render lawful any donation, devise, or bequest to or in favour of any religious order, community, or society of the Church of Rome bound by monastic or religious vows, prohibited by an Act passed in the 10th year of the reign of King George IV., entitled 'An Act for the Relief of his Majesty's Roman Catholic Subjects,' to or in favour of any member or members thereof." But it appears to me that the latter statute carried the matter no farther than the 10 George IV. c. 7; and it was, I apprehend, only intended by the Charitable Bequests Act to exclude from its operation bequests void, as being contrary to the policy of the 10 George IV. It is necessary, therefore, to consider (there being no express provision in the latter Act making a gift or bequest in favour of persons bound by monastic vows, void) whether such bequest is void as against the policy of the statute. Previous to the Toleration Act dissent was neither recognised nor permitted. In the case of *The King v. Larwood* (Lord Raymond, p. 30), it is laid down that "time out of mind there was a discipline established in the Church of England which all persons were obliged to observe—by the canon law before the Reformation, and since the Reformation by the statutes of Edward VI. and Elizabeth; so that the law took no notice of such persons as dissenters before the Act 1 William and Mary," the Toleration Act. Thus, previously to the Reformation everyone was, or was supposed to be, a Roman Catholic; and from the Act of Uniformity to the Toleration Act, everyone was, or was supposed to be, a member of the Church of England or Ireland, dissent being only connived at, but not recognised by law. The Toleration Act, 1 William and Mary (English), and 6 George I. c. 5 (Irish), to a certain extent recognised dissent, but excluded Roman Catholics from the benefit of the enactment. The English Act, 31 George III. c. 32, and the Irish Act, 38 George III. c. 21, sec. 11, which provided that a Roman Catholic should not be subject to any penalty for not attending divine service in the parish church,

to a very limited extent gave toleration to the Roman Catholic Church.—*Evans v. Cassidy* (11 Ir. Eq. Rep. 249, 250.) Prior to the Reformation, gifts or bequests for the promotion of doctrines opposed to the Roman Catholic religion, or to support ministers not of the Roman Catholic Church, would have been void, as opposed to the then policy of the law. After the Reformation and Act of Uniformity, gifts or bequests for the promotion of doctrines opposed to the then established religion, or for the support of Roman Catholic priests, would have been void as contrary to the policy of the law. After the Toleration Act the law was altered as to Protestant Dissenters. As to Roman Catholics, I shall have to consider the statutes relaxing the penal laws. While the penal laws were in force a gift for the maintenance of Roman Catholic priests was decided to be superstitious and invalid—*Gates v. Jones* (cited 2 Vernon, 266). So a bequest to be applied to such purposes as the superiress of a convent or her successor should deem most expedient was held to be void—*Smart v. Prujean* (6 Vesey, 567). So a bequest of legacies to several Roman Catholic establishments in foreign countries and in these kingdoms was held to be void—viz., to each superior for the time being of the Benedictine Monks of the Southern or Northern provinces (an establishment in England), to the English Black Nuns at Paris, to the establishment of the Benedictine Nuns at Cambray, to the English Benedictine Monks of — in Lorraine; to J. Bolton, for the maintenance of a Roman Catholic minister, for ever, were held to be void.—See *De Garcia v. Lawson* (note to 4 Vesey, jun., 2nd edition, 433). So in *Cary v. Abbott* (7 Vesey, 490, decided in the year 1802) a bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith was held to be illegal; such bequest was void, as being contrary to the then policy of the law and not by reason of any provision by statute making it void. With regard to Protestant dissenters, prior to the Toleration Act, gifts in favour of their places of worship, ministers, or schools, were invalid, as being superstitious—that is, as tending to promote doctrines contrary to those of the established religion (Tudor's Law of Charitable Trusts, 20). It is perfectly clear, therefore, in my opinion, that, prior to the relaxation of the penal laws against Roman Catholics, the bequest in this case to the Rev. Robert White and the Rev. B. T. Russell, to be applied as they shall deem best for the education and maintenance of two priests of the Order of St. Dominick in Ireland, would have been invalid as being contrary to the policy of the law. Although a bequest for the maintenance and education of two secular priests of the Roman Catholic Church would have been invalid prior to the relaxation of the penal laws, yet such bequest would now be valid, having regard to the provisions of the 10 George IV., c. 7. The question, however, is, whether the bequest to the Rev. Robert White and the Rev. B. T. Russell, to be applied as they shall deem best for the education and maintenance of two priests of the Order of St. Dominick in Ireland is valid, that order being bound by monastic vows, and the priests of the order being monks. Mr. Brewster has referred to several statutes prior to the 10 George IV., c. 7, to show what the policy of this law was as to the regular clergy, prior

to the passing of that Act; and the enactment of the 3 William III., c. 1; 2 Anne, c. 3; 2 Anne, c. 7; 8 Anne, c. 3, secs. 16 and 31; and 21 and 22 George III., c. 24, sec. 5, are important to establish what was the policy. Was that policy altered, so far as the regular clergy were concerned, by the 10 George IV., c. 7? [His Honour, after reading secs. 28, 29, 33, 34, 35, and 36 of the last-named Act, proceeded]—I am of opinion, having regard to the sections of the said statute of 10 George IV., c. 7, to which I have referred, that any bequest for the education and maintenance of regular priests of an order bound by monastic vows, who have become such since the passing of the statute, is invalid, being contrary to the policy of the law. There is, however, no express provision in the Act making the bequest void. I have already stated that I do not consider it to be a reasonable construction of the bequest, having regard to the date of the will (15th November, 1861), and that it was to be applied exclusively for the benefit of the monks who were such on the 23rd of April, 1829, the date on which the Act came into operation. If not, the bequest was void—(See *Sir B. Reed's case*, referred to 4 Reports, 113). If the bequest was void, as being contrary to the policy of the law, but not void by the express provision of the statute, the next question which arises, is whether the bequest should be carried out *cy pres*. That question is one of difficulty. If a bequest is void under the express provision of a statute it will not be carried out *cy pres*. (1 Jarman on Wills, 3rd edition, 225); (Tudor on Charitable Trusts, 90, 273); *Middleton v. Cuter* (4 B. C. C. 409); *Chapman v. Brown* (6 Vesey, 404). However, when there is a charitable bequest, which is invalid as being contrary to the policy of the law, the bequest is applied *cy pres*. In *Cary v. Abbott* (7 Vesey, 490, the bequest there (which would now be valid) was for the purpose of bringing up poor children in the Roman Catholic religion. That bequest was decided to be illegal, being contrary to the then policy of the law. The Master of the Rolls, Sir W. Grant, in giving judgment, said—“The consequence of the disposition being void, if authority was out of the question, would be an intestacy; that the gift, being so void, must be considered as no gift. But this is contradicted by authorities without number. According to them, whenever a testator is disposed to be charitable, in his own way and upon his own principles, we are not to content ourselves with disappointing his intention if disapproved by us; but we are to make him charitable in our way and upon our principles; if once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects not only within his intention, but wholly adverse to it; it is not for me to overturn the settled law and practice, according to which charitable bequests void as to one object may be appropriated to another.” So in *Muggeridge v. Thackwell* (7 Vesey, 75) it was laid down by Lord Eldon that, where a gift denotes a charitable intention, but the object to which the exercise of it is applied is against the policy of the law (as in the case of a gift to superstitious uses), the Court would lay hold of the charitable intention, and execute it for the purpose of establishing some charity agreeably to the law in the room of that contrary to it. The case of

the *Attorney-General v. Vint* (3 De Gex and Smale, 704) appears to have been decided on the same principle. In Shelford on the Law of Mortmain and Charitable Uses, p. 99 it is thus laid down:—"When a devise is to a superstitious use made void by statute, or to a charity void by the statute 9 George II., c. 36, the land or fund will belong to the heir-at-law, or next of kin; but where it is in itself a charity, but the mode in which it is to be applied cannot by the law of England take effect, as for promoting a religion contrary to that established by law, then the Crown, by sign manual directed to the Attorney-General, may give orders to what charitable purpose it shall be applied." Mr. Shelford then refers to *Cury v. Abbot*, which I have cited, in which the Court declared the bequest of the residue to be void, but directed it to be applied to such use as the King should appoint by sign-manual. The same direction was given where money was directed to be applied in teaching the Jewish Law. *Da Costa v. De Paz* (Ambler, 228; 2 Swanston, 487). *De Garcia v. Lawson* (4 Vesey, 433, 2nd edition; 1 Mer. 100). The question then arises, is the bequest to the Rev. R. White and the Rev. B. T. Russell a charitable bequest? I apprehend that a bequest for the benefit of ministers of any denomination of Christians is a charitable bequest. (1 Jarman on Wills, 193; Tudor on Charitable Trusts, p. 10; Shelford on the Law of Mortmain and Charitable Trusts, ed. 1836, p. 73). It is now necessary to advert to the ground upon which the Master has decided that the bequest to the Rev. R. White and the Rev. B. T. Russell cannot be carried out *cy pres*. The Master referred to the passage of Lord Hardwicke's judgment in *Da Costa v. De Paz*, (Ambler, 288) that "When the devise is to a superstitious use, and made void by statute, or to a charity, and made void by the Statute of Mortmain, then it should belong to the heir-at-law or next of kin. But where it is in itself a charity, but the mode in which it is to be disposed of is such that by the law of England it cannot take effect, as in the present case, promoting a religion contrary to the established one, then the Crown, by sign-manual directed to the Attorney-General, may give orders in what charitable manner it shall be disposed." The Master's judgment then proceeds thus:—"That passage is badly expressed. What, no doubt, Lord Hardwicke said, and what he has always been understood to have meant (see Lord Eldon's words, 7 Vesey, 46, 47, and Sir Wm. Grant's words, same volume, 495) was to draw a distinction between a gift void by statute, and one which, offending against no statute, was forbidden by the *lex non scripta*." The Master then adds—"As I shall have frequent occasion to refer to this distinction, it will be convenient to call it Lord Hardwicke's rule." The Master then refers to cases which he considers illustrate Lord Hardwicke's rule, as he understands it; but which, with great respect to the Master, appear to me to be opposed to the interpretation he has put on Lord Hardwicke's words.—*Gates v. Jones* (2 Ver.) is thus stated in the report:—"Gates v. Jones: case in the Exchequer, affirmed in the House of Lords, where a charity given to maintain Popish priests was applied to other uses by the king, and not to turn to the benefit of the heir." The Master refers to the

argument of counsel in *Carey v. Abbot* to show that that case "is not to be found." Sir W. Grant, however, acted upon it in *Carey v. Abbot*. If *Gates v. Jones* be correctly reported, it is an authority against the Master's view. A gift to maintain Roman Catholic priests was, of course, perfectly legal by the common law. Such bequest became illegal by the effect of the Act of Uniformity and the penal laws against the Roman Catholics. There was no express enactment making gifts for the maintenance of Roman Catholic priests void, but it was clearly contrary to the policy of the statute law under which the Protestant Church was established. So in *Curey v. Abbot* (7 Ves. 490) the bequest was for the purpose of educating and bringing up poor children in the Roman Catholic faith: that would have been a perfectly valid bequest by the common law, when the Roman Catholic religion was the established religion. It became invalid by the operation of the Act of Uniformity and the penal laws against Roman Catholics. But there was no express enactment against a bequest for the educating of poor children in the Roman Catholic faith. The bequest, however, was against the policy of the statute law, and therefore invalid; but the bequest, being a charitable bequest, was carried out *cy pres*. The case of *Da Costa v. De Paz* was, no doubt, the case of a bequest for advancing the Jewish religion, and would have been invalid prior to the Reformation, as being contrary to the policy of the common law, but it was invalid as contrary to the policy of the statute law under which the Protestant religion had become the established religion. So Lord Eldon laid down, in *Muggeridge v. Thackwell*, that where a gift denotes a charitable intention, but the object to which the exercise of it is applied is against the policy of the law, as in the case of a gift to superstitious uses, the Court would lay hold of the charitable intention and execute it for the purpose of establishing some charity agreeably to the law in the room of that contrary to it. So the case of *The Attorney-General v. Vint* (3 De Gex & Smale, 704) is contrary to the view taken by the Master, as in that case the bequest was contrary to the policy of the statute law and not contrary to the policy of the common law. The result of the case appears to be this:—If a charitable gift or bequest is expressly made void by the statute (as in the case of the English Mortmain Act), the bequest will not be carried out *cy pres*. Secondly, if a charitable bequest is invalid, as being contrary to the policy of the common law or statute law, it will in general be carried out *cy pres*. Thirdly, if the testator show an intention not of general charity, but to give to some particular institution in some particular place, and such intention cannot be carried out, the Court will not hold that the gift is applicable to charity generally; it will fail altogether. Applying those principles to the appeal of the Rev. R. White and the Rev. B. T. Russell, I am of opinion that the bequest to the Rev. R. White and the Rev. B. T. Russell was a charitable bequest, but was invalid, being contrary to the policy of the 10 George IV. c. 7; but that it was not contrary to any express provision contained in that Act. Secondly, that being contrary to the policy of that Act, the bequest is to be carried out *cy pres*. Thirdly, I am of opinion that the Wheatley Church case and the decision of Lord

Chancellor Blackburne in *Carberry v. Cox*, have no application to the bequest to the Rev. R. White and the Rev. B. T. Russell. Fourthly, the bequest should, in my opinion, be carried out under the sign-manual and not by the Court. The case of *Muggeridge v. Thackwell*, I think, establishes that, although there is some conflict in the cases. The case of *West v. Shuttleworth* (2 M. & K. 698), and cases of that class, have no application. Lord Cottenham, in giving judgment, said, with respect to bequests for masses, that there was nothing of charity in their object. The intention was not to benefit the parish, or to support the chapel, but to secure a supposed benefit for the testatrix herself.

With respect to the appeal by the Rev. Patrick Thomas Conway, the bequest to him was in these words:—"I bequeath £500 to the Rev. Patrick Thomas Conway, of St. Mary's Priory, Cork, Roman Catholic clergyman." No trust appears on the will, but there was a secret trust disclosed to the Rev. Mr. Conway by the testator in his lifetime; and if that trust was invalid the bequest is invalid.—*Tee v. Ferris* (2 Kay & J.) The discharge of the petitioner to the charge of the executors alleged that the Rev. Thomas Conway was a member of the Order of St. Dominick, and that is not denied; and the said discharge further stated that the said legacy to the Rev. Thomas Conway was in trust for the sole use and benefit of the members of the Order of St. Dominick, and was void. The Rev. P. T. Conway, by his charge, states—"That chargeant has read that portion of the petitioner's discharge in this matter which impeaches the said bequest to this chargeant, on the ground that the said legacy was left to this chargeant upon trust, that he would take and apply same for the maintenance and support, or for the use and benefit of, the members of the Order of St. Dominick resident in the United Kingdom, and chargeant saith that no trust, save as hereinafter mentioned, was imposed upon chargeant in relation to the said bequest—that is to say, that he, the testator, had a conversation with chargeant, who informed him that he had bequeathed, or would bequeath, to chargeant the sum of five hundred pounds, and that the said sum was, or would be, so bequeathed to chargeant, to be applied in or towards the redemption of the rent to which the church in Cork with which this chargeant is connected was subject; and chargeant saith he does not remember the precise words used by the said testator, but they were to the above effect. And chargeant saith that the church with which chargeant, as a Roman Catholic clergyman, is connected, is the Roman Catholic church or chapel known as St. Mary's Church, on Pope's-quay, in the city of Cork, and that the said church is held by certain clergymen as trustees thereof, subject to a yearly rent of £60 or thereabouts, and chargeant submits that the said trust for redeeming the said rent is a perfectly valid trust, and that the petitioner is not entitled by law to have the said bequest to chargeant set aside." The petitioner has filed a discharge to the charge of the Rev. P. T. Conway, which states that—"With regard to the third and fourth paragraphs of said charge, petitioner refers to such proofs as to the truth of the statements therein as the said chargeant may make, and petitioner

charges that the said church therein referred to is a church belonging to said Order of Dominican monks, whereof the said chargeant is a member, and is maintained and kept by them and for their use and benefit as such members of the said Order, and for the exercise of their calling and occupations as such members as aforesaid of said Order, and petitioner submits that the alleged trust for the redemption of the head rent of said church so used, attended, and occupied by the members of the said Order, in the exercise of their calling as members of the said Order, is one for their own use and benefit, and is therefore illegal, having regard to the constitution of the said Order, as stated in petitioner's said former charge, and which, in order to avoid repetition, he begs may be taken as incorporated with this discharge, so far as same relates to the said bequest." An affidavit has been made by Timothy Molony, Esq., Justice of the Peace, which states that the Roman Catholic Church, of Pope's-quay, in the city of Cork, to which the Rev. P. T. Conway is attached, is very largely frequented by the Catholics of Cork, and is one of the ordinary and principal places of Roman Catholic worship in said city. I am of opinion that the bequest to the Rev. P. T. Conway was invalid, as contrary to the policy of the 10th George IV., c. 7. The church belongs to the Order of Dominican Monks, bound together by monastic vows, and Rev. P. T. Conway is one of the members of the Order, and the trust is for the redemption of the rent of their church. The fact that the Roman Catholic inhabitants may be permitted to attend the church cannot vary the question. I am also of opinion, for the reasons I have stated, in reference to the appeal of the Rev. R. White and the Rev. B. T. Russell, that charitable bequests contrary to the policy of the statute law or the common law should in general be carried out *cy pres*. The question of difficulty in the case of the bequests to the Rev. Mr. Conway is, whether the principle of the *Wheatley Church case* and the case of *Carberry v. Cox*, governs the bequest. I entertain doubt as to the *Wheatley Church case*, but it has been recognised by Lord Chancellor Blackburne in *Carberry v. Cox*, and by the Lord Chancellor in *Daly v. Attorney-General*. [His Honor read the observations of the Lord Chancellor, in *Daly v. Attorney-General* (11th Irish Chancery Reports, 45, 46, in relation to the *Wheatley Church case*), and the decision of Lord Chancellor Blackburne in *Carberry v. Cox*.] I do not see any sound distinction between the bequests in *Carberry v. Cox* of an annuity to the monks of Mount Mellory, to be appropriated to the improvement of the chapel of Mellory, and the bequest to Mr. Conway, which was in trust for the redemption of the rent of the chapel in Cork of the monks of St. Dominick. I am bound by those decisions, and so far as the bequest to the Rev. Mr. Conway is concerned, I shall therefore declare that the bequest to Mr. Conway is void, and that it cannot be carried out *cy pres*. The Master's order will, therefore, be affirmed as to the bequest to the Rev. Mr. Conway, but will be varied as to the bequest to the Rev. Mr. White and the Rev. Mr. Russell. I myself entertain an opinion that the *cy pres* doctrine in charity cases is contrary to common sense, and have never been able to understand why the

Court of Chancery is to make a will for a person which he did not himself make. This appears to have been Sir W. Grant's opinion, according to his judgment in the case of *Cary v. Abbott*. The injustice was flagrant during the existence of the penal laws, when a bequest for the maintenance of Roman Catholic priests might be applied to the maintenance of clergymen of the Established Church. This was what judges in former days called *cy pres*, and the principle was very justly commented upon by Mr. Scully, in his well known work on the penal laws. At present there is little, if any, injustice in the application of the principle of *cy pres*, because in this case, for example, the bequest to the Rev. Mr. White and the Rev. Mr. Russell might, on the reasonable application of the *cy pres* doctrine, be applied to the maintenance and education of two secular priests.



Court of Appeal in Chancery.

[Reported by Oliver J. Burke, Esq., Barrister-at-Law.]

[BEFORE THE LORD CHANCELLOR AND THE LORD JUSTICE OF APPEAL.]

IN THE MATTER OF THE ESTATE OF JOHN RORKE, OWNER: EX PARTE, MARIA ISABELLA LLOYD, PETITIONER.—Nov. 19, 1863.

Deed—Construction of—General words—When controlled by recitals—Jurisdiction of Landed Estates Court—21 & 22 Vic. c. 72, s. 36—Fraud.

A. being entitled to certain leasehold, and also to certain fee simple estates, devised the latter to trustees upon trust for his eldest grandson, B., for life, in case he should attain twenty-three, with remainder to his sons in tail male; and if B. should not attain twenty-three, then upon trust for whichever of the testator's younger grandsons should first attain that age, for life, with like remainder to his sons, with remainder over. After directing several legacies and annuities to be paid out of his leasehold estates he bequeathed his residuary estate (which included his leasehold estates) to his seven younger grandsons, share and share alike. B. attained the age of twenty-three, and died without issue in 1849. By deed dated the 29th of March, 1834, reciting that A. by his will, after devising several legacies, had bequeathed the residue of his property comprising, amongst other matters, certain leasehold interests to his seven younger grandsons, and reciting that C., one of the testator's grandsons, was entitled under this will to a seventh share of the residuary estate of A., consisting, among other matters, of the lands therein-after mentioned, C. granted to D. all his seventh share of the residuary estate of A., and in particular all his estate and interest in his seventh share of the leasehold estates (which were specifically enumerated). "and all the estate and interest of him, the said C. therein or in any other lands which were

part of the residuary estate of the said A.," to have and to hold the said leaseholds, "and other the share which the said C. is at present entitled to of any lands or tenements, or any other property part of the residuary estate of A." unto D., his heirs, &c.

Held, that B.'s contingent reversionary interest in the fee-simple estates passed under the deed.

E., one of A.'s grandsons, who was the solicitor employed to prepare the deed of the 29th March, 1834, purchased from D. the interest which he took under this deed. He also purchased from his other brothers their respective shares in the residuary estate of A. A petition having been presented to the Landed Estates Court by a judgment creditor of E. for the sale of E.'s lands, including the fee-simple estates devised by A., semble, that the Court had no jurisdiction to declare, that by reason of the fraud of E. in the preparation of the deed of the 29th of March, 1834, the reversionary interest of C. in the fee-simple estates did not pass under the deed.

JAMES HALPIN, by his will, bearing date the 27th of August, 1814, devised all his lands of Johnstown, Enfield, and Coldblow, in the county of Meath, of which he was therein stated to be seised in fee-simple, to Andrew Rorke and Jonathan Lynch, upon trust, to receive the issues and profits until the testator's grandson, James H. Rorke, should attain the age of twenty-three years, and in the meantime, invest and apply them in the manner therein mentioned; and as soon as his said grandson should attain the age of twenty-three, then to convey the lands to him for his life, with remainder to his first and other sons in strict settlement, with power to James H. Rorke to jointure and to charge the lands with any sum not exceeding £10,000 for the portions of younger children; and in case James H. Rorke should not attain the age of twenty-three years, then to whichever of the testator's grandsons should first attain that age, for life, with like remainder to his sons, and with remainder over. After bequeathing several legacies and annuities which the testator directed should be paid by his executors out of the lands of Newtown, in the county of Kildare, and Ballycarn, in the county of Meath, he directed that the residue of his property, after payment of his debts and legacies, should be divided amongst his grandsons, Edmond, John, Andrew, Laurence, Henry, Constantina, and Patrick, share and share alike, such shares to be payable to them respectively on attaining twenty-three years of age. And it was provided that whichever of them should become entitled to the Johnstown estate, under the previous limitations should have no share of the residue of his said property. The testator further empowered the executors and trustees to sell his said leasehold interests in the lands of Newtown, in the county of Kildare, Ballycarn, in the county of Meath, and Posseltown, in the county of Meath, and dispose of them in favour of any of his said grandsons to whom he had bequeathed the residue of his estate, and the said trustees were appointed executors of his will.

The testator died in 1816, and his will was proved

by Andrew Rorke, the elder, one of the executors. The eight grandsons of the testator attained the age of twenty-three years; and the eldest of them, James Halpin Rorke, became tenant for life of the Johnstown state under the provisions of the will.

By an indenture, bearing date the 29th of March, 1834, and made between Andrew Rorke, junior, of the one part, and his father, Andrew Rorke the elder, of the other part, after reciting, "Whereas James Halpin, late of Johnstown house, in the county of Meath, Esq., in or about the 1st day of July, 1815, died, having first duly made and published his last will and testament in writing, bearing date the 27th day of August, 1814, whereby, after devising several legacies, he bequeathed the rest, residue, and remainder of his property comprising, amongst other matters, certain leasehold interest in the counties of Meath and Kildare, to his seven younger grandsons, share and share alike, on their attaining the age of twenty-three years, and thereof appointed said Andrew Rorke and Jonathan Lynch, since deceased, executors;" and reciting, "And whereas said Andrew Rorke, junior, is under and by virtue of said hereinbefore recited will, as one of the younger grandsons of the said James Halpin, deceased, entitled to a seventh share or proportion of the residuary estate of the said James Halpin, consisting, among other matters, of the towns, lands, and premises situate in the counties of Meath and Kildare hereinafter mentioned, and the rents, issues, and profits thereof, for and during the respective terms thereof yet to come and unexpired;" and reciting, "And whereas the said Andrew Rorke, junior, hath been already paid by the said Andrew Rorke as such executor as aforesaid, a sum of £700 on account of his seventh share or proportion of the said residuary estate, and he, the said Andrew Rorke, junior, hath now proposed to assign and make over unto the said Andrew Rorke all his right, title, and interest of, in, and to his said seventh share or proportion of the said residuary estate of the said James Halpin, at or for the price or sum of £700, to which the said Andrew Rorke hath consented and agreed;" Andrew Rorke, junior, in pursuance of the said agreement, and in consideration of the said sum of £700 paid by the said Andrew Rorke, released the said Andrew Rorke, his heirs, executors, administrators, and assigns, and his and their lands, tenements, hereditaments, and personal estate; and "also the estate of the said James Halpin, of and from all claim or demand whatsoever, for and in respect of the seventh share to which the said Andrew Rorke, junior, is *at present entitled* of the residuary estate of the said James Halpin, deceased." And Andrew Rorke, junior, did thereby, according to the estate or interest of him, the said Andrew Rorke, junior, "therein," grant unto the said Andrew Rorke "All that and those the seventh share of him, the said Andrew Rorke, junior, of and in the residuary estate of the said James Halpin, deceased; and in particular, all the estate and interest of him, the said Andrew Rorke, junior, of and in his seventh share of the lands of Newtown, situate in the parish of Newtown, barony of and county of Kildare, and of and in the lands of Ballycarn, situate in the barony of Lower Moyfenragh, and county of Meath, and of and in the lands of Possextown, situate

in the barony of Upper Moyfenragh, and county of Meath aforesaid, and all the estate and interest of him, the said Andrew Rorke, junior, therein or in *any other lands which were part of the residuary estate of the said James Halpin, deceased.* To have and to hold the said several premises in the counties of Meath and Kildare, and other the share which the said Andrew Rorke, jun. *is at present entitled to of any lands or tenements, or any other property part of the residuary estate of the said James Halpin, deceased,* as one of his residuary devisees or legatees, unto the said Andrew Rorke, his heirs, executors, administrators, or assigns, for the entire estate yet to come therein, for his and their own use and benefit." And the indenture contained a covenant by Andrew Rorke, junior, that he had not incumbered his said seventh share of the residuary estate of the said James Halpin, or the said lands of Newtown, Ballycarn, and Possextown, and also a covenant for further assurance, and to release the said Andrew Rorke as such executor as aforesaid, and the said residuary estate, from all claims of him, the said Andrew Rorke, junior, for or in respect of same; and the sum of £700 was endorsed on the back of the said deed as the consideration received by Andrew Rorke, junior, for the said assignment.

This deed was prepared by John Rorke, the owner in this matter, who was himself a solicitor, and one of the grandchildren and residuary devisees of James Halpin.

By another indenture, dated the 25th of June, 1835, Andrew Rorke the elder, in consideration of the sum of £700, assigned to John Rorke the share of the residuary estate which he had purchased from Andrew Rorke, junior.

John Rorke having made similar purchases of the shares of his other brothers, became entitled to the whole of the residuary estate which they took under the will of James Halpin.

Andrew Rorke, junior, died in the year 1848, having previously made his will and codicil, by which he disposed of all the property he should be entitled to on the death of his brother, James Halpin Rorke, charged with £1000 for his son, Andrew Henry, who was at that time a minor, about 16 years of age.

Constantine Rorke died in the year 1846, intestate and without issue, leaving James Halpin Rorke, his eldest brother and heir-at-law him surviving. James Halpin Rorke died without issue on the 8th of May, 1849, and by his will, dated the same year, purported to devise the lands of Johnstown, Enfield, and Goldblow, to Edmund Rorke, his next brother, and heir-at-law.

By the will of James Halpin, however, all the limitations over of the Johnstown estate, with the exception of those to the children of James Halpin Rorke, were to take effect in the event of James Halpin Rorke dying before he reached the age of twenty-three years; and therefore, as he attained the age of twenty-three, and died without issue, these limitations were defeated, and the fee-simple estates passed under the residuary clause of the will, being otherwise undisposed of.

On the death of James Halpin Rorke John Rorke claimed the Johnstown and other fee-simple estates,

one-seventh in his own right and the remaining six-sevenths, as assignee of his brothers. Edmond Rorke, on the other hand, laid claim to the lands as devisee or heir-at-law of James Halpin Rorke; and Laurence, Henry, and Patrick Rorke each claimed to be entitled to one seventh of the lands as residuary devisees in the will of James Halpin. Litigation being threatened, by a deed of compromise, bearing date the 8th of July, 1850, made between Edmund, John, Laurence, Henry, and Patrick Rorke, of the first part, Philip O'Reilly of the second part, and Michael A. Rorke of the third part, the several parties of the first part confirmed the lands of Johnstown to John Rorke, and granted the said lands to Philip O'Reilly upon trust, that Edmond Rorke should receive a rent-charge of £240 per annum out of the lands; and that Laurence, Henry, and Patrick should each receive a rent-charge of £120 per annum out of the lands; and subject to these several rent-charges, to the use of Michael A. Rorke for a term of 1000 years, and after the expiration thereof, and in the meantime, to the use of John Rorke, his heirs and assigns. And it was provided that the rent-charge of £240 per annum should be redeemable on payment of £4000, and that each of the rent-charges of £120 per annum should be redeemable on payment of £2000; and the trusts of a term of 1000 years were declared to be to secure the payment of the said rent-charges.

Andrew Henry Rorke was not a party to this indenture, and did not attain the age of twenty-one years until four years after the date of its execution. However, John Rorke continued to pay him £120 per year in respect of his share of the residuary estate up to the date of the filing of the petition in this matter.

In Hilary Term, 1857, a judgment was entered by Thomas Lloyd, whose executrix was the petitioner, upon the bond of John Rorke, bearing date the 11th of July, 1857, in the penal sum of £6000, conditioned for the payment of £3000 and interest, which judgment was registered against these lands as a statutable mortgage in March, 1859.

A petition for sale was filed in the Landed Estates Court on the 28th of April, 1860, by Maria Isabella Studdert upon foot of this judgment, and on the 9th of August, 1860, the conditional order for sale was made absolute.

When the title to the lands of Johnstown, Enfield, and Coldblow came to be investigated in the Landed Estates Court the title to the one-seventh which had belonged to Andrew Rorke, junior, appearing doubtful or defective, Andrew Henry Rorke was called upon by notice to file a claim if he had any. A claim was accordingly filed on his behalf; and the matter having been argued before Judge Longfield the claim was allowed, on the grounds that the reversionary interest of Andrew Rorke, junior, in the fee-simple estates of James Halpin did not pass under the deed of the 29th of March, 1834. Judge Longfield was of opinion that it was the intention of Andrew Rorke, junior, to dispose of his interest in the residuary leasehold estates merely; but that John Rorke, the purchaser, who acted as solicitor in the preparation of the deed, fraudulently and craftily worded the deed in such ambiguous language as to include the contingent estate in remainder in the lands of Johnstown, Enfield, and

Coldblow, which was not intended to be conveyed. It was therefore ordered that the petition should be dismissed as to one-seventh of these fee-simple estates.* From this order of Judge Longfield Michael A. F. Studdert and Maria Isabella Studdert, otherwise Lloyd, his wife, the petitioner, now appealed.

Brewster, Q.C., (with F. W. Walsh, Q.C., and Leech) for the appellants. No question has been raised in this case except as to the reversionary interest of Andrew Rorke, junior, in the seventh of the fee simple estates of James Halpin; and we insist that John Rorke acquired a perfect title to this under the deed of the 29th of March, 1834. The deed grants in terms all the estate of Andrew Rorke, junior, in the lands specifically mentioned, and "in any other lands which were part of the residuary estate of the said James Halpin, deceased." Now, incontrovertibly, these lands in question formed part of the residuary estate of James Halpin, and therefore the interest in them passed under the deed. As to the effect of general words in the operative part of a deed it is only necessary to refer to the following authorities:—*Walsh v. Trevanion* (16 Sim. 178); *Drew v. Lord Norbury* (3 Jon. & Lat. 267); *In re Gardiner* (11 Ir. Ch. Rep. 519); *Johnson v. Webster* (4 De G. M. & G. 474) which shows that *prima facie* when a person conveys or settles an estate he means to include in the conveyance every interest he can part with and which he does not except. *Doe d. Pell v. Jeyes* (1 Bar. & Ad. 593); *Mill v. Hill* (3 H. of L. Ca. 847); *Reade v. Armstrong* (7 Ir. Ch. Rep. 375); *Carter v. Palmer* (1 Dr. & War. 722; s. c. 1 Ir. Eq. Rep. 289); *Stack v. Royse* (12 Irish Chancery Reports, 246). As to the question of fraud on the part of John Rorke, in the preparation of this deed, that point cannot be entertained in this suit. A purchaser under an executed deed must be made a defendant in any proceeding taken to set it aside, and if the respondent here thinks that he can make any such case, he must file an independent bill in this Court for the purpose. [*The Lord Chancellor*—Certainly. The only question before us is the construction of the deed. *The Lord Justice of Appeal*—That is the only point we can now entertain].

Serjeant Sullivan (with Andrews, Q.C., and Henry Fitzgibbon) in support of the order of Judge Longfield. In the first place we maintain that there are words in this deed of the 29th of March, 1834, which prevent this reversionary interest in the fee simple estates from passing to Andrew Rorke. Turning to the will of James Halpin, we find that the testator first disposes of his fee simple estates of Johnstown, Enfield, and Coldblow; then makes provision for the payment of a number of legacies and annuities; and lastly, directs his leasehold property of Newtown, Ballycarr, and Possetown, to be distributed amongst his seven younger grandsons. This leasehold interest which is so disposed of is alluded to in the will as the *residue* of the testator's estate. Now this indenture of March, 1834, recites the will of James Halpin, and states that after devising several legacies the testator bequeathed the *residue* and remainder of his property, comprising, among other matters, certain leasehold

* *In re Rorke's estate* (13 Ir. Ch. Rep. 365).

interests in the counties of Meath and Kildare to his seven younger grandsons, and that Andrew Rorke, junior, is under that will entitled to a seventh share or proportion of the residuary estate of James Halpin, consisting, among other matters, of the lands in the counties of Meath and Kildare thereafter mentioned, and the profits thereof during the respective terms yet to come. But what is the residuary estate referred to? The leasehold estates are the only ones referred to as the residue of the testator's estates in the will, and it is but natural that the word "residue" should be used in the same sense in both instruments. What again, are "the lands in the counties of Meath and Kildare hereinafter mentioned"? The only lands specifically named from beginning to end of the deed was the leasehold estates of Newtown, Ballycarn, and Possetown, which are carefully and accurately described in the operative part of the deed. Not one word occurs in it that can fairly be referred to the fee simple estates, and it is plain that Andrew Rorke, junior, never intended by this deed to part with any claim or right to them. But we find in this deed still stronger internal evidence that the leasehold lands were the only subject of the grant. After acknowledging the receipt of £700 from Andrew Rorke, the elder, the executor, on account of the one-seventh share of the residuary estate, Andrew Rorke, junior, in consideration of a sum of £700, releases Andrew Rorke, the elder, and the estate of James Halpin from all claim or demand in respect of "the seventh share to which the said Andrew Rorke, junior, is at present entitled of the residuary estate of the said James Halpin, deceased." Again, when we come to the *habendum* we read "to have and to hold the said several premises in the counties of Meath and Kildare and other the share which the said Andrew Rorke, junior, is at present entitled to, of any lands or tenements or any other property part of the residuary estate of James Halpin, deceased, as one of his residuary devisees or legatees." In the clause whereby the executor is released, the words, "the share to which the said Andrew Rorke is at present entitled," can only refer to the leasehold interests, and can it be reasonably argued that it was the intention of the parties that in the *habendum* the very same words should have a different meaning? The only words that can be construed as sufficiently large in their signification, to pass the contingent reversionary interest in the fee simple estates, are those occurring in the estate clause of the deed. But general words in the operative part of deeds have been often held to be controlled in their meaning by the recitals. In *Childers v. Eardley* (28 Beav. 648) a mother had a power of appointment over a fund in favour of her children, and which in default of appointment was divisible equally, the share of the daughters to vest at twenty-one or marriage. She had one son and one daughter, and on the marriage of her son she appointed to him a moiety of the fund. The settlement recited that he was entitled to this moiety, and was also contingently entitled to the other moiety in the event of his sister dying unmarried under twenty-one, and it further recited an intention to settle a moiety of the fund appointed, and "all other his part, share, and interest, as well vested as contingent," in the

trust funds. The daughter attained twenty-one and died, and the mother afterwards appointed the residue of the fund to her son, and it was held that this residue did not pass under the settlement. Again, in *In re Wright's trusts* (15 Beav. 367) the words, "all other his personal estate and effects whatsoever or whosoever, of or belonging, or due or owing to him," in a deed of assignment were not considered to convey a contingent reversionary interest in a legacy. Similar principles are to be found in *Pope v. Whitcombe* (3 Russ. 124) and *Moore v. Magrath* (Cowp. 9). In the latter case a grant of certain lands *nomination*, together with "all other his lands, tenements, and hereditaments in the Kingdom of Ireland," was held not to pass any lands of the grantor in Ireland except those specifically mentioned, Lord Mansfield stating that it was very common to put into deeds a sweeping clause, and that the use and object of it in general was to guard against any accidental omission; but that in such cases it was meant to refer to estates or things of the same nature and description with those which had been already mentioned.

A question has been raised as to the jurisdiction of the Landed Estates Court to set aside a deed on account of fraud, incidentally to a proceeding in that Court, without directing an independent suit to be instituted in the Court of Chancery. The 37th section, however, of the Landed Estates Court Act (21 & 22 Vic. c. 72) gives to that Court "all the power, authority, and jurisdiction of a Court of Equity in Ireland," and it is the practice of that Court to set aside deeds in the course of an ordinary suit for sale.—*Ronayne's estate* (13 Ir. Ch. Rep. 444).

Assuming, for the sake of argument, that the words of the deed were sufficient to pass the fee simple estates, it is a purchase of a reversionary interest, and the purchaser must be prepared to show that the full value was given for it.—*Bromley v. Smith* (26 Beav. 644). It is quite immaterial also that the vendor was a person of mature age who understood the true value of the property. Nor will the fact of the reversion being dependent on contingencies that do not admit of estimation by an actuary, relieve the purchaser from the *onus* of showing that fair value was given.—*Talbot v. Staniforth* (1 John. & Hem. 484); *Peacock v. Evans* (16 Ves. 512); *Boothby v. Boothby* (15 Beav. 212); *Salter v. Bradshaw* (26 Beav. 161); *Tottenham v. Green* (32 L. J. N. S. Ch. 201).

It is highly improbable that Andrew Rorke, junior, knew that he had a contingent interest in Johnstown and the other fee simple estates under James Halpin's will. The will was obscurely drawn, and no one without a knowledge of law would be aware that the undisposed of interests in the lands of which the testator had made but partial dispositions, would pass under the residuary clause. At the time of the execution of this deed, too, James Halpin was still alive, and having attained the age of twenty-three was in possession of the fee simple estates. It is plain that John Rorke, who was a solicitor, knew the actual rights of the parties, and framed the deed in such a manner as to include this contingent interest. It is also evident that his brothers had not the most remote suspicion of their rights in connection with the fee simple estates, and that John Rorke knowing this was

afraid that his purchases would not be upheld in a Court of Equity; otherwise, why would he have given so large a sum as £12,000 to induce his brothers to join in the deed of compromise of July, 1850.

Andrews, Q.C., on the same side.—With regard to the construction of the deed of the 29th of March, 1834, the law as to general words in a deed is expressed clearly in Davidson's *Precedents*, vol. 1, p. 85 (3rd edit.), "If general words be preceded by a specification or enumeration of particulars, the general words will not be construed to signify anything of a higher order or more importance than what is before expressed." But in the present case the granting part of the deed enumerates specifically the leasehold estates, and therefore the general words of the "all the estate" clause cannot pass any interest in the fee simple estates. General words also must be controlled by the recitals in a deed.—*Lindo v. Lindo* (1 Beav. 496); *Doe d. Meyrick v. Meyrick* (1 Cr. & Jer. 223); *Gray v. Earl of Limerick* (1 De G. & Sm. 370); *Potts v. Potts* (1 H. of L. Ca. 67); *Burton's Real Property*, p. 179. To pass a reversion, the lands must be described with strict accuracy. Davidson's *Precedents*, vol. 1, p. 83. A grant of all a man's estates in possession will not pass a reversion; but here, in both the clause of release and the *habendum*, the words, "at present entitled to," are used in reference to the share of Andrew Rorke, junior, in the residuary estate of James Halpin, and consequently no contingent reversionary interest can be held to be conveyed by this deed.

As to dealing with an expectant heir for his reversion, *Edwards v. Burt* (2 De G. M. & G. 55); and *Alborough v. Tyne* (7 Cl. & Fin. 437) may be mentioned in addition to the cases already cited.

F. W. Walsh, Q.C., in reply.—The only point to be considered in this case is the construction of the deed of March, 1834. The other questions raised cannot be discussed or determined in the present suit. Great stress has been laid on the words "at present entitled to" in the clause releasing the executor and in the *habendum*. The deed has a two-fold aspect; a receipt for the £700 already paid to Andrew Rorke, junior, by the executor out of the residuary estate, and a sale of all the interest of Andrew Rorke, junior, in the rest of the residuary estate for a further sum of £700. Therefore, the contract to sell all "the said residuary estate" cannot include that portion of the residuary estate which has been already paid, and in consequence must refer to any other estate or interest that Andrew Rourke, junior, had in the lands devised or bequeathed by the will of James Halpin. But both in the granting part of the deed and in the *habendum* we have language clearly directed to the contingent reversionary interest in the fee simple estates. After granting the interest in the leasehold estates of Newtown, Ballycarn, and Possetown, the deed proceeds to grant "all the estate and interest of him the said Andrew Rorke, junior, therein, or in any other lands which were part of the residuary estate of the said James Halpin, deceased, to have and to hold the said several premises in the counties of Meath and Kildare, and other the share which the said Andrew Rorke, junior, is at present entitled to of any lands or tenements or any other property part of the residuary

estate of the said James Halpin, deceased, as one of his residuary devisees or legatees," &c. But what are these "other lands of the residuary estate of James Halpin," and this "other the share of Andrew Rorke, junior, of any lands or tenements, or other property part of the residuary estate of James Halpin?" No other lands were devised or bequeathed by the will of James Halpin except the leasehold estates of Newtown, Ballycarn, and Possetown, and the fee simple estates of Johnstown, Enfield, and Coldblow. Therefore, the deed evidently was meant to pass the reversionary interest in the fee simple estates as well as the interest in the leaseholds. As to the question of the value of this reversionary interest, it was of but trifling value at the time of the execution of the deed.

If, indeed, there was any doubt as to what passed by the deed, the grant must be construed as strongly as possible against the grantor.

THE LORD CHANCELLOR.—Whatever may have been the intention of the parties to this deed of the 29th of March, 1834, it appears perfectly clear to me that the reversionary interest of Andrew Rorke, junior, in the fee simple estates devised by the will of James Halpin, was conveyed to his father, Andrew Rorke, by this deed. *If prima facie* the language of the deed had been only applicable to the leasehold estates, the occurrence of general operative words in the granting part might have been controlled by reference to the recitals. However, there is here a grant of the interest of Andrew Rorke, junior, in the leasehold estates which are specifically mentioned, and "in any other lands which were part of the residuary estate of the said James Halpin." And we find that no other lands formed part of the residuary estate, except the fee simple estates of Johnstown, Enfield, and Coldblow.

The case must, therefore, be remitted to the Landed Estates Court, with a declaration that, according to the true construction of the deed of the 29th March, 1834, the one undivided seventh part or share of the fee simple lands of Johnstown, Enfield, and Coldblow, passed to Andrew Rorke, the elder.

THE LORD JUSTICE OF APPEAL.—I think the order of the Court below must be reversed. If I were to confine my attention to the recitals in this deed I might have some doubt as to whether the parties purposed to deal with the reversionary interest in the fee simple estates, but when I come to the granting part, I find that this property was intended to pass. It is only necessary to refer to the words of the grant itself:—"All that and those the seventh share of him the said Andrew Rorke, junior, of and in the residuary estate of the said James Halpin, deceased; and in particular all the estate and interest of him the said Andrew Rorke, junior, of and in his seventh share of the lands of Newtown," &c., which are there described, "and all the estate and interest of him the said Andrew Rorke, junior, therein or in any other lands which were part of the residuary estate of the said James Halpin." If the respondents are right in their construction, we must expunge these words or give them no meaning whatsoever. Again, in the *habendum*, the grantee is to hold "the said several premises in the counties of Meath and Kildare, and other the share which the said Andrew Rorke, junior,

is at present entitled to of any lands and tenements, or any other property part of the residuary estate of the said James Halpin." We cannot nullify the effect of these words, and therefore the order of the Landed Estates Court cannot be upheld.

Order below reversed. All parties to bear their own costs of the appeal.

Court of Queen's Bench.

[Reported by William Woodlock, Esq., Barrister-at-law.]

COGHAN, APPELLANT, LORD LISMORE, RESPONDENT.—
January 29.

Fishery Appeal—Statute 26 & 27 Vic. c. 114—Injury to navigation—Right of the Crown to be heard on argument of appeal.

In appeals under the 26 & 27 Vic. c. 114 the Crown has a right to appear and be heard upon the question of the weir condemned by the Commissioners being an injury to navigation. Dissentiente, Hayes, J.

THIS was an appeal under the Irish Fisheries Act, 26 & 27 Vic. c. 114. The Commissioners had found against a weir, the property in which was claimed by the appellant, both upon grounds of title and also upon the ground that it was an injury to navigation. Upon the hearing of the appeal the Solicitor-General claimed to be heard on behalf of the Crown to support the decision of the Commissioners upon the navigation point. This claim was resisted by the appellant.

The *Solicitor-General* and *Barry, Q.C.*, appeared for the Crown.

Brewster, Q.C., and *Tandy* for the appellant.

Shaw, Q.C., for the respondent.

LEFROY, C.J.—The majority of the Court are of opinion that the Crown has a right to intervene for the purpose of upholding this decision. The object of the Act is two fold: first, to enable individuals to assert their rights through the medium of this body. The Crown has a duty on behalf of the public to maintain the decision, inasmuch as it gives to the Crown a ready mode of abating the nuisance which it is of importance to the public should be abated as quickly and completely as possible, not to leave the Crown to institute a new proceeding; and it is one of the great objects of the Act to maintain the rights of the public to act through the prerogative of the Crown as a royal trustee, to exercise the rights of navigation to the utmost extent. On these grounds, therefore, so far as I can speak them, the opinion of the majority of the Court is to allow the Crown to appear and defend this application.

O'BRIEN, J.—I concur on the ground that it is a public right; and this decision gives them a remedy and a right which they would not otherwise have. With regard to the case put by Mr. Tandy, that here

there is a respondent, I think if they have a right to interfere in one case they have a right to interfere in another, for they do it on the same principle in both cases, of shewing that the proceedings ought to be sustained. The not appearing below would not benefit the owners of the weirs below. The Crown would have had no interest in appearing below; but where we have a decision of a tribunal declaring a public question, surely the duty is cast on them, if they think fit, to be heard in sustaining them.

HAYES, J.—I do not hesitate to say I must be wrong in the conclusion at which I have arrived as the other members of the Court differ from me, but I am bound to state the grounds of my decision. I find a statutable jurisdiction created; and in answer to a question which I put I am informed that the rights of the Crown are not barred or interfered with, and that the Crown is wholly independent of the enactments in this statute. Well, here we have a statutable jurisdiction, a decision made, and an appeal. For the purpose of that appeal we learn that two parties appear, one who complains of the decision, and another who has appeared below, who has made himself active hitherto, and now undertakes before this Court to sustain the decision of the Commissioners. It is said that the Crown has a duty to perform. If it has, it has been hitherto rather oblivious of that duty. It is hard that the Crown should be permitted to interfere against the appellant. It is said that the Crown intends only to interfere in the public part of the case. It has in my judgment no more right to interfere than in a dispute about a road which two parties have determined to settle between themselves. It would be very mischievous, in my judgment, if the Crown were to be permitted to interfere when and where it likes.

FITZGERALD, J.—I agree with the majority of the Court that the Solicitor-General should be heard on the preliminary point, and on the point of the weir being illegal as interfering with navigation. The ground on which I think it ought to appear is, that in navigable rivers the whole of the property is vested in the Crown, as a royal trustee, for public purposes. In the 5th section I find a duty cast on the Commissioners, that they shall abate and remove all fixed nets that are injurious to navigation. There is a public duty to perform in reference to a public right; to protect the public right of navigation. The Commissioners have proceeded to inquire whether the weir in this case is injurious to navigation, and they have pronounced judgment. It appears to me that that is the very judgment which the Crown ought to be permitted to support, it being a judgment affecting Crown property as trustee. It seems to me that that is a case in which we ought to hear the Crown. I may observe that in ordinary cases where proceedings are taken on account of a public nuisance, though it is true that a private individual may be prosecutor, yet the proceeding is in the name of the Crown, and the Crown can intervene at any moment.

COSGELAN, APPELLANT. LORD ENMORE, RESPONDENT.—
February 1.

*Fishery appeal—St. 26 & 27. Vic. c. 114—Evidence
—Short-hand writer's notes.*

*In an appeal under st. 26 & 27 Vic. c. 114, held by
Lefroy, C.J., and Fitzgerald, J., that the Court
should not look beyond the facts stated in the case
submitted by the Commissioners, or go into the
short-hand writer's notes of the evidence adduced
before them.*

*Per Hayes, J.—That the Court should look to those
notes and decide upon the evidence, not merely upon
the case stated.*

*Per O'Brien, J.—That the Court might look to the
notes for the purpose of ascertaining whether there
was evidence of any particular fact stated in the
case, or whether any fact had been omitted from
the case, but not for the purpose of weighing the
evidence given on opposite sides.*

In this appeal the Commissioners in the case stated by them stated that they had the notes of the evidence adduced before them taken by a short-hand writer, and were ready to produce them if the Court required them to do so. Counsel for the appellant now insisted that the Court should require the production of the notes and go into the whole of the evidence. Counsel for the respondent argued that the Court should confine itself to the facts stated upon the case itself.

The same counsel appeared as in the case last above given.

FITZGERALD, J.—The question at present is, whether the parties are to be at liberty to refer to the notes of the evidence taken by the short-hand writer, and the allegation on which the appellant bases his application for using the notes is, on the passage in the case submitting to the Court whether they should furnish the judges with a copy of the notes, &c. They have given their decision and the reasons therefor, and submit whether they should furnish the notes. I think, therefore, that it is a mistake to say that the notes are incorporated with the case. The Commissioners very properly offered to do it, but the case before us is simply an appeal on the special case. There is no case made before us to send back the case to the Commissioners for amendment. The contention on the part of the appellant is, that she shall be at liberty, by her counsel, on the argument of the case to refer to the notes and bring before us the evidence, which was before the Commissioners. In my judgment that cannot be done, and, I think, for obvious reasons. If one was to deal with conjectures, we might think that the Legislation intended that this appeal should be in the nature of a rehearing on the materials which the Commissioners had before them; but if that was the intention of Parliament, Parliament has not so expressed it, and one must go on the language of the Act. What the Act says is, that the Commissioners shall be required to inquire into certain particulars, and, amongst others, whether particular weirs are, in their judgment, obstacles to navigation; and it says

that they shall give notice to the parties and hear the evidence; and then it gives a right of appeal. It is stated expressly in the 14th section that the appeal is to be on a special case, and the section provides what the case is to contain. It shall be settled by the Commissioners; and the appeal shall be by a special case, stating the facts and the grounds of their decision. It is well settled that the facts established in the case do not mean the evidence given in it. There may have been fifty witnesses examined before the Commissioners, not one of whom they believed; and there may have been the evidence of half a dozen of witnesses to establish a single fact. I may endeavour to illustrate this case by a reference to the Registry of Voters Act; and I recollect well in the case of the Dublin freemen it was contended on the one hand that we should go into the evidence which was given before the revising barrister; and on the other, that we were bound by the conclusion at which he had arrived; and though perhaps if I had gone into the evidence I would have come to a different conclusion from his, yet I, for one, felt that I was bound by his conclusion. Well, it is said in the Act that these three Commissioners shall state the facts. By that I understand that, judging by all before them, the demeanour of the witnesses and other matters, they shall find such facts as they deem proved. Otherwise there is no use in the Legislature saying that they shall state the facts. What would have been said is, that they shall report the evidence; and it appears to me that we must come to the conclusion that it would be the duty of the Court, if we went into the evidence, to decide what part of it we should believe or reject. I do not think that this was the intention of the Legislature as it is to be gathered from the language of the Act; and I think that going into the evidence would be fraught with mischief, as I do not see how we could decide upon the credit of the witnesses produced below. It may be urged—and we have heard this argued with a full feeling of the responsibility which lies upon us—that our decision in this case will be final; but it does appear to me that there can be no danger in our holding that we should not go into evidence; because, incorporating into this Act the Act for appeals from magistrates, there is no reason why the Court should not, if it thinks it necessary, remit the case back to the Commissioners to be amended. So here, if an application was made stating that there had been certain facts established which would materially affect the rights of the parties, and which were not stated or wrongly stated, and asking us to send the case back, I, for one, if there were fair grounds for that allegation, and if such had been the application, would hold that the case should be remitted to the Commissioners for the purpose either of having the statement in it altered, or of having a supplemental one added. But here there is no quarrel with any statement of fact made by the Commissioners. I do not find that counsel say that the facts found are not sustained by the evidence; nor has our attention been called to any other fact than those found. There may have been evidence given which the Commissioners thought immaterial, and which they considered it unnecessary to state. The conclusion therefore which I have arrived at is, that on the hearing of the appeal

we can only deal with the facts stated on the case settled by the judges below, and decide whether the conclusions which they have drawn are consonant with right and justice. On the other hand if the appellant says that any other facts were established which ought to be added, the course should be to remit the case back to be amended; but I do protest against having the short-hand writer's notes thrown in upon us *in globo*.

HAYES, J.—As I differ in some matters from my brother Fitzgerald, I shall state the opinion at which I have arrived. In substance the question is whether we are to proceed to adjudicate upon the case which is now presented to us, or whether we are to be assisted by further statements of the facts proved before the Commissioners. Now I, for one, am very slow to come to a conclusion on this case without seeing my way to the doing of justice; and the view which I have taken is, that before all things it becomes most important to see whether or not this weir is detrimental to navigation. Upon the case as stated I could come to no conclusion. For want of a better I might adopt the conclusion of the Commissioners, but I apprehend that if I did so it would be a perfect delusion and a mockery to the public to call this a court of appeal at all. Let us see whether the Act of Parliament has intended to delude the persons interested as to this appeal. The 14th section of the Act says that the appeal is to be by a special case to be settled by the Commissioners. It does not say that it is to be settled in presence of both parties. The Commissioners may go into their own study and settle it without reference to either party. So that here, upon an appeal which is to decide both law and fact, the Commissioners may decide as many matters of fact as they choose. Then the Act says that upon the special case being stated the appellant shall serve a copy of it upon the other party. There is no provision for going before the Commissioners and summoning the other party to appear. The only thing which can be done is provided by the 9th clause of the section, which says that "when a party gives in good faith notice of an appeal under this section, but omits through mistake to do some act necessary to perfect the appeal, the appellate court may permit an amendment on such terms as it thinks just." Why, to perfect the appeal would seem to be something collateral, and would not have reference in any way to introducing into the case more than the Commissioners themselves introduced. Well, what is the result? I do not say that the Commissioners have not been most anxious to do their duty, but here we have a most important question; and they tell us that they are of opinion that this weir is injurious to navigation. Mr. Shaw says that we are not competent to deal with the evidence, but still that is not the question here. The question is, is the subject to be deluded by the appearance of an appeal when the appeal court has not the power of going into the case? I think we have not the means here of deciding, and I think we ought to have them; and the Commissioners say that they are ready to produce the short-hand writer's notes. Now, it is said, why should the short-hand writer's notes be produced? There is no provision in the statute for their production. That is true, but it is the duty of the

judge to take evidence. If there is any objection to the short-hand writer's notes let the facts proved be shown.

O'BRIEN, J.—I have already intimated the purpose for which, and for which alone, I think the evidence before the Commissioners might be referred to. The question, I think, is not altogether free from doubt under the Act, whether in administering the law under the Act, considering the extraordinary powers given to the Commissioners, it might not be advisable for us to be in possession of all that was before them in order to say whether their decision was well founded. It has been said that that would be taking on ourselves to decide whether the Commissioners were right or wrong in the credit which they gave to the evidence on one side notwithstanding the evidence given on the other. I do not think that that would necessarily follow; nor do I mean to suggest that such an inquiry should be conducted by the Court. The Commissioners refer to one fact, and say that certain vessels are obliged to sail in a particular direction, and that by reason of that they are prevented from passing over part of the river. On that and on other facts of the case the first question is to see whether in our opinion those facts stated warranted the conclusion at which the Commissioners have arrived, that the weir is injurious to navigation. That is a question which we might determine on the case itself, and without referring to the evidence adduced to prove the several matters of fact. But beyond that there is a question that the evidence before the Commissioners was not sufficient to sustain their finding as to the matters of fact. Now, I do not think that the question is at all to be regarded in the same light as if we were asked to say whether a finding by a jury was against the weight of evidence. We are to say, not whether the Commissioners were right or wrong in determining the fact, or whether the preponderance of evidence was greater on one side or the other, but whether there was evidence to sustain that matter of fact; and it is much the same as if a defendant applied to have a plaintiff non-suited. That would be a matter which we would be competent to deal with,—a question of law, whether, looking at the evidence, there was a sufficient case to be laid before a jury. Beyond that, if there was sufficient evidence to lay before a jury, and though there was evidence on the other side, as to which party's evidence they attached the greater weight to, there the Court could not take upon itself the task of saying whether, though there was evidence on both sides, the finding below was against the weight of evidence; that is a duty which I do not think is cast upon us in this case; but I do not think it precludes us from seeing whether there was any evidence below sufficient to sustain the finding of the Commissioners on these matters. If it became a matter of conflict of evidence, that would not be a matter for us. When the *onus probandi* lies upon a party, and he produces no evidence at all, that I would say is a matter which the Court may look to. Therefore, so far as that goes, so far counsel for the appellants can tell us, he seeks to go into the evidence to shew that there was no evidence at all below on the point; to that extent, in the first instance, I think they are entitled to refer to the evidence. There is

another matter, namely, the suggestion that probably on the evidence there might have been evidence of some particular matter of fact which is not noticed in the case. A fact may have been omitted, or the importance of a fact may not have been seen, when the case was prepared. If that point should arise in the progress of the case, the Act of Parliament gives us the same power which we have in magistrates' cases, in which an express power is given to us to send back the case if the counsel tells us that there is evidence of some particular matter of fact not noticed in it. We can send back the case in order to see whether the fact was omitted merely through mistake, or because the evidence was not believed. With regard to the authority of the short-hand writer's notes, it is true that they are not incorporated in the case. Reference has been made to the decision of the Court of Registry appeal. In that case there appeared facts sufficient to warrant the revising-barrister, so far as he was a juror, in coming to the conclusion at which he arrived, because there was proof there of the custom having been long exercised. There was evidence the other way tending to show that the custom was one of recent origin, but there was evidence which, if the tribunal below had consisted of the two distinct branches of a judge and a jury, the judge should have submitted to the jury. We held that we could not quarrel with the decision of the judge acting as a juror. It seems to me that our decision in that case cannot prevent us from doing what is asked in this case. I think, therefore, that it is open to the counsel for the appellants to show either that there was no evidence of some particular matter of fact, or that there was evidence of some particular matter of fact which has been omitted.

LEFROY, C. J.—In this case it appears to me that my brother Fitzgerald has in two words stated the essential distinction upon which the case turns—that is, the distinction between a re-hearing and an appeal. The distinction between these two courses of proceeding is this:—Upon a re-hearing you bring all the evidence before the Court which re-hears the case which has a right to decide upon the application of that evidence and upon the credit to be given to the witnesses. If this was intended to be a re-hearing I am at a loss to see why the Legislature should have passed an Act taking these cases out of the hands of the ordinary tribunals, and referring them to commissioners whom it has made the judges both of law and of fact. Those commissioners were selected for the purpose of redressing the abuses of the law which had theretofore taken place under the decisions of ordinary tribunals. The Legislature gave those commissioners the right of examining witnesses, and the power to take notes of the evidence, and having discharged those preliminary duties they are to come on that evidence, as to the relevancy of which and the credit of the witnesses they are the judges, to a conclusion as to facts; they are to make a record, not of the evidence, but of the facts which they find to be established to their satisfaction. For the purpose of an appeal they are to state not what this or that witness said, but the facts established, and having recorded these facts they are to refer them to

this Court, leaving it open to each party to apply to the Court for the insertion of any fact which may have been omitted. The fact that the commissioners are not obliged to give way to frivolous objections shows the implicit confidence which the Legislature reposed in them. We have no jurisdiction to decide upon the credit to be given to particular witnesses; our jurisdiction is to act upon the facts found by the tribunal which has been created by the Legislature. Are we to decide that the commissioners have not properly discharged their duty? If they have decided contrary to law, it is our duty to correct their mistake; but we have no more right to attack their authority than they have to attack ours. What the Legislature has given is an appeal and not a re-hearing, and I am of opinion that we should not go into this evidence.

Court of Common Pleas.

[Reported by J. Field Johnston, Esq., Barrister-at-Law.]

WHALLEY v. LORD MASSEREENE.—Jan. 29.

Quare impedit—Suggestion of death of co-defendant.

A co-defendant died pending the argument of a bill of exceptions taken at the trial by the defendants, and the plaintiff entered up judgment of venire de novo against all the defendants. On motion by the plaintiff that a suggestion of the death should be entered on the record, and the record, if necessary, be amended, Held, that the stat. 9 Wm. 3, c. 10, s. 7 (1r), applied.

McCausland, Q.C., for the plaintiff, moved that a suggestion be entered on the record of the death of Lord Massereene, prior to awarding a *venire de novo*. Lord Massereene had died before the judgment. In *Newnham v. Low* (5 T. R. 577), one of two plaintiffs died before interlocutory judgment. [*Ball, J.*—Has not the Common Law Procedure Act provided for this?] There is a question whether it applies. We are moving under the statute 9 Wm. 3, c. 10, s. 7. This is a case of surviving defendants and sole plaintiff. We say we are entitled to enter a suggestion, and to proceed against the other two. In *Bouher and others v. Wood* (Glasc. Rep. 75), a writ of error was brought. One of the plaintiffs died. There was one defendant. Thus there is one authority in England, and one in Ireland.

Joy, Q.C., contra.—This is for liberty to enter a suggestion on the record in pursuance of the statute. The only Irish statute is that of Wm. 3, and it does not provide for the present case. It contemplates the case where there is more than one plaintiff on the record. This is an application to the discretion of the Court. The notice goes on to say that the record shall, if necessary, be amended, without saying how. Lord Massereene died in April, 1863. Three full terms after, this is asked for by a party who does not

Pretend he did not know of the death long ago. They want to send this down to be tried against the incumbent, who would be liable for costs. Lord Massereene had a verdict in the first action. We have a writ of error which they did not apply to stay. [*Keogh, J.*—Is it seriously contended that the statute does not apply?] This is an application to the discretion of the Court. An amendment is asked, and it is not stated what it is. Judgment has been entered. [*Monahan, C. J.*—As I understand, Lord Massereene died pending the argument of the bill of exceptions, and therefore before judgment.] This is a judgment against a dead man. The verdict against Lord Massereene has been set aside, and there is no verdict against him, but there is a judgment of *venire de novo*. The defendants are liable to costs, and poor clergymen are not able to pay costs, and are liable to six months' imprisonment. In *Fishmongers' Company v. Robertson* (3 C. B. 970), Wilde, C. J., says, "Speaking from my own experience of some 40 years, I must say I never knew a motion of this sort to be granted, unless where the delay had been the act of the Court." That was an application to enter up judgment *nunc pro tunc*. [*Monahan, C. J.*—Is it your argument that because judgment was entered after Lord Massereene's death, there are to be no more proceedings in this at all?] The application is to the discretion of the Court. [*Monahan, C. J.*—Supposing the House of Lords upholds the two Courts here?] Broom's Practice, 487. [*Monahan, C. J.*—They want to do what they ought to have done before. The bill of exceptions was all right. They say there ought to have been a suggestion on the file before the judgment was entered, and they want to have it entered now.] They omitted it deliberately, and for a purpose, and, if so, when the event has turned out contrary to anticipation, are they to be permitted now? The Court already decided on the demurrer in this case that the Common Law Procedure Act did not apply. The Court of Error upheld that. The cause of action has not survived here. It is defunct. They claim the fee-simple. We defend the fee simple. Lord Massereene died. Who are the defendants? The incumbent and Carlisle, to whom Lord Massereene sold. The principal issue is, whether Clotworthy Massereene did or did not convey the advowson. As to the case in Glascott, that was a case of one defendant and two plaintiffs. [*Monahan, C. J.*—That is the converse.] It does not appear that there was any argument on this point. [*Ball, J.*—What were the grounds in the case where it was refused? Was there any way in which the delay was accounted for or sought to be accounted for?] The death was in August, 1846, and the application in February, 1847. Is the delay here the delay of the Court? It is their own delay for a purpose.

MONAHAN, C. J.—It seems to be almost as of course. An action of *quare impedit* is pending. It goes to trial, there being one plaintiff and four defendants. There was a bill of exceptions taken at the instance of the defendants. The plaintiff says advisedly, and no doubt properly, that he did not think it proper to enter the suggestion pending the argument, and he was right in not doing so. Where he made a slip was in entering up judgment against four parties, one

of whom is dead. He is going to trial. He wants to correct a mistake in entering up this judgment, and if not, it will be virtually entering a *set processus*. We think that the words of that statute, "two or more plaintiffs, two or more defendants," apply as much to one plaintiff and five defendants as to five plaintiffs and one defendant. In the case cited it was the converse of the present. We make the order that the party be at liberty to amend this record by entering a suggestion of the death.

Motion granted.

Court of Probate.

Reported by W. R. Miller, Esq., LL.D., Barrister-at-Law.

GREER v. WATERSON.—Nov. 29.

Pleading—Replication.

Where a plea alleged that the will propounded in the declaration had been revoked by a later will, the date of which was not known, the provisions of which were inconsistent with those in the will alleged, and which had been given by the deceased to the plaintiff, the Court required a replication to be filed by the plaintiff.

Henry Fitzgibbon, for the plaintiff, moved to fix the mode of trial. The plaintiff had in his declaration propounded a will. The defendant had pleaded, besides other plea, one to the effect that the will alleged by the plaintiff had been by another will made after the execution of the former, and the provisions of which were inconsistent with those in the former revoked, but the exact particulars were not in the knowledge of the defendant; and that the said later will had been, after its execution, given by the deceased into the custody of the plaintiff. There was no allegation of its due execution, nor of its date or contents. The affidavit of scripts had denied all knowledge of any will save that alleged and another referred to.

Dr. Ball, Q.C., and Falkiner for the defendant.

KEATINGE, J.—I think there ought to be a replication filed traversing the several statements in the plea. The affidavit of scripts could not have been pointed to those statements as it was filed before the plea.

Order that a replication be filed.

KEOGH v. WALL.—Nov. 27.

Costs—Next of kin failing to impeach will—Mitchell v. Gard (3 S. & T. 275) commented on and followed.

Where a will of an aged person was drawn from instructions taken by her spiritual adviser, who, though not taking any beneficial interest under it, yet took most extensive fiduciary powers as sole trustee and executor for the benefit of the next of kin; and an alleged memorandum containing such instructions was not forthcoming; and the will was drawn from such memorandum by the attorney of

the clergyman, who did not see the testatrix in reference thereto, nor witness it; and the draft made by the attorney was not shown to the testatrix nor produced at the trial, the Court gave the next of kin their costs out of the estate though the will was established.

This was a suit brought by the plaintiff, Michael Keogh (a son of the deceased Mrs. Catherine Keogh), in order to have revoked a probate had in common form of the will of Mrs. Keogh, granted shortly after her death, in 1863, to the defendant, the Rev. John Wall, R. C. C. of Roscrea, the executor named in her will and codicil, dated respectively the 23rd February and 3rd March, 1863; and to have such will and codicil proved in special form of law, otherwise to show cause why the same should not be condemned. The will gave all the testatrix's property to the defendant on various trusts for the benefit of her three children, two sons and one daughter. The only bequest to the defendant was a sum of £10 for such charitable purposes as he thought fit. A sum of £300 was left for the daughter, to be disposed of by her as she thought fit by will, and in default thereof the defendant had a power to give it to either of the two sons as he pleased. It appeared from the evidence that the defendant had himself taken the instructions from the testatrix and made a memorandum at the time, which he had given to his solicitor, who had his office in Roscrea, who prepared a draft of the will, which he sent to the defendant, who returned it approved of by him, without showing or reading it to the deceased. The attorney then engrossed the will and gave it and the memorandum to the defendant, who on the same day got it executed by the testatrix, in the presence of two witnesses whom he selected. Neither the memorandum nor the draft were forthcoming; nor were they referred to in defendant's affidavit of scripts. The jury found a verdict establishing the will.

Peat (Dr. Ball, Q.C., with him), for the plaintiff, asked for costs.—The memorandum was not referred to, as it should have been in the affidavits of scripts made by the defendant.* Notice had been given by the plaintiff to produce it, but it was not produced. The plaintiff, besides being a next of kin, is also heir-at-law. He went into no special case.

Dr. Townsend, for the defendant.—The jury found that no undue influence had been practised by the defendant. The plaintiff had received his legacy of £50, and lay by for fourteen months, having allowed probate in common form to be taken by the defendant. If costs were given to the plaintiff they would come out of the pockets of innocent persons, as the defendant takes no beneficial interest under the will.—*Gamble v. Robinson* (8 Ir. Jur., N.S., 55); *Douce v. Reed* (8 Ir. Jur., N.S., 39); *Bell v. Armstrong* (1 Add. 375); *Miller's Pr.* 160.

KEATINGE, J.—The defendant on whom the *onus* was cast of proving the will and codicil in this case did not press for costs against the plaintiff. The plaintiff was a legatee in the will, and there are two matters in the case which *prima facie* would disentitle the plaintiff to costs and which generally would render him liable to pay costs. These are—first, that

the will was proved in common form a few weeks after the death of the testatrix; and secondly, that the plaintiff, a next of kin and a legatee in the will, has received his legacy. In ordinary cases it is the right of the executor to require a next of kin, being also a legatee, to bring in and lodge in Court the amount of the legacy paid to him before he is permitted to dispute the validity of the will. Still that is no absolute bar. It might be shown that the legacy was paid and received under mistake or misapprehension of the facts. But no such application was made in this case and the cause proceeded. The plea filed by the plaintiff traversed the due execution and the capacity of the testatrix, and also alleged undue influence exercised by the defendant, who was the sole trustee and executor named in the will. It required a very strong case indeed, on the part of the next of kin, after such a period of time from the grant of probate, and after receipt of his legacy, to induce the Court, according to the principles which govern it in awarding costs, to give the next of kin costs out of the estate; and the question now is, whether that special case has been made here by the next of kin. After a very anxious consideration of all the facts, and remembering that I must in other cases follow the rule I am about to make, I have most carefully considered the law and applied it to the facts of this case. The case of *Mitchell v. Gard* (3 S. & Tr. 275) goes very fully either directly or by reference into all the cases decided on costs; and Sir J. P. Wilde has very fully laid down the principles on which costs are given. He begins with this observation—“The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties, and the question who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.”—p. 277. And at p. 278 the Court deduces two rules, viz.:—“1st. If the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate. 2nd. If there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.” Now, those last lines might be read as establishing that in the case put the losing party should only be excused from the payment of costs, but it is quite plain from the judgment, as it dealt with the question of costs generally, and as it dealt with the facts of that case, that the meaning of the Court was that, if reasonable grounds existed for raising an issue of undue influence, the party doing so, though he failed, might yet get his costs. In this case, as I said several times in my charge to the jury, I believe that the defendant intended to act with perfect fairness, yet, whether the observation be general as to other cases, or be confined to this particular case, I consider that the interference as to a will, unless in cases of absolute

* See *Forsell v. Poole* (32 L. J., Pr. 6), on this point.

necessity, of any clergyman with a party whom he has as a minister of religion attended, whether he takes an interest under the will or not, is much to be deprecated, and that observation is not confined to clergymen of any denomination. I am far from saying that in extreme cases, where a clergyman interferes and the will is established, costs must come out of the estate. All depends on the special circumstances of the case, and going back to Sir J. P. Wilde's judgment—"If the fault lies at the door of the testator, &c., it is just that the costs of ascertaining his will should be defrayed by his estate." In the construction of that passage, I take it to be clear that if the testator himself, instead of being active, employs another who so conducts himself as to occasion doubt and difficulty as to whether the testator was competent and uninfluenced, the same rule will apply. Now in this case there were three children of the testatrix—two sons and one daughter, and she, the testatrix, an old lady, seventy-four or seventy-five years old. It was arranged, on consultation between the deceased, the defendant, Mr. Wall, who was her confessor, and a Mr. Meara, a friend of hers, to divide the property in certain shares amongst the children, and that Meara and Wall were to be trustees and executors, or, according to Meara, he was to be executor, trustee or witness, but according to Wall, Meara was to be trustee and executor. The dispositions so agreed on were by Wall, at that consultation, committed to paper. That was in 1861; and a few days before the death of Mrs. Keogh, in 1863, various alterations were made in the memorandum as to the intentions of the deceased, and the most important one was that Wall was to be sole trustee and executor, and not in the ordinary sense, having only a legal estate, but subject to certain qualifications he was to have the right to deal with the property as he pleased. The daughter, it appeared, was not strong-minded; she was nervous, and it was quite right that she and her property should be protected by trustees. But the £300 which she was to get, Wall was to pay it or not just as he pleased to her, and if that stood alone there is evidence to account for all that caution; but by the same will a house was left to the son Joseph, subject to the right of the daughter to live in it, and the residue was given to Mr. Wall to invest it in any securities he pleased, and to pay the interest and annual produce thereof; and any part of the principal he might, at any time, pay or not to the daughter, and on her death to whichever of the sons he thought required it most. And there were the most ample indemnity clauses in the will. A document of the kind should be narrowly watched. A codicil was then made. The daughter was dissatisfied as to the disposition of the house, and the house is then given to her for her life, with power to her to dispose of it by will, and in default then it goes to Wall in trust, to give it to either of the sons; and the £300, as to which no ultimate disposition was made by the will, is given to such persons as the daughter should by her will give it to, and in default then Wall is to select the son as before. He is put, in fact, in *loco parentis*, but to take nothing beneficially. The validity

of those documents was found by the jury, and in accordance with my charge, and they found that there was no undue influence. But the question remains, was or was not this a fitting case for a most sifting inquiry? And did not the admitted circumstances of the case present abundant ground of suspicion? In my opinion they did. This will was prepared from the memorandum originally written in December, 1861. Mr. Wall having made certain alterations in it, questions arose as to the time when same were made, and if made then to what extent; and the transaction has been so conducted that the parties have been left only to Mr. Wall's word for the instructions. I say that it is not right that in the case of a party claiming, though only in a fiduciary character, a property over which he has such extensive rights, such important facts should depend on the evidence of a person so circumstanced alone; and the parties must depend on his evidence, because the important document which ought to be produced has not been produced. I don't collect that such a stringent search has been made for it as ought to have been made, and it may yet be in existence. I give Mr. Wall credit when he says he believes it has been destroyed. But next of kin have a right to ask, if destroyed, why was it destroyed? Why it was not preserved? But another document existed which we ought to have had here, but which we have not—the draft prepared by the attorney. Where is that draft? It is not forthcoming. Why in general is a draft made? Of course to enable the party making the will to go over it and see if it carries out the intentions. Mr. Wall appears to have thought that as the memorandum had been approved of by the deceased, there was no occasion to read over to her the draft, and he did not take it to her. He approved of it himself and returned it to the attorney who then engrossed the will. I think it was a great indiscretion on his part in preparing a will of a person living within a stone's throw of him, and from instructions given to him by a clergyman—his own relation, and not taking the instructions from the lady herself. He would have done a duty to this old lady, whose attorney he professed to be, and discharged his duty to himself, to the public, and to his profession to have stayed his hand and insisted on seeing the lady. But he did not even insist on being a witness to the will, and as to the codicil he was doubly indiscreet. He took verbal instructions from Wall varying to a considerable extent the provisions of the will. The house was taken from Joseph and given to Catherine, and extensive powers were given to Wall to act about it as if it were his own, and so also as to the £300. The whole case was eminently suspicious until the evidence was given. Now I think it was all fair and proper. I attribute no blame, save extreme indiscretion to the attorney. Then do the facts, as they appeared before the institution of the suit, and as they appeared in Court, justify the next of kin in vehemently suspecting undue influence? Satisfied as I am with the verdict, I say there was an abundant case of suspicion. I accordingly award to the next of kin his costs out of the estate.

Decree accordingly.

Law and Equity Index

TO

THE IRISH JURIST,

INCLUDING

A DIGEST OF THE CASES DECIDED IN THE COURTS OF COMMON LAW AND EQUITY IN IRELAND, AS REPORTED IN THE SIXTEENTH VOLUME OF THE IRISH JURIST (THE NINTH OF THE NEW SERIES,)

AND IN THE

FOURTEENTH VOLUME OF THE IRISH COMMON LAW AND CHANCERY REPORTS.

. The letters at the conclusion of each paragraph indicate the titles of the Reports digested, and the names of the respective Courts, thus:—Ir. Jur. Irish Jurist—Ir. C. L. R. Irish Common Law Reports—Ir. Ch. R. Irish Chancery Reports—C. Chancery—R. Rolls—Q. B. Queen's Bench—C. P. Common Pleas—Exch. Exchequer—Cir. Cas. Circuit Cases—Ex. Cham. Exchequer Chamber—Reg. C. Registry Cases—Crim. Ap. Court of Criminal Appeal—L. E. C. Landed Estates Court—Adm. Admiralty Court—M. O. Master's Office—Consol. Cham. Consolidated Chamber—P. O. Judicial Committee of the Privy Council—Bank. Bankrupt Court—H. L. House of Lords.

ABDUCTION, *See* CRIMINAL LAW.

ADMIRALTY.

Collision.] In a suit for collision against a steamship, where she was found to have caused the total loss of the promovent vessel, her owners will be exempted from liability, if it appear that she had a duly licensed pilot in charge, and that the pilotage was by statute compulsory. *The Malvina*, 9 Ir. Jur. N.S. 199, Adm.

In a case of collision where the impugnant steamship was found in default, and relied on compulsory pilotage as exempting her owners from liability, the right of exemption will not be forfeited by the interference of her captain, if it clearly appear that the pilot alone was to blame for the collision, and that the acts of the captain were calculated to prevent or modify it. *Ib.*

Where an impugnant ship obtains the dismissal of a suit for collision by relying on the legal defence of compulsory pilotage, each party will be left to bear their own costs. *Ib.*

In a suit for collision to recover damages, as in the case of a total loss, the impugnant vessel will be held liable, if she ported her helm when she should, under all the circumstances, have starboarded, and if she was herself the cause of the collision, in not exhibit

ing coloured lights as required by the statute. *The Swan*, 9 Ir. Jur. N.S. 278, Adm.

Salvage.] Special agreements with the owners by the masters of a tug-steamer to a percentage on the earnings of the tug, and by seamen to increased wages, for foregoing all claims for salvage, will not be upheld by the Court of Admiralty, as being repugnant to general principle and prejudicial to the public interest, and as the effect of such agreements would be to take away from the actual salvors the motives to all enterprise and energy. *The Maryanne*, 9 Ir. Jur. N.S. 60, Adm.

In this case, in which the derelict barque and cargo, which sold for £27,000, was saved from total destruction, but saved without risk to life or limb, the Court considering it a case of meritorious salvage, although not of first-class merit, awarded to the salvors a sum of £1,080, or "two-fifths" of the value. *Ib.*

The Court in distributing a sum awarded for salvage will award very liberal remuneration to a steam vessel specially built for and devoted to salvage services, inasmuch as she is not employed in general trade for the conveyance of goods and passengers, and depends entirely on her chances for public encouragement and support. *Ib.*

In this case of derelict salvage the Court awarded a sum of £470 to the salvors, or a little more than

"one-third" of the total value of the property saved, and gave them their costs of the suit. *The Erin-go-Bragh*, 9 Ir. Jur. N.S. 100, Adm.

In this case where there was no personal risk or any danger, but which was an ordinary salvage service performed with skill, good conduct and complete success to a vessel in imminent peril of being totally lost, the Court awarded to the salvors a sum of £375 or "one-fourth" of the admitted value and costs. *The Rothsay Castle*, 9 Ir. Jur. N.S. 360, Adm.

AFFIRMATION.

An affirmation, taken under the 3 & 4 W. 4, c. 82, stated that affirmant was a member of a religious sect, called "Separatists," but did not in terms, follow the form of affirmation required by the Act. *Held*, that it must be assumed to have been properly made. *Wolsley v. Worthington*, 14 Ir. Ch. Rep. 369, Ch. App.

ANNUITY.

A bond given to secure an annuity recited that G. H. C. had contracted and agreed with R. K. for the sale to him of a deferred annuity; and also recited that upon the treaty for the purchase of the annuity, it was agreed that the payment of it should be secured by the bond of G. H. C. in a sufficient penalty and by his warrant of attorney for confessing judgment. *Quare*, in the absence of any further evidence of a contract to grant the annuity, could arrears of the annuity be recovered to a greater amount than the penalty of the bond? *Cooke v. The Marquis of Donegal*, 9 Ir. Jur. N.S. 41, Ch.

E., for valuable consideration granted to D. and his heirs, an annuity of £35, charged upon freehold lands, upon trust for M., until her death or marriage; and by the same deed he covenanted that he would pay to M. a sum of £500 upon her marriage with the consent in writing of H. M. married without the consent of H. but with the knowledge and assent of E. E. by a deed subsequently executed conveyed the same lands to trustees, upon trust to secure to M. an annuity of £17 10s., "the same to be paid and payable to her until such time as she should be paid, or sufficiently secured, in a sum of £500, the same to be for her sole and separate use and benefit." *Held*, that the annuity of £17 10s. did not terminate on the death of M. *Watson v. Powell*, 14 Ir. Ch. Rep. 38, Ch.

ARBITRATION AND AWARD.

Upon the face of an award an expression appeared which was construed in one sense by the taxing-master, but in a different sense (as it appeared by the arbitrator's certificate subsequently given by him) by the arbitrator himself; nevertheless the Court, on motion to remit the award to the arbitrator for his explanation, refused to interfere with the interpretation put by the taxing-master on the expression used. *Godfrey v. Broderick*, 9 Ir. Jur. N.S. 359, Exch.

ASSIGNMENT, COVENANT AGAINST, See MORTGAGE.

AVERMENT.

Proof of.] To an avowry pleaded to an action of replevin the plaintiff replied that divers persons before and at the time of the demise in the plea mentioned, were in possession, seisin, and enjoyment of a portion of the premises as tenants in fee thereof under grants thereof by the defendants prior to the said demise. Upon the trial of an issue joined upon this replication the plaintiff proved the possession of the parties, but failed to prove that they derived under grants by the defendants. The judge told the jury that it was immaterial whether the parties had derived under the defendants or not; that it was the duty of the lessors to see that they did not undertake to demise more than they had a right to demise, or to give possession of; and that if they did so demise at a gross rent and afterwards distrained for that rent, they must be defeated in the action. *Held*, that this was a misdirection. *Tyrrell v. The Irish Society*, 9 Ir. Jur. N.S. 395, C. P.; s. c. 14 Ir. C. L. Rep. 493.

BANKRUPTCY AND INSOLVENCY.

Proof of debts.] A party becomes security for the payment of a composition by an arranging trader, and when two of the instalments are paid, the case is turned into bankruptcy. The creditors prove against the estate of the principal for their first bills, giving credit for the instalments paid. The surety then becomes bankrupt, and the creditors seek to prove on his estate for two sets of unpaid bills. Such proof will not be allowed, the creditors having made their election. *Re Sheehan and Feehan's Estate*, 9 Ir. Jur. N.S. 198, Bank.

Order and disposition.] Where the owner of chattel property and of an establishment where he carried on his business leaves the country without giving any directions as to his affairs, or making any provision for his wife, and one of the trustees of the marriage settlement of that wife takes possession of those chattels which are made the subject of the settlement, and pays the wife a weekly sum for the hire of them with the consent of co-trustees, and they so remain with him to his bankruptcy, they will be held to be in his order and disposition, and the true owner cannot claim them, it appearing that he knew of the arrangement but did not remonstrate against it. *Re Angus Murray*, 9 Ir. Jur. N.S. 98, Bank.

Fraudulent preference.] A bank, being indorsee of bills, on which a trader had forged acceptances, the trader in contemplation of bankruptcy took up the bills, without pressure on him being made by the bank. The traders became bankrupt. *Held*, that the payment to the bank was a fraudulent preference. *In re ——— and ——— Bankrupts*, 14 Ir. Ch. Rep. 113, Ch. App.

Debt fraudulently contracted.] A party bringing a frivolous or unfounded action, by which the defendant is put to costs, is a debt fraudulently contracted by the plaintiff in such action, who seeks to take the benefit of the Insolvent Act. *Dunne's Case* in 1 B. & J. Reports, adopted. *Re Carpenter*, 9 Ir. Jur. N.S. 20, Bank.

Final examination.] Where a bankrupt is charged with forgery, and with making false entries in his books, and obtaining credit by false representations,

his examination will be adjourned *sine die*; and although the documents alleged to have been forgeries have been destroyed, and none of them forthcoming, a prosecution for forgery will be directed, as well as a prosecution for frauds against the bankruptcy law. *Re Patrick McNevin*, 9 Ir. Jur. N.S. 197. Bank.

The Court of Bankruptcy has no jurisdiction to make a certificate from the creditors of the bankrupt a condition precedent to passing the final examination. *In re Burke*, 14 Ir. Ch. Rep. 107. Ch. Ap.

Semble—the Court has no power to adjourn the final examination of the bankrupt *sine die* for any misconduct of the bankrupt if his disclosures be full and true. *Ib.*

Committal.] There is no distinction in the examination of a bankrupt and a witness who is examined with regard to a bankrupt's property; the test in every case is, if the account given be such as a reasonable man can believe. *Re Felix McCann*, 9 Ir. Jur. N.S. 77. Bank.

It is not necessary, in a warrant of committal, to refer to the particular answers that are deemed unsatisfactory; it is enough to refer to the evidence generally, and ask the bankrupt or witness if he have any further or other account to give. *Ib.*

Although the examination may disclose grounds for a criminal prosecution, that will be no bar to the Court exercising its jurisdiction to commit for unsatisfactory answering. The Court has power to commit a witness for unsatisfactory answering to a criminal prison. A witness examined in Dublin may be committed to Kilmainham, and not the Four Courts Marshalsea. *Ib.*

Recommittal without warrant.] A witness committed by the judge of the Bankrupt Court for unsatisfactorily answering questions put to him on examination in a bankrupt matter, was again brought up for further examination and recommitted without a warrant. The recommittal was held bad. *In re Daly*, 9 Ir. Jur. N.S. 137. Exch.

Arrangement clauses: turning arrangement into bankruptcy after certificate.] In an affidavit to verify a petition presented to the Court by an arranging trader, he states that the schedule of assets contains a true and full account of the property he has to be made available for the payment of the composition. And where creditors, relying on the truth of this, accept the composition offered, and the trader obtains his certificate, the creditors may, long after the certificate is obtained, bring the case by motion before the Court praying that the certificate may be withdrawn. The Court, on satisfactory evidence that leasehold property was omitted, and that the affidavit to support the petition was untrue, will withdraw the certificate and put the case into bankruptcy. *Re an Arranging Trader*, 9 Ir. Jur. N.S. 120. Bank.

Trust deed.] A trader executed a trust deed, purporting to be for the benefit of all his creditors who would come and execute it within a month, and it was advertised in accordance with the provisions of the 93rd section of the Irish Bankruptcy and Insolvency Act, 1857. A creditor who had at first assented to it, and afterwards, more than three months after its execution, obtained an adjudication against the trader, sought to compel the trustees under the

deed to bring in and lodge in the bankruptcy matter whatever they had realised under it, on the ground that the deed was not protected inasmuch as it was an act of bankruptcy. *Held*—that having been privy and assenting to the provisions of the deed, although he did not execute it, he could not question its validity; but *held* that the form of the deed drafted from the ordinary lithographed precedent was objectionable, and did not entitle trustees to the benefit of the 93rd section; in fact, that such form is contradictory in its terms, as purporting to be for the benefit of all the creditors, and then attempting to exclude such creditors as did not execute it within a certain time named. *Re John Smart*, 9 Ir. Jur. N.S. 195. Bankr.

Semble—all creditors coming in before the trust fund is distributed are entitled to their dividends. *Ib.*

Equitable mortgage.—Sale.] Where A. equitably mortgaged his property to B.'s creditors as a security for the debt of B., who afterwards becomes bankrupt, the Court of Bankruptcy ought not to order the sale of A.'s property, and cannot adjudicate upon the rights of third parties to, or the trusts upon that property. *Re Purcell, a bankrupt*, 9 Ir. Jur. N.S. 102. Ch. Ap.

Right of lien.] Where the assignees of a bankrupt dispute the right of lien and a doubt exists on the subject, the Court will not make an order to give up the property, but leave them to establish their right by law if so advised. *Re Angus Murray*, 9 Ir. Jur. N.S. 98. Bankr.

Settlement of wife's property obtained after marriage.] Although an insolvent may obtain property by his wife after marriage, he has no right to put it in settlement for the benefit of herself and children if he have creditors at the time. The Court, in order to compel the trustee of such settlement to reassign for the benefit of creditors, will discharge the order for hearing and not grant a new one until such assignment is made. But if the insolvent is in custody only at the suit of one creditor to whom a small sum is due, he will be remanded for two years at the suit of his creditors, with an intimation that if the trustee submits to the jurisdiction of the Court the insolvent will be discharged. *Re Clark*, 9 Ir. Jur. N.S. 384. Bankr.

BILL OF EXCHANGE.

Plea of want of consideration.—Insolvency.] To an action against the acceptor of a bill of exchange by the indorsee the defendant pleaded that the bill was indorsed to the plaintiff to secure a sum due by the drawer of the bill before he was discharged as an insolvent, together with interest, &c., from which debt the drawer was duly discharged by virtue of the proceedings in the insolvency, of which the plaintiff had notice, &c., and also to secure a sum of £30 advanced by plaintiff to defendant, and that save to the extent of the said sum of £30 (which the defendant brought into Court) there was no consideration for the acceptance by the defendant of the said bill of exchange. *Held*, upon demurrer, a bad plea. *Bernal v. Croker*, 9 Ir. Jur. N.S. 31. C.P.

BILL OF SALE.

A bill of sale and affidavit annexed thereto de-

scribed the attesting witness as "W. J. Miller, 21 Remington-street, Islington, in the county of Middlesex, *now in no occupation.*" The witness had been in the militia, but at the time of the execution of the bill of sale had no occupation. *Held*—this was a sufficient description of the witness to satisfy the requirement of the first section of the Bills of Sale Act (17 & 18 Vict. c. 55). *Trousdale v. Sheppard*, 14 Ir. C. L. Rep. 370, Q.B.; s.c. 7 Ir. Jur. N.S. 275.

CHARGE.

By articles executed in the year 1784, previously to the marriage of A., lands were covenanted to be settled on A. for life, with remainder to trustees for a term, to raise £3000 for two or more younger children of the marriage, payable at twenty-one or marriage, with power to A. to appoint this sum as he might think proper among the younger children, with remainder to the first and other sons of the marriage successively in tail male, with remainder to the daughters as tenants in common in tail. There was issue of the marriage a son, P. S., and two daughters, M. and S. On the marriage of M., in the year 1807, A. appointed to M. £2000, part of the £3000 which was assigned to the trustees of the settlement. P. S., on attaining twenty-one, joined his father, A., in suffering a recovery, and the lands were resettled on A. for life, remainder to P. S. in fee. P. S. died in 1821, intestate, and unmarried, leaving M. and S., his co-heiresses. On the marriage of S. with R. a settlement was executed, dated 14th April, 1823, by which A. & S., after reciting their title to the estate, but without taking any notice of the charge of £3000, conveyed S.'s moiety of the lands upon certain trusts, for the benefit of R., S. and their issue. In 1825 A. died, without making any further appointment of the charge of £3000; and on the 10th of December, 1825, S. and R. executed a deed purporting to assign the £1000, the unappointed residue of the £3000 charge, to the trustees of the Provincial Bank. It being conceded by all parties that the marriage articles should be construed as if they contained a hotchpot clause, *Held*—That in consequence of the execution of the settlement of S., her £1000 was not a subsisting charge on her moiety. *In re Norcott's estate*, 14 Ir. Ch. Rep. 315. L. E. C.

Held a'so—That it could not be raised out of M.'s moiety. *Ib.*

Held also—That M. was entitled to have £500, part of her appointed share of £2000, raised out of S.'s moiety. *Savage v. Carroll*, 1 B. & B. 265, disapproved of; *Tenison v. Moore*, 13 Ir. Eq. Rep. 424, followed. *Ib.*

CHARITY.

What is not within stat. 7 & 8 Vict., c. 97.] A bequest of a sum of money, for the purpose of building a church in Ireland is not within the 7 & 8 Vict. c. 97, s. 16, and is therefore valid, though the will be made within three months of the testator's death. *Pollock v. Day*, 14 Ir. Ch. Rep. 297, R.; s.c. affirmed on appeal, 14 Ir. Ch. Rep. 371, Ch. Ap.

Jurisdiction of Court in cases of.] The Commissioners of Charitable Donations and Bequests in Ire-

land, filed a petition, which prayed, among other things, that the commissioners be discharged from their trusts in the matter of the Fanning Charity, and that new trustees might be appointed. *Held*, that though the Court would have jurisdiction to interfere if there were any breach of trust, or misappropriation of the funds, yet the Court had no power to relieve the Commissioners from the trusts imposed on them by Act of Parliament. *In re Fanning's Charity*, 9 Ir. Jur. N.S. 146.

Quere—Whether the Court had power to frame a scheme of rules for the management of a charity under the control of the commissioners. *Ib.*

Effect of stat. 10 G. 4, c. 7.] A testator by will, dated 15th November, 1861, bequeathed £500 to two Roman Catholic priests or the survivor of them, "to be applied as they shall deem best for the maintenance and education of two priests of the order of St. Dominick in Ireland;" also £500 to another Roman Catholic priest on a secret trust disclosed to him by the testator during his lifetime. *Held*, with reference to the former bequest (varying the Master's order) that it was a charitable bequest, but invalid, as being contrary to the policy of 10 Geo. 4, c. 7; but that not being contrary to any express provision contained in that Act, it was to be carried out *cy pres* under the sign-manual and not by the Court. And with respect to the latter bequest (affirming said Master's order), that being given on an invalid trust, it was void absolutely, and could not be carried out *cy pres*. *Simms v. Quinlan*, 9 Ir. Jur. N.S. 404, R.

CLERK OF THE PEACE.

Clerks of the peace are entitled to a fee of 2s. 6d. upon every renewal of a publican's license. 3 & 4 W. 4, c. 68, ss. 2, 6, 10. *Hawkins v. M'Loughlin*, 14 Ir. C. L. Rep., App. i., Exch.

M'Loughlin, appellant; The Clerk of the Peace of Wexford, respondent, 2 Ir. Jur. p. 168

CONTRACT.

* [The defendant, a Roman Catholic clergyman in Sheffield, through P, who was the superintendent of the Glasnevin Cemetery, Dublin, for the uses of a cemetery about to be opened in Sheffield, gave the plaintiff (a stationer in Dublin) an order, which, according to the evidence of P, was in the following words, "One copy of each of the large books, and as few as possible of the smaller books and forms." According to the plaintiff's evidence, P desired him to furnish "One book of the forms least in use, and a moderate quantity of the others, in proportion as they were used in Glasnevin Cemetery." The plaintiff forwarded to the defendant, through P, two of the large books and an excess in the "smaller books and forms," over the requirements of the Sheffield Cemetery, as ascertained by the evidence at the trial, together with a quantity of stationery, which had not been ordered at all, and included them all in the one invoice. *Held*, (following *Levy v. Green*, 1 EL & EL 969) that the defendant was justified in rejecting the whole.—*Christian, J., dissentiente. Shannon v. Barlow*, 9 Ir. Jur. N.S. 229, C. P.

And per *Christian, J.*, that the case was distinguishable from *Levy v. Green* as to the indefinite por-

tion of the order, 1st, because it was indefinite; and 2ndly, because it appertained to a certain measure or standard which was in the possession of the defendant, but not in the knowledge of the plaintiff; and that as to the portion of the order which was alleged to be precise, there was not evidence to show that the books in question were not amongst those most in use. And, that as to the stationery, which was not ordered, no case decided that where articles *alterius generis* were sent along with those ordered, the purchaser was at liberty to reject the whole of them. And that a verdict which, under these circumstances, specified the articles in the invoice, for which the jury thought the plaintiff entitled to recover, ought not to be disturbed. *Id.*

COPYRIGHT.

The proprietors of copyright in a book need not, in an action for the infringement thereof, aver that the defendant published the plaintiff's book. The plaintiff states a good cause of action if it avers that the defendant published *parts* of the plaintiff's book. *Rookey v. Kelly*, 14 Ir. C. L. Rep. 158, Q. B.; s. c. 7 Ir. Jur. N.S. 213.

Such a cause of action is not answered by a plea in confession and avoidance, to the effect that the book of the plaintiff and the books of the defendant were composed by one and the same author, from common sources of information, "and that no *part* of defendant's said books, or either of them, was copied or colourably altered from the said book of the plaintiff." *Id.*

COVENANT.

A deed of assignment of the premises, demised by a lease dated the 20th of October, 1824, for a term of 500 years, contained a covenant on the part of the assignee to expend £2,000 in building houses, within seven years from the 1st of September, 1855. The deed contained a clause of re-entry for breach of the covenant. By a subsequent indorsement under seal, dated the 12th of November, 1856, after reciting that the assignee had built one house, and was desirous to let the remainder of the premises for building ground, the following covenant was entered into on the part of the assignor:—"That in case any penalty or forfeiture shall be incurred under and pursuant to, and for non-performance of the clauses, covenants, and agreements in the deed reserved, that, in such case, such penalty or forfeiture shall not in any manner affect the interest of the persons who may be tenants to said within premises, so as in any manner to deprive such persons of the full benefit of their respective holdings;" and that in case such forfeiture were incurred by the assignee, "that then and in such case, such penalty or forfeiture shall not in any manner whatsoever, interfere with or affect the interest or property of the persons who might be tenants to said demised premises under the said assignee, &c., so as in any manner to deprive them of the full benefit and advantage of their respective holdings upon the premises; and that in case of any such penalty being incurred, and that any proceedings were taken and rendered effectual on account thereof, the assignor, instead of the assignee, should be entitled to recover

and receive the rents to be payable by such persons so becoming tenants to said premises; and that such persons should not be liable to pay any greater sum than the rent originally reserved." The assignee having failed to perform the covenant within the specified period, the assignor brought an ejectment on the title, for breach of the covenant. *Held*, that notwithstanding that the deed of assignment transferred to the assignee the whole of the interest of the grantor, he might re enter for condition broken. *Colville v. Hall*, 14 Ir. C. L. Rep. 265, C. P.; s. c. 8 Ir. Jur. N. S. 303.

Held also, that the indorsement did not amount to a release of the condition in the principal deed, but merely to a covenant not to disturb the under-tenants. *Id.*

Held also, that the fact that a receiver had been appointed, and acted over a portion of the premises, on foot of a judgment, registered as a mortgage, obtained by the assignor against the assignee for arrears of rent, did not amount to an eviction, so as to prevent the assignor from taking advantage of the breach of condition; and that the receipt by the receiver, from an under-tenant, of rent, which accrued due after bringing the ejectment, did not operate as a waiver of the forfeiture. *Id.*

Whether absolute or qualified.] A was, under his marriage settlement, tenant for life of certain leasehold property held for a term of fifty-two years, with remainder to his wife for life, remainder to the children of the marriage absolutely. By deed reciting the settlement, that there were two children of the marriage, both infants, that there was a contract for purchase of the property, and that inasmuch as the children were incompetent to convey, A had agreed to covenant for their execution of the deed on their reaching twenty-one, the trustees of the settlement, A and his wife, joined in conveying the leaseholds for the residue of the term to a purchaser according to their several interests; then all the conveying parties covenanted that notwithstanding any act done by them or any of them, they or some of them had good title to convey "for the residue of the term in manner aforesaid, according to the true intent of these presents." They also covenanted against incumbrances, and for further assurance; and finally, A covenanted for the execution by the children of the marriage as they should attain twenty one. *Held*, that on the true construction of the entire deed the covenant for title was not absolute but qualified, and that there was not any breach of it in consequence of A and his wife having only life estates. *Doyle v. Kinsley*, 9 Ir. Jur. N. S. 26. Ex. Cham.

Where a deed of assignment, after reciting that under a certain deed A was seized and possessed of certain premises, and that he had agreed with the plaintiff for the sale of all the defendant's estate and interest under the same deed, to the plaintiff, witnessed that the defendant did grant, &c., and assign unto the plaintiff, the premises, to hold same to him, his heirs, executors, &c. for ever; and also contained a covenant that the defendant then had in himself good right, full power, and lawful authority to make that conveyance of his estate and interest under the said deed to the plaintiff, his heirs, executors, &c. *Held*,

that this was not an absolute covenant that A had power to convey a freehold estate, but only that he had power to convey such an estate as he took under the said deed. *Delmer v. McCabe*, 14 Ir. C. L. Rep. 377, C. P.; s. c. 9 Ir. Jur. N. S. 236.

Covenant to settle after-acquired property.] Where a settlement contains a covenant that all the real and personal estate of the settlor whereof he then was, or should at any time thereafter be possessed or entitled unto, should stand charged with the payment of a certain sum of money for the trusts in the settlement mentioned, such covenant to charge after acquired property is not capable of registration under the Registry Acts, so as to give the settlement priority over subsequent purchasers for value without notice of the after-acquired lands. *Gubbins v. Gubbins*, 1 Drury & Walsh, considered, and held not to be a decision to the contrary. *Re F. & W. Olden*, 9 Ir. Jur. N. S. 297, Bank.

CRIMINAL LAW.

Abduction.] A mother does not lose the possession of her child, an unmarried girl under the age of sixteen, by contracting a second marriage, and neither the consent of the girl herself, nor that of her stepfather, to her being taken away out of the possession and against the will of her mother, is any bar to an indictment and conviction under statute 24 & 25 Vic. c. 100, s. 55. *The Queen v. Norton*, 9 Ir. Jur. N. S. 156, Crim. App.

See EVIDENCE.

CUSTOM.

Obligation to inquire into custom of trade.] The defendant gave to the plaintiffs the following guaranty—"10th April, 1863—Gentlemen,—I beg leave to inform you that at the request of Mr. John Ferguson, of Upper George's-street, Kingstown, who has lately opened an establishment of general merchant and dealer in groceries of all kinds, that I have consented to give you a general guaranty for a sum not exceeding £200 for any orders he may give you for the carrying on of his house of business at Kingstown, and for the goods you may supply him under this letter of agreement. This guaranty to be in force against me till recalled, reserving the right to do so when occasion shall require, and on notice to you." *Held*, in an action brought to recover the price of goods supplied to Ferguson by the plaintiffs, that the defendant was not discharged by the plaintiffs having taken bills from Ferguson for the amount due to them, in accordance with what was proved to be the custom of the wholesale grocery trade of the city of Dublin, he being under an obligation, if he did not know, to inquire as to the usage upon which the trade was carried on. *Woods and others v. Armstrong*, 9 Ir. Jur. N. S. 292, C. P.

Held, also, as to a portion of plaintiffs' demand, which consisted of duty on tea, advanced by the plaintiffs, that the same was a part of the price of the tea. *Id.*

See EVIDENCE.

DAMAGE.

Rule as to proximate or remoteness of.] The

defendant, under an agreement in writing, undertook to act as agent in Glasgow for the plaintiffs, cattle and provision dealers in Dublin; part of the agreement was, that the defendant should open a cash account at a bank in Glasgow, to the amount of £500, to be used at any time in honoring and retiring cash orders of the plaintiffs. It was also agreed that no cash order would be drawn by the plaintiffs "without the defendant having in his hands the full amount of such orders previous to his being required to pay the same." While the defendant had cash in bank, and goods in hands, amounting to more than the £500, upon the day on which a cash order for £250 fell due in Glasgow, the defendant left that city, and the order was returned dishonored to Dublin. It having been proved that, in consequence of the cash order having been dishonored, the plaintiffs' trade in Glasgow was suspended, that their Dublin business was seriously injured, and that they had lost the agency of an Australian firm; the jury gave damages for loss upon each of those heads. *Held*, that no portion of the damages was too remote, as the losses flowed naturally from the default of the defendant. *Boyd and others v. Fitt*, 14 Ir. C. L. Rep. 43, Exch.; s. c. 8 Ir. Jur. N. S. 50.

Semble, That the rule laid down in *Hadley v. Baxendale*, 9 Exch. 841, is too strict, and that *Smeed v. Foord*, Ell. & Ell. p. 614, and *Gee v. The Lancashire and Yorkshire Railway Company*, 6 Hurl. & Nor. 221, contain sounder expositions of the law as to the proximate or remoteness of damage. *Id.*

DEED (CONSTRUCTION).

A fund was, by a deed of 1841, vested in trustees, in trust for such of four persons as should be living at the determination of life interests limited to their father and mother. On the marriage of A, one of the four, her father being still living, a settlement was executed, which recited an agreement that a share of £2,700 and the one-fourth share of the fund, and the interest thereof to which A should become entitled, should be conveyed to trustees upon certain trusts, and by which A assigned to the trustees the share of £2,700, and all and every other sum or sums of money or other property to which she might thereafter become entitled, upon certain trusts as to the share of £2,700; and upon trust after the decease of A and L, her intended husband, to permit the children of the marriage to receive the interest of the share of £2,700, and every other sum or sums of money to which A might become thereafter entitled in such shares &c. as A and L or the survivor should appoint, and in default of appointment as to the principal, equally among the issue of the marriage; and if but one child, for such child only; and it was agreed that the one-fourth of the trust fund, or any other sum to which A might thereafter become entitled under the settlement of 1841, should, when received by the trustees of that deed, be paid by them to L, or his assigns, should A be then living, and not otherwise, the same to be for his sole use and benefit. L died, leaving a son a minor, and his wife A surviving him, and A's father afterwards died; whereupon the trust fund under the deed of 1841,

became divisible between A and her sister. *Held*, first, that L having died before A's father, did not take a vested interest in the principal of the moiety of the fund, under his marriage settlement. Secondly, that A was entitled to the interest of it during her life. Thirdly, that the minor son of L was entitled to the principal after her death. *In re Jager's Trusts*, 14 Ir. Ch. Rep. 155, R.

By ante-nuptial articles executed in 1819, J. C. covenanted that if the marriage should take effect, and the intended wife should survive him, and if he should not in his lifetime have settled lands or other hereditaments to the value of £180 per annum to the uses then specified, and if he should not have devised lands of the like amount for the like uses, then his heirs, executors, and administrators should, within six months after his decease, pay to the trustees £3000, to be invested on the trusts specified, which were to be for the wife for life, remainder to the children of the marriage as she should appoint, and in default equally. J. C. afterwards acquired property (including the lands of B.) which was, however, incumbered; and being considerably indebted, he, in the year 1850, assigned all the said property to a trustee for payment of his debts and for other purposes, and subject thereto upon the trusts of the articles of 1819, with various trusts as to the residue of the rents. *Held*—upon the construction of the whole deed, that the lands of B. were subject to the trusts of the articles of 1819 to the extent merely of an annuity of £180. *Re Clancy's estate*, 9 Ir. Jur. N.S. 72; S.O. 14 Ir. Ch. Rep. 361. L. E. C.

A. being entitled to certain leasehold, and also to certain fee-simple, estates, devised the latter to trustees upon trust for his eldest grandson, B., for life, in case he should attain twenty-three, with remainder to his sons in tail male; and if B. should not attain twenty-three, then upon trust for whichever of the testator's younger grandsons should first attain that age, for life, with like remainder to his sons, with remainder over. After directing several legacies and annuities to be paid out of his leasehold estates he bequeathed his residuary estate (which included his leasehold estates) to his seven younger grandsons, share and share alike. B. attained the age of twenty-three, and died without issue in 1849. By deed dated the 29th March, 1834, reciting that A. by his will, after devising several legacies, had bequeathed the residue of his property comprising, amongst other matters, certain leasehold interests to his seven younger grandsons, and reciting that C., one of the testator's grandsons, was entitled under this will to a seventh share of the residuary estate of A., consisting, among other matters, of the lands thereafter mentioned, C. granted to D. all his seventh share of the residuary estate of A., and in particular all his estate and interest in his seventh share of the leasehold estates (which were specifically enumerated), "and all the estate and interest of him, the said C., therein or in any other lands which were part of the residuary estate of the said A.," to have and to hold the said leaseholds, "and other the share which the said C. is at present entitled to of any lands or tenements, or any other property part of the residuary estate of A." unto D. his heirs, &c. *Held*

—that B.'s contingent reversionary interest in the fee-simple estates passed under the deed. *In re Rorke's estate*, 9 Ir. Jur. N.S. 409. Ch. Ap.

E., one of A.'s grandsons, who was the solicitor employed to prepare the deed of the 29th March, 1834, purchased from D. the interest which he took under this deed. He also purchased from his other brothers their respective shares in the residuary estate of A. A petition having been presented to the Landed Estates Court by a judgment creditor of E. for a sale of E.'s lands, including the fee-simple estates devised by A., *semble*, that the Court had no jurisdiction to declare, that by reason of the fraud of E. in the preparation of the deed of the 29th of March, 1834, the reversionary interest of C. in the fee-simple estates did not pass under the deed. *Id.*

DEGREE.

Where by the charter of the College of Physicians powers were given to the president and fellows to make such statutes, decrees, and ordinances for the regulation of the faculty of physic as to them might seem necessary, and to grant testimonials to all candidates presenting themselves for examination as they might deem entitled to receive them. *Held*—That this did not imply the power to grant DEGREES, and that between a license and a degree there was a well-recognised distinction. *The Attorney-General v. The King and Queen's College of Physicians in Ireland*, 9 Ir. Jur. N.S. 362.

Held also—That in case any corporate or other body usurp the power of granting degrees without express authority, proceedings are properly taken in the name of the Attorney-General. *Id.*

See quare—Whether one body to whom the privilege has been granted can file a bill against another body which has usurped such privilege without having first established its right at law. *Id.*

DESCRIPTION.

By two conveyances of equal date, executed by the Commissioners of the Incumbered Estates Court, certain premises were granted in severalty to A. and B., and certain mountain lands were by those same conveyances granted to A. and B. in undivided shares, proportioned to the rights of commonage thereon previously enjoyed by A. and B. respectively under certain leases. The premises granted in severalty were described as being in the occupation of the grantees, as containing a certain number of acres, and as being represented in maps annexed to the several conveyances, and they were to be held subject to the leases. Those leases which were also of equal date described the premises thereby demised as containing a certain number of acres, and as being in the possession of the respective lessees. The acreage in the conveyances and in the leases was substantially the same. A reclaimed piece of the mountain land was in the possession and occupation of A. at the time of the leases and of the conveyances; but if included in the lands demised and granted to him in severalty, it would render the acreage inaccurate. Moreover, the maps annexed to the conveyances represented it as a portion of the mountain lands. *Held*—That, as to the leases, it should be considered as portion of the lands

demised; but that, as to the conveyances, it should be considered portion of the mountain lands. *In re Clement's estate*, 14 Ir. Ch. Rep. 506. L. E. C.

As to the principle upon which the partition of the mountain lands should be carried out, *quære*. *Ib*.

EASEMENT.

Where a dwelling-house obstructs the enjoyment of an easement, the defendant, in an action for breaking and entering plaintiff's said dwelling-house, may justify the breaking and entry by pleading the enjoyment of the right for forty or twenty years before the commencement of the suit, and that said house obstructed him in the exercise of his said right. *Kearns v. Henderson*, 9 Ir. Jur. N.S. 69. Ex.

A plea of enjoyment of an easement for twenty or forty years before the commencement of suit is sufficient without saying twenty or forty years next before. *Ib*.

See WAR.

EJECTMENT.

Nature of action of.] The nature of the action of ejectment as distinguished from a personal action for rent is not altered by the Common Law Procedure Act of 1853, and it still remains an action essentially for the recovery of the possession of the land. *Wakefield v. Smith*, 9 Ir. Jur. N.S. 391. Q.B.

Defence of judgment recovered in prior action for rent on which ejectment founded.] The recovering of a judgment and issuing of execution in a personal action for rent form no bar to a subsequent ejectment founded upon the nonpayment of the same rent, where the judgment and execution have been unproductive; and the maxim of *factum transit in rem judicatam* does not apply in such a case. *Wakefield v. Smith*, 9 Ir. Jur. N.S. 391. Q.B.

ESTOPPEL.

To an action on a policy of assurance under seal, the defendants pleaded that the age of the assured exceeded what it was represented to be in the policy. The plaintiff pleaded the following replication on equitable grounds:—That the defendants ought not to be allowed or received to plead the said defence, or to make the objections therein contained, because that before and at the time of the making of the said proposal and policy, the plaintiff was in communication with the said defendants upon the subject of the said proposal and policy; and that in the course of and all through such communication, the defendants, meaning and intending that the plaintiff should believe and act upon the belief, by their conduct caused the plaintiff to believe, and the plaintiff accordingly did believe and acted upon and made said proposal, acting upon the belief that the age of the said R. H. M. did not at the time of the making of the said proposal exceed fifty-six years, and that the plaintiff did not in fact know from any documents or otherwise howsoever, save than from the defendants themselves, whether the age of the said R. H. M. at the time of the making of the said proposal exceeded fifty-six years or not. *Held*,—upon demurrer, a good replication. *Sweeney v. The Promoter Insurance Company*, 9 Ir. Jur. N.S. 355. S.O. 14 Ir. O. L. Rep. 476. C.P.

S., in 1854, purchased several denominations in the Incumbered Estates Court as trustee for E. Before the conveyance was executed, E. agreed to sell those denominations to S. in consideration of a bill of exchange for £10,000 and a mortgage upon the denominations. S. forged a conveyance from the Incumbered Estates Court, and executed for value a conveyance to W. reciting the forged conveyance as if genuine. Afterwards the Landed Estates Court executed a conveyance to S. reciting the purchase-money to be E.'s. *Held*—That no interest under the genuine deed passed by estoppel to W. so as to give him priority to E.'s demand. *Eyre v. Sadler*, 14 Ir. Ch. Rep. 119. Ch.

Held also—That E. had a lien for the amount of the bill. *Ib*.

EVIDENCE.

Where in an action against the acceptor of a bill of exchange purporting to be accepted *per pro*, "the Tipperary Joint Stock Bank, W. K. manager," upon the issue raised upon a traverse of the acceptance W. K. being called as a witness was asked, on the part of the plaintiff, whether it was part of his business, as manager, to accept bills of exchange for the said bank? which was objected to by the defendant. *Held*, that the question was admissible. *Eyre v. M'Dowell*, 14 Ir. O. L. Rep. 314; s.c. 8 Ir. Jur. N.S. 383, C.P.

An entry contained in a book belonging to the bank, purporting to be a copy of a circular informing the customers of the bank that W. K. had been appointed manager, and had been empowered to sign all documents and indorse all bills on account of the bank, was admitted at the time as secondary evidence on the part of the plaintiff of the issuing of the original circular. *Held*—That in the absence of evidence of the sending of the original to the customers of the bank that the evidence was inadmissible. *Ib*.

The defendant's counsel proposed to ask the manager of another bank whether the bill of exchange sued on was one which in the ordinary course of business a bank, according to banking usages, would accept for an inland customer? *Held*—That the question was proper. *Ib*.

He also proposed to ask same witness whether a bill accepted in the same way as the present would, according to the course of trade and bankers, put a party upon inquiry as to the authority of an acceptance. *Held*—That the question was proper. *Ib*.

He also proposed to ask the same witness whether authority to indorse was also authority to accept? *Held*—That the question was inadmissible. *Ib*.

The judge having told the jury that, if they believed that K., as manager of the bank, signed the bill by direction of J. S., and that J. S. was a director at the time, the acceptance was binding on the bank. *Held*—That having regard to the fact that the bill was accepted *per procuracion*, and that the deed of partnership required three directors to form a court, and empowered the Court of directors to make regulations respecting the accepting of bills, that the direction was wrong. *Ib*.

The fact of the knowledge, by the solicitor of a *bona fide* holder, but who has not acted for him in the particular matter, that a bill has been fraudulently

accepted is not evidence that the holder had notice of the fraud at the time of the indorsement. *Ib.*

At the trial of an action brought by the plaintiff for disturbance in his office of weighmaster under the 4 Anne (Ir.) c. 14, evidence was given that there had been boards fixed up in front of the market-house of Clones, and in front of the shambles, with tolls and customs marked on them; and that when meal and potatoes were brought to the market, the buyers used to pay rent for liberty of re-selling them. *Held*—upon the argument of a bill of exceptions, that this was evidence from which the jury might infer that tolls and customs were legally leviable in Clones, and that Clones was a town in which the office of weighmaster, under the 4 Anne, c. 14, existed. *M'Mahon v. Ellis*, 9 Ir. Jur. N.S. 329. S.C. 14 Ir. C. L. Rep. 499 C.P.

The 4 Anne, c. 14, imposed a penalty of 40s. a month on the owner of tolls and customs who should neglect to appoint a weighmaster. There was evidence given that Sir T. B. Leonard was the owner of the tolls and customs of Clones, and the plaintiff gave evidence that he acted as weighmaster from the death of his father till 1851. *Held*—That there was evidence to go the jury that the plaintiff was duly appointed weighmaster pursuant to the 4 Anne, c. 14. *Ib.*

Held also—That evidence of the fees taken by the plaintiff being larger than the statutable ones, supposing it given, would weaken but not annul the other evidence, as it was for the jury to choose between a violation of the statute to the owner of the tolls and customs, and imputing extortion to the plaintiff. *Ib.*

The plaintiff gave no direct evidence of having taken the oath required by the 10 G. IV. c. 7. The defendant gave some evidence of a fruitless search for the oath amongst the records of the Court of Chancery, but none of any in a court of assize. *Held*—That this was not such a rebuttal by the defendant of the presumption that the oath was taken arising from the plaintiff's having acted in the office, as entitled the defendant to have the question withdrawn from the jury. 1. Because this assumed that the plaintiff was bound to follow section 20 of 10 G. IV. c. 7, as to the time and manner of taking the oath, which he was not. 2. Because waiving this, the neglect of the officer to record the oath would not invalidate its effect if taken. 3. Because the search was insufficient. *Ib.*

A piece of bog, X, was surrounded by four townlands, A, B, C, and D. X was described in the reference to the Down Survey as "bog belonging to the adjacent towns." A, "together with all bogs, &c. &c., thereunto belonging," had been granted to the ancestors of the plaintiff by letters patent of the 33 Car. 2; and B, "together with all bogs," &c. &c. had been granted to the ancestors of the defendant, by letters patent of the 19 Car. 2. To an action for trespass upon X, brought by the owner of A, a tenancy in common was pleaded by the defendant the owner of B. At the trial, the meaning of the reference was left to the jury, who found for the defendant. Upon motion for a new trial—*Held*, (the Lord Chief Baron, *dissentiente*,) that the words "belonging to the adjacent towns" did not at the date of

the letters patent, create a tenancy in common in X, but meant that undefined portions of X formed part of the adjacent towns. *Tisdall v. Parnell*, 14 Ir. C. L. Rep. 1, Exch.

Per the Lord Chief Baron.—The meaning of the words "belonging to the adjacent towns" was a question for the jury, who had properly found those words to mean that X was held in common by the owners of the adjacent townlands. *Ib.*

To establish a tenancy in common by use and enjoyment, acts of ownership by all the alleged tenants in common, in various parts of the lands indifferently must be proved. *Ib.*

A jury may, without consent, be discharged from finding upon an issue which their findings on other issues render immaterial. *Ib.*

The inadmissibility of the Ordnance Survey as evidence upon questions of title illustrated. *Ib.*

Evidence of possession. Statute of Limitations. Book of Distributions. The plaintiff in an action of ejectment produced an attested copy of a patent from King Charles II., an attested copy of an extract from the Down Survey, a copy of a lease dated 19th September, 1701, purporting to be executed by the lessee only, and demising for the term of 91 years, and a lease dated 8th May, 1793, demising in the terms of the lease of 1701, with covenant for perpetual renewal. No question having been asked by either side at the trial, to be left to the jury, *Held*, that there was evidence of possession and enjoyment, entitling the plaintiff, in whom the interest of the lessee in the lease of 1793 had vested, to a direction. *Poole v. Griffith, and others*, 9 Ir. Jur. N.S. 202, Exch. Ch.

Held, also, as against occupiers who had taken separate defences to the same ejectment, it being admitted that all rent receivable under the lease of 1793, and a fee-farm grant which had been substituted for it, had been regularly paid up to the bringing of the ejectment, that there was evidence of possession in 1793, and some evidence of possession subsequent, *Pigot, C.B., dissentiente. Ib.*

Held, also, that the want of such evidence of possession as the payment of rent afforded would not enable the occupiers to avail themselves of the Statute of Limitations, unless they showed a possession in themselves or in some one else than the plaintiff, following *Smith v. Lloyd*, 9 Ex. Rep. 562; *Pigot, C.B., dissentiente. Ib.*

The Book of Distributions is admissible in evidence when offered to show the contents of profitable and unprofitable land, and not to make title, although it be impossible to point out the precise authority under which it was made. *Ib.*

Seemle, that the reasonings of Lord Chancellor Napier in *Knox v. Earl of Mayo*, 7 Ir. Chan. Rep. 563, in favour of its admissibility are unsustainable. *Ib.*

Evidence of custom. The plaintiff, in an action of replevin, in order to prove the existence of a custom in the County Fermanagh, by which, in estimating the amount of rent due upon the number of acres comprised in his farm, a public high road which ran through it ought to be excluded, gave the following evidence:—C, a land-agent, and the son of

the head-landlord of the premises in question, deposed that he knew of no instance in which a public road was charged for, but did not know what was the practice on the large properties in the county, and always directed the surveyor not to measure the road. *L.*, a surveyor of six years' practice, stated that he knew all the large estates in the county; that he never knew of an instance in the county in which roads were charged for, but did not know whether, in the cases he referred to, there were express agreements. *C.*, a surveyor, stated that he did not know whether the tenants paid for the roads or not; that he always measured the roads separately. *Held*, that there was no evidence of the alleged custom to go to the jury. *Lipsett v. Bell*, 9 Ir. Jur. N.S. 315, C. P.

Evidence of appointment of testamentary guardian. Notice to quit had been served on the defendant in an ejectment, signed by A B, described therein as testamentary guardian of the infant plaintiff. To prove that A B was such guardian, probate of the will under which A B was appointed, and a notice which had been served (in accordance with the provisions of the 68th section of the 20 & 21 Vic., c. 79), were tendered in evidence. *Held*, that the probate of the will was not receivable in evidence, to prove the appointment of testamentary guardians; such appointment not being a devise or other testamentary disposition of, or affecting real estate, within the 68th sec. of the 20 & 21 Vic., c. 79. *Cope v. Mooney*, 14 Ir. C. L. Rep. 256, C. P.; s.c. 8 Ir. Jur. N. S. 342.

Held, also, that a notice under the above section, need not state the purpose for which the evidence is required. *Ib.*

Evidence of appointment of testamentary guardians. The Probate of a will appointing testamentary guardians, being tendered in evidence, under the 68th section of the Probate Act, as proof of such appointment, *Held*, that it was inadmissible; and that in order to come within the terms of the section, the devise or other testamentary dispositions must directly affect real estate. *Cope v. Mooney*, 9 Ir. Jur. N.S. 184, Exch. Ch.

Held, also, (*Lefroy, C.J., dubitante*) that the notice to be given under that section, must specify the particular purpose for which the probate is to be given in evidence. *Ib.*

Irwin v. Callwell disapproved of. *Ib.*

Entries in Bible. A Bible containing entries of births, &c., which were not shown to have come to the knowledge of any deceased members of the family, held not admissible in evidence. *Splenis v. Lefevre*, 9 Ir. Jur. N.S. 62, Exch. Ch.

Refreshing memory. To refresh the memory of a witness, a document was put into his hand. This document was not in his writing, but he deposed that at the time of the transactions in question, and while they were fresh in his recollection, he made certain memoranda; that afterwards at a distance of two or three months, those memoranda were copied by another person into the book now produced; that he (witness) inspected the copy, when made, and compared it with the original, at the time, and that he found it to be correct. The original was lost; the person who had made the copy was living. *Held*, that the copies of the memoranda, in the book now

produced, were admissible for the purpose of refreshing the witness's memory. *Lord Talbot de Malahide v. Cusack*, 9 Ir. Jur. N.S. 327, Q. B.

Admissibility of evidence of character. Where a witness upon his cross-examination is merely asked questions tending to impute to him the commission of particular criminal acts, and also to impeach his character for veracity, but he gives no answers admitting the imputations and impeachment, evidence cannot be adduced to support his general good character. *The Queen v. Hayes*, 9 Ir. Jur. N.S. 158, Cr. App.

Per Pigot, C.B.—If the witness upon such a cross-examination makes admissions which impeach his general character at the time to which the cross-examination is pointed, general evidence of his mere recent reputation may be adduced. *Ib.*

EXECUTION.

*Effect of endorsement on writ of *fi. fa.** R. D. L. issued a writ of *fi. fa.* against one A. S. on judgment recovered against her, and he endorsed the writ with the endorsement: "The defendant is a widow lady, and resides at No. 15 Mespil-parade, in the county of the city of Dublin, where she has goods and chattels. Signed R. D. L." Under this writ the goods of A. S. were not seized, but those of E. S. were wrongfully taken: the goods taken being, as appeared by the finding on an interpleader issue, the goods of E. S. Immediately on the seizure being made E. S. claimed the goods, of which R. D. L. had notice; nevertheless, the sheriff remained in possession of said goods for ten or eleven days after the making of said claim and notice thereof. The above facts having been deposed to in an action brought against R. D. L. by E. S. for breaking and entering her dwelling-house, and for taking therefrom the goods and chattels of the plaintiff, E. S., the judge, on the trial, told the jury, firstly, that there was no evidence of any authority given by the defendant previous to the seizure to seize any goods save those of A. S. Secondly, if the jury believed that the seizure of the goods in question was made for the use of the defendant, and that he subsequently sanctioned and adopted the seizure, of which, in his opinion, there was strong evidence to go to them, the defendant would be liable. The jury found for the plaintiff, damages £25. Previous to the finding liberty was reserved for the defendant to move for a non-suit, or that a verdict should be entered for the defendant if the Court should be of opinion "that there was no evidence that the trespass was done for the defendant's use, or that he subsequently sanctioned and adopted it." On cause being shown against making absolute the conditional order obtained by the defendant in pursuance of the said leave reserved in that behalf, the Court was of opinion, firstly, that the endorsement on the writ was in effect a direction to the sheriff to seize the goods of the plaintiff. Secondly, that the trespass was done for the defendant's use, and that he subsequently sanctioned and adopted it; and that therefore the verdict must be entered for the plaintiff. Cause shown allowed. *Stratton v. Lawless*, 9 Ir. Jur. N.S. 36, Exch.; s. c. 14 Ir. C. L. Rep. 432.

EXECUTOR AND ADMINISTRATOR.

Executors, in passing their residuary account, erroneously represented the legatees as strangers in blood to the testator, whereby a large sum for legacy duty was paid to the Crown. A suit having been instituted to take an account of the trust funds, the executors, by their answer, admitted their liability for the principal money erroneously paid, but disputed their liability to the payment of interest. The decree at the first hearing was silent as to interest, and merely directed a reference to take an account of the trust funds. *Held*, first,—That the executors could properly be charged with interest on further directions. Secondly,—That interest was chargeable on the principal money erroneously paid (*O'Brien, J. dissente*). *Shaw v. Turbett*, 14 Ir. Ch. Rep. 476. S.C. 8 Ir. Jur. N.S. 1. Ch. Ap.

FISHERY.

Appeals under st. 26 & 27 Vic. c. 114.] In an appeal under st. 26 & 27 Vic. c. 114, *held* by Lefroy, C.J., and Fitzgerald, J., that the Court should not look beyond the facts stated in the case submitted by the commissioners, or go into the short-hand writer's notes of the evidence adduced before them. *Coghlan, app., Lord Lismore, resp.*, 9 Ir. Jur. N.S. 415. Q.B.

Per Hayes, J.—That the Court should look to those notes and decide upon the evidence, not merely upon the case stated. *Ib.*

Per O'Brien, J.—That the Court might look to the notes for the purpose of ascertaining whether there was evidence of any particular fact stated in the case, or whether any fact had been omitted from the case, but not for the purpose of weighing the evidence given on opposite sides. *Ib.*

In appeals under the 26 & 27 Vic. c. 114, the Crown has a right to appear and be heard upon the question of the weir condemned by the commissioners being an injury to navigation. *Dissente*, Hayes, J. *Coghlan app., Lord Lismore resp.*, 9 Ir. Jur. N.S. 414. Q.B.

FRANCHISE I. (PARLIAMENTARY.)

A person elected a free burgess of New Ross, but having neither taken the oath nor paid the stamp duty on his admission, is not entitled to be registered as a voter for that borough. *Hovelt app., Tottenham resp.*, 9 Ir. Jur. N.S. 245. Ex. Ch. Reg. Ap.

Quere, is residence within seven miles of the borough requisite in the case of a free burgess admitted since the Reform Act, 2 & 3 Wm. 4, c. 88. *Ib.*

FRANCHISE II. (MUNICIPAL.)

The subletting of a portion of the premises for which a party is rated does not deprive him of the municipal franchise in the city of Dublin. *The Queen v. The Lord Mayor of Dublin*, 9 Ir. Jur. N.S. 324. Q.B.

Right of women to vote at election of town commissioners under st. 17 & 18 Vic. c. 103.] Women are capable of voting at the election of town commissioners under the Towns Improvement Act, 1854, st. 17 & 18 Vic. c. 103. *The Queen v. Crosthwaite*, 9 Ir. Jur. N.S. 148. Q.B.

Women are incapable of voting at the election of town commissioners under the Towns Improvement Act, 17 & 18 Vic. c. 103. [*Monahan, C.J., Pigot, C.B., and Ball, J., dissente*.] *The Queen v. Crosthwaite*, 9 Ir. Jur. N.S. 188. Ex. Ch.

GAOL.

Appointment of chaplain to.] A vicar-choral is not, in right of that office, a clergyman ordinarily official within the parish within the meaning of the 7 Geo. 4, cap. 74, secs. 68, 71, 74; and the board of superintendence are not warranted, by the provisions of that statute and of the 19 & 20 Vic. cap. 68, sec. 18, in appointing a vicar-choral to be chaplain of the county gaol, to the exclusion of the incumbent of the parish and his curates having actual cure of souls. *Wade v. Strangways*, 9 Ir. Jur. N.S. 179. Assizes.

GRAND JURY LAW.

Writs of certiorari are granted, not as matter of right, but in the exercise of a sound judicial discretion. In the matter of the Mayo Presentments, 14 Ir. C. L. Rep. 392. S.C. 7 Ir. Jur. N.S. 96. Q.B.

To sustain an application for a writ of certiorari to remove presentments, on the ground that they are illegal, the illegality must appear on the face of the presentments; the Court will not go behind them. *Ib.*

If "the year of the king's reign, and the chapter and section of the Act of Parliament under which" a "presentment" for the levying of any public money is authorised to be made and fiated, is not inserted on the face of the presentment, the omission is an illegality apparent on the face of the presentment, and warrants the granting on that ground of a writ of certiorari. *Ib.*

Where the interests of a large portion of the public are concerned, the Court will sometimes grant a writ of certiorari, although the application for it has not been made until after the lapse of a period greater than would debar an individual from obtaining the writ to redress his own private injury. *Ib.*

A grand jury has not jurisdiction to make on a county at large re-presentments for arrears of county cess, nor to re-present arrears to be levied by instalments. *Ib.*

The grand jury of the County of Mayo re-presented arrears of county cess to be levied off the county at large by twenty instalments. *Held*—That there appeared on the face of the re-presentments an absolute want of jurisdiction, such as warranted the court in granting a writ of certiorari to remove them for the purpose of their being quashed. *Ib.*

The circumstance that some part of the moneys so re-presented had been, in fact, levied before the making of an application for a writ of certiorari was held not to be a bar to the granting of the writ and the quashing of the re-presentments. *Ib.*

A presentment purporting to be for the costs incurred by the solicitor of a grand jury in relation to a bill which was passing through Parliament at the time when the presentment was made shows on its face an illegality which warrants the court in granting on that ground a writ of certiorari. *Ib.*

Semle—That re-presentments can be now made

by a grand jury only under the 19 & 20 Vic. c. 63, s. 6.

GUARANTY.

The defendant entered into the following guarantee with the plaintiff: "You will please to credit D.M.K. to the extent of £30 monthly, from time to time, and in default of him not paying I will be accountable for the above amount." *Held*—That this was a continuing guaranty for goods supplied to the value of £30 in each month, and not a guaranty to the amount of £30 only. *Tennant v. Orr*, 9 Ir. Jur. N.S., 131. C.P.

The true rule in construing a guaranty is not to construe it either strictly against the guarantor or in favour of him, but according to what the court can ascertain to be the intention of the parties to it. *Ib.*

To an action on a guarantee in the above terms the defendant pleaded the guaranty, and paid into court £30, saying that was all that was due upon it. Upon a motion to make absolute a conditional order to reduce a verdict for £225 11s. 10d., obtained by the plaintiff, by the amount of a bill of exchange, taken on account of the amount due upon the guaranty, and from which the defendant had been discharged by the laches of the plaintiff. *Held*—That the case sought to be made being apparently inconsistent with the former one, and the parties having gone to trial on other questions, the defendant was not entitled to the reduction sought for, or to such an amendment of the pleadings as should raise the defence of the passing of the bill of exchange, and the laches of the plaintiff. *Ib.*

HIGHWAY.

The trackway along the Grand Canal, vested in the Grand Canal Company by stat. 11 & 12 Geo. 3 (Ir.), c. 31, is a public highway, and since the passing of the Rathmines Improvement Act is to be repaired by the Rathmines Improvement Commissioners, in whose district it is. So held by O'Brien, J., and Hayes, J., *dissentientibus* Lefroy, C.J., and Fitzgerald, J. *The Queen v. The Rathmines and Rathgar Improvement Commissioners*, 9 Ir. Jur. N.S. 301.

The proper remedy to compel the commissioners to repair is by mandamus. So held by O'Brien J., and Hayes, J., *dubitante* Lefroy, C.J., and *dissentiente* Fitzgerald, J. *Ib.*

HUSBAND AND WIFE.

In an action for necessities provided by the plaintiff for the defendant's wife, the substantial question was as to the fact of a marriage having taken place between the defendant and his alleged wife. The plaintiff gave evidence for the purpose of showing that according to the law of Scotland a valid though irregular marriage had been celebrated. Professional witnesses called at either side gave conflicting evidence respecting the state of the marriage law of Scotland as bearing upon the facts of the case. *Held* That the judge was right in leaving it entirely to the jury, as a question of fact, to say whether the alleged Scotch marriage was a valid contract in accordance with the law of that country, and that he was not bound to have directed them as to what was the state

of the law in Scotland with reference to the facts in evidence. *Thelwall v. Yelverton*, 14 Ir. C. L. Rep. 188, C.P.; s.c. 7 Ir. Jur. N. S. 347.

Evidence was further given of a marriage having been subsequently celebrated in Ireland between the parties by a Roman Catholic priest in holy orders, according to the rites of that Church. It was proved on the part of the plaintiff that the defendant had, within twelve months, occasionally attended Roman Catholic worship; that he had expressed himself in private conversations in approval of the doctrines of the Church of Rome; and that he had declared himself to be of that persuasion to the officiating clergyman. It was on the other hand proved, on the part of the defendant, that he had been born and educated in the doctrines of the Church of England; that he had never publicly renounced that profession; and that he attended the episcopal service frequently during twelve months next before the ceremony. *Held*—per Monahan, C.J., and Ball, J., that there was evidence from which a jury might infer that the defendant had been a Roman Catholic throughout the entire period of twelve months before the marriage, so as to take the case out of the operation of the 19 G. 2, c. 13, (Ir.) the latter statute having reference to actual religious belief and not merely nominal profession. *Ib.*

Held contra, per Keogh, J., and Christian, J., that notwithstanding the evidence relied on by the plaintiff, the learned judge was bound to tell the jury that the defendant had not ceased, during the period in question, to profess the Protestant religion within the meaning of the statute, and that the marriage was void in law. *Ib.*

Wife's chose in action.] A feme covert entitled to a share in a legacy payable out of real estate, with the consent of her husband, agreed, together with the other parties beneficially interested, to accept the lands in lieu of the money. The lands were accordingly conveyed by the trustees of the will to a trustee; and by a subsequent deed declaring the trusts a portion of the land was limited to the husband and wife for their joint lives, and to the survivor of them for life, with remainder to such of their children as the husband in his lifetime, or the wife, if she survived him, should appoint. *Held*—by the Lord Chancellor (the Lord Justice of Appeal not expressing any opinion), that the assignment of the lands to the trustees did not operate as a reduction into possession of the wife's chose in action; and that the lands into which the money was thereby converted were subject to the same uses and trusts as the money. *In re Bayley's estate*, 9 Ir. Jur. N.S., 398. Ch. Ap.

Held also, by the Lord Chancellor (the Lord Justice of Appeal not expressing any opinion), that the modification of the prior rights and interests of the husband and wife in the lands formed a sufficient consideration in the deeds declaring the trusts to make it a deed for value. *Ib.*

Effect of judicial separation.] Where a legacy was bequeathed to a lady prior to her judicial separation from her husband, *held* that, in the absence of an affidavit showing that the existence of this legacy was known to the judge of the Divorce Court, when considering the amount of the wife's alimony, the hus-

band had no claim thereto. *Re Wetherall's trusts*, 9 Ir. Jur. N.S. 25. R.

Held also—That the principal should not be paid out to the wife, but should be settled on the wife and the children of the marriage. *Ib.*

INFANT.

Contract by.] A., while an infant, made a lease to B. of certain lands, reserving a rent; and during his minority commenced an action of ejectment by C., his next friend, against B., laying the demise on the 23rd January, 1861. A. attained full age on the 27th April, 1861, and on the 29th April, in the same year executed to C. a lease of all his estate of W. (including the lands demised to B.); and that lease contained a covenant to avoid all the leases on the W. estate made by him during his minority. A. on the 14th June, 1861, received from B. the half-yearly gale of rent due on the 1st May, 1861, in respect of the lands demised to him, and on the same day gave a receipt to B. for that gale of rent and executed a confirmation of B.'s lease. No step had been taken in the ejectment proceedings from the time when A. came of age until the execution of the confirmation. The ejectment having been afterwards proceeded with, and a verdict had for the plaintiff, on motion that that verdict should be set aside and a verdict entered for the defendant, *held*—that as A. was estopped by his receipt of rent from disputing B.'s title for the period between 1st November, 1860, and the 1st May, 1861, he could not maintain an action of ejectment against B., in which the demise was laid on a day within that period. *Sutor v. Trimble*, 14 Ir. C. L. Rep. 342; s.c. 7 Ir. Jur. N.S. 255, Q.B.

Held also—That by the execution of the confirmation A. was precluded from relying on the lease to C., either as an avoidance of the lease to B. or for the purpose of showing that at the date of the confirmation he had no estate sufficient to enable him to confirm that lease. *Ib.*

Held also—That the confirmation, although made subsequently to the commencement of the action, related back so as to set up the lease to B. from the day of its execution. *Ib.*

Held also—That the 204th section of the Common Law Procedure Act, 1853, does not apply to a case where the plaintiff takes title out of himself. *Ib.*

Held, per O'Brien and Hayes, JJ., that where an infant makes a lease reserving a rent he cannot avoid it until of full age. *Ib.*

The case of *Thornton v. Illingworth*, observed on. *Ib.*

A lease made by an infant is not void, but voidable only, notwithstanding that the rent reserved is not the best obtainable. A lease made by an infant, so reserving a lease, is not avoided by a lease of the same lands made to a third party by the infant upon his attaining his full age. To avoid a lease made by an infant under which the lessee is in possession, upon the lessor attaining twenty-one years of age, some act of notoriety, viz., ejectment, entry, or demand of possession, is requisite—mere execution of a second lease. *Sutor v. Brady*, 14 Ir. C. L. Rep. 61. Ex.

Both leases might stand together as a lease and a grant of the reversion therein. *Ib.*

Two tests as to what acts of an infant are void, and what voidable. *Ib.*

INFORMATION.

Case stated.] When after information filed, but before issue joined, a case is stated by consent of plaintiff and defendant for the opinion of the Court under the 50th section of the 3 & 4 Vic. c. 105, it was held, that that section has no reference to cases where issue is not joined. The 92nd section of the Common Law Procedure Amendment Act, 1853, which empowers to parties to state a case, does not deal with informations. *The Attorney-General v. The Great Southern and Western Railway Company*, 9 Ir. Jur. N.S. 86.

INJUNCTION.

Trade-marks.] J. sold under a trade-mark a medicine known as J.'s ointment. O., without authority sold an ointment as J.'s ointment, under an imitation of J.'s label. J. having threatened proceedings against O. an agreement was made by which, after reciting that O. alleged that his invasion of the rights of J. was inadvertent, and that he had discontinued the same, and agreed not again to infringe on such rights, it was agreed that "all claims in respect of the said invasion, not only with respect to the said O., but to include all parties who may have purchased the said ointment from him, shall be settled and discharged by the payment of the sum of £1000," the receipt of which was acknowledged. This agreement also contained an undertaking to execute a formal release of all claims and demands in respect of the above infringement. J. having commenced suits against persons who had purchased the ointment from O. previously to the agreement but retailed it afterwards, O. filed a petition specifically to enforce the agreement, and to restrain J. from proceeding in the suits against the purchasers from O. *Held*—That the agreement did not authorize any sale after the date of it of ointment previously purchased from O. Secondly,—that even if the terms of the agreement required the construction that J. was to permit ointment previously purchased from O. to be sold under the imitated trade-mark, the Court would not specifically enforce such an agreement, as it would be a fraud upon the public. *Oldham v. James*, 14 Ir. Ch. Rep. 81. Ch. Ap.

Costs in suits to restrain waste.] Where in an injunction suit in the nature of a writ of estrepement to restrain waste the case is forced to a hearing by the conduct of the respondent, the petitioner, if successful, is entitled to his costs of suit, although an account of the waste committed be waived. *Dunany v. Dunne*, 9 Ir. Jur. N.S. 342. Ch.

Semble—When in such suits no account is sought, or the account is waived, the petitioner should serve a notice on the respondent to ascertain whether the right to continue the injunction is disputed. *Ib.*

JOINT STOCK COMPANY.

To sustain an action for money had and received against a person named as a director of a projected company by a proposed subscriber for his deposit, two things must be shown; first, that the money so paid came to the defendants hand or power for the pur-

pose of being applied to the objects of the projected company; and secondly, that the project failed, by reason of no company, or company conformable to the prospectus, having been formed. *Hayes v. Stirling, Shaw v. Stirling, Dudgeon v. M'Birnie, Madden v. Cusack*, 14 Ir. C. L. Rep. 277. Exch.

To a summons and plaint which averred that the defendant represented himself to be a director, and required payment of a deposit by any applicant for shares to be made to persons named by him as the bankers of the company, and that the plaintiff, in reliance on the representation so made by the defendant, paid to the bankers of the company, who were his agents in that behalf, the amount of the deposit, the defendant demurred, as it was not shown that the money came to the defendant's hands. Demurrer disallowed. *Ib.*

The natural meaning of the averment, "that the scheme detailed in the prospectus wholly failed, and became abortive, and had been totally abandoned," is, that the consideration upon which the deposit was paid had wholly failed. *Ib.*

JOINT TENANTS.

Exclusive possession; Statute of Limitations. Upon the trial of an ejectment brought by the surviving joint tenant under a freehold lease, it was proved that many years previously the plaintiff and the co-tenant had made a division of the lands, the subject of the lease, by parol. The co-tenant continued in exclusive possession of his portion until his death, when he devised it to his son, and the possession of the co-tenant, together with the possession of his son, extended over a longer period than twenty years. *Held*, that the defendant, who derived by assignment from the son of the co-tenant, was entitled to a direction for a verdict by virtue of the Statute of Limitations, 3 & 4 Wm. IV., c. 27, sec. 12. *Murphy v. Murphy*, 9 Ir. Jur. N.S. 290, C. P.

ISSUE.

Issue of devisavit vel non. E, seized of lands subject to mortgages, devised them to P, in whom the mortgages became vested. *Held*, that the Court had jurisdiction in a suit instituted by the heir of E, praying the ordinary redemption relief and an issue *devisavit vel non*, to grant such an issue. *Egmont v. Darrell*, 14 Ir. Ch. Rep. 564, Ch.

JUDGMENT.

Execution of warrant to confess. A defendant being in custody, under execution on foot of a judgment, in consideration of his discharge, gave a bond and warrant to confess judgment for a larger amount, to a party who represented himself as the assignee of the former judgment. Judgment having been subsequently entered on foot of the bond and warrant, and registered as a mortgage against the defendant's lands, an application was, several years afterwards, made to set aside the bond and warrant as having been obtained from the defendant by fraudulent misrepresentation, and under pressure of duress. *Held*, on the ground that there had been some consideration for the original judgment; that a long period had elapsed during which both the judgment creditors

had left the country; and that the party in whose name the present application was made had ceased to have any personal interest in the matter; that the motion ought not to be granted. *Nolan v. Gumley*, 14 Ir. C. L. Rep. 301, C.P.; s.c. 8 Ir. Jur. N.S. 253.

Where the plaintiff dictated to the defendant, in custody, a letter, addressed to an attorney whom the defendant had never seen, requiring him to attend the next day, and witness the defendant's signature to a bond and warrant of attorney. *Held*, that the fact of the attorney not having been originally named by the defendant did not vitiate the execution of the instrument by the defendant, within the 93rd General Order, 1851. *Ib.*

Held, that an attestation clause, in this form, was valid: "Signed, sealed, and delivered in the presence of Francis Carolan, attorney for the said P. G., 11 Talbot-street, Dublin, and subscribe my name as his attorney, and at his request." *Ib.*

Redocketing. Priority. Where an unredocketed judgment is followed by a mortgage with a redocketed judgment intervening, the priority of the unredocketed judgment is not affected, if no claim be made on foot of the mortgage. *Woodroffe v. Greene*, 9 Ir. Jur. N.S. 379, Ch. App.

The rule in *Huthwaite's case*, 2 Ir. Ch. Rep. 54, that an unredocketed judgment is not only null and void as against a subsequent mortgage, but also null and void against an intervening redocketed judgment, is not applicable where the mortgagee makes no claim to the fund to be distributed. *Woodroffe v. Greene*, 14 Ir. Ch. Rep. 224, R.

Charge. A judgment is not made a charge upon the ecclesiastical rectories of the Crown, by the 3 & 4 Vic. c. 105, s. 22. *Sweeney v. Fleming*, 14 Ir. Ch. 23, Ch. App.

Winter v. Homan, 6 Ir. Eq. Rep. 479, overruled *Ib.*

JUDGMENT MORTGAGE.

Sufficiency of affidavit. A judgment was recovered by R. W. S. against T. B. in the Court of Queen's Bench for the sum of £1,200 debt, and £3 1s. 11d. for costs. The affidavit to register the said judgment as a mortgage against the estate of the said T. B., pursuant to statute 13 & 14 Vic. c. 29, stated that the said R. W. S. had obtained a judgment against T. B. for the sum of £1,200 debt, besides ——— for costs. *Held*, that the affidavit did not comply with the requisites of the 6th section of the statute. *In re Bennett's estate*, 9 Ir. Jur. N.S. 119, L. E. C.

Held, also, that a payment to an incumbrancer on account of a judgment badly registered as a mortgage made by the Court in the presence of a subsequent incumbrancer does not in any way prejudice the right of the subsequent incumbrancer to impeach the prior statutable mortgage on the ground of defective registration. *Ib.*

In an affidavit, filed under the provisions of the 6th section of the 13 & 14 Vic. c. 29, for the purpose of converting a judgment into a mortgage, the lands intended to be comprised in the mortgage were described as "the lands of A, B, and C, situate in the baronies of D and E, and county of L." *Held*,

that the affidavit was insufficient, the baronies not having been "distinctly" stated, within the meaning of the statute. *In re Morrow's estate*, 14 Ir. Ch. Rep. 45, Ch. App.

The entry, by the officer, of the party's name, &c. in the roll of judgment, under the 8 Geo. IV, c. 85, s. 8, is not the title of a judgment. In such entry, and in the judgment the statements of the residence of the plaintiff were different. An affirmation, made for the purpose of registering the judgment, under the 13 & 14 Vic., c. 29, followed the statement in the judgment. Held, that the affirmation was correctly framed. *Wolsey v. Worthington*, 14 Ir. Ch. Rep. 369, Ch. App.

Effect as to execution against chattel interests.] The sheriff cannot take in execution, under a writ of *fiery facias*, a chattel interest against which a judgment mortgage, under the 13 & 14 Vic., c. 29, has been registered. *Re Gerrard's estate*, 9 Ir. Jur. N.S. 21, Ch. App.; s. c. 14 Ir. Ch. Rep. 466.

The words "anything in this Act notwithstanding" in the 10th section of the 13 & 14 Vic., c. 29, are equivalent to "anything to the contrary in this Act notwithstanding," and refer to that clause of the 1st section of the Act, which abolishes execution against all interests in lands. *Ib.*

JURY AND JURY PROCESS.

The provisions of section 109 of the Common Law Procedure Act, 1856, do not apply in the case of a criminal information tried by special jury, struck under the old system; and, therefore, the fact of such a jury having been summoned by virtue of writs of *venire* and *distringas*, and not by virtue of the precept of the judges of assize, does not form a ground of challenge to the array. *The Queen v. Rea*, 9 Ir. Jur. N.S. 221, Q. B.

The provisions of section 18 of the statute 3 & 4 Wm. IV., c. 91, are directory only, and not mandatory; and therefore, the fact of none of the jurors having been summoned by the sheriff six days before the assizes does not form a ground of challenge to the array. *Ib.*

LANDED ESTATES COURT.

Specific performance of agreement to grant a lease.]

An agreement for a lease at a fair rent and value entered into by the owner of an estate at the time when a receiver had been appointed over it by the Court of Chancery, the Court of Chancery never having taken any course in respect to it, although the tenant went into possession under the same, held valid; and *Held*, that the owner of the estate, which was then selling in this court, should execute a lease to the tenant in pursuance of the agreement, and that same should appear upon schedule of tenancies. *In re Blake's estate*, 9 Ir. Jur. N.S. 97, L. E. C.

Re-opening question of title to lands sold.] The Court will not re-open a question of title to lands sold and conveyed by it unless upon clear evidence, that it has conveyed lands which ought not to have been conveyed through the fraud, negligence, or misconduct of the party having the carriage of the sale, in which case the Court has jurisdiction to compel a reconveyance, or award compensation; but when the

Court is called upon to exercise this jurisdiction, there must be a real and substantial pecuniary grievance to redress. *In re Collis' estate*, 9 Ir. Jur. N.S. 177, L. E. C.; s. c. 14 Ir. Ch. Rep. 511.

Apportionment of rent.] Where lands ordered for a sale are held jointly with other lands under a fee-farm grant, the Court has no jurisdiction to apportion the fee-farm rent between the sold and unsold portions. *Casus omissus* in the Landed Estates Court Act. *Cassan's estate*, 9 Ir. Jur. N. S. 72, L. E. C.

Compensation to purchaser.] Where a purchaser elects not to be discharged but to apply for compensation, he must be content with the amount of his actual loss, and cannot complain of misrepresentation of value, which is only ground for discharge. In cases of over statements of rents payable under tenancies from year to year, the Court taking into account the tenant's power to quit, allows a year and a-half rent computed on the over statement. *Re Ussher's estate*, 9 Ir. Jur. N.S. 58, L. E. C.

Discharging purchaser.] One moiety of a fee-farm rent was put up for sale, but the purchaser misunderstood the description in the rental, and whilst bidding considered he was bidding for the whole rent and not a half only. The Court having regard to the fact that the sum bid was manifestly excessive, discharged the purchaser on the terms of his lodging in Court a sum sufficient to meet the expenses of another sale, and undertaking to lodge any further sum the Court might require and paying the owner's costs of the motion. *Re Brown and Blackie's estate*, 9 Ir. Jur. N.S. 59, L. E. C.

Practice.] Lien for costs claimed by solicitor, upon deeds lodged in Court, it not being intended to proceed with the petition for sale of lands—Notice of motion served by the solicitor for an order directing the keeper of the deeds to hand them back. *Held*, that the proper course would have been to have served notice of motion for an order declaring the solicitor entitled to a lien, and for liberty to file a claim setting forth the particulars to be vouched before the examiner; and in the event of the sum found to be due not being paid, for an order to continue and take the carriage of the proceedings. *Re Kelly's estate* 9 Ir. Jur. N.S. 59, L. E. C.

LANDLORD AND TENANT.

Construction of agreement.] By a memorandum of agreement certain premises were agreed to be "let for one year certain," from the 1st day of April, 1860, at a rent payable quarterly on certain days in each and every year during the tenancy;" and certain allowances were to be made to the intended lessee out of each of the first four quarters' rent. *Held*, an agreement for a tenancy from to year. *Wharton v. Kelly*, 14 Ir. C. L. Rep. 293, Q. B.; s. c. 7 Ir. Jur. N.S. 58.

The case of *Thompson v. Maberly*, followed. *Ib.* *Surrender by act and operation of law.*] A verbal agreement between an undertenant and the owner of the reversion, made contemporaneously with a formal surrender of the interest of the mesne lessee, and which agreement was proved to have been acted upon, to the effect that the sub-tenant should thenceforward

remain in possession of part of the premises as caretaker, *Held*, to operate as a surrender by act and operation of law, although no actual change of possession took place at the time. *Lambert v. McDonnell*, 9 Ir. Jur. N.S. 871.

Effect of statute 23 & 24 Vic., c. 154.] To a summons and plaint by an assignee of the original grantor of a fee-farm grant, against a defendant, as assignee of the original grantee, for a breach of covenant, committed prior to the 1st January, 1861, the defendant demurred. *Held*, that fee-farm grants come within the scope of the Landlord and Tenant Law Amendment Act, (Ireland) 1860, 23 & 24 Vic., c. 154. And (Pigot, C.B., *dissentiente*), that fee-farm grants, executed prior to the passing of that statute, are affected by its provisions. *Chute v. Busteed*, 14 Ir. C. L. Rep. 115, Exch.; a.c. 8 Ir. Jur. N. S. 369.

Per Pigot, C.B.—That without expressing any opinion as to whether fee-farm grants come within the scope of the statute, the latter does not contain sufficiently clear and unequivocal indications of the intentions of the Legislature that it should have a retrospective operation. *Ib.*

Security for mesne rates and costs, under statute 23 & 24 Vic., c. 154, s. 75.] An agreement to take a lease, signed by the tenant only, and not by the landlord, is not such an instrument regulating the terms of the tenancy as will entitle the landlord to require security for mesne rates and costs under statute 23 & 24 Vic., c. 154, s. 75, in an ejectment against the tenant overholding. *Domville v. Brack*, 9 Ir. Jur. N.S. 266, Q.B.

Precept to restrain waste under statute 23 & 24 Vic., c. 154, s. 35.] Informations taken under the 35th section of the 23 & 24 Vic., c. 154, upon which it is sought by the landlord of any premises to obtain a precept from a justice of the peace to restrain a tenant or others from doing any acts of waste, in said section mentioned, must state, if present acts of waste are complained of, what those acts are; and, if future, what those future acts, the tenant intends to do, are. A precept, therefore, granted on an information, which informed merely of past acts of waste, and which averred that the tenant "persists in doing and committing acts of unlawful waste to the injury and damage of said premises, notwithstanding that I warned him to desist from the same," was held bad and quashed accordingly. *In re Brady v. Slator*, 9 Ir. Jur. N.S. 153, Exch.

LEASE.

F., tenant of C. for a term of years, in 1844 "agrees to let unto G. the house and demesne of C. in as large a manner as the same is now held by F., at the rent of £48 per annum, for and during a term equal to the term which F. has of same, leaving him full power of ejectment and right of distraint in case of non payment of rent, G. to have a power of surrender by giving six month's notice in writing." *Held* an agreement for a sub lease, not an assignment. *Palmer v. Spring*, 14 Ir. Ch. Rep. 380. Ch.

In 1847 F. served a notice on G., calling on him to take out a lease; G. omitted to do so, but remained in possession, paying rent under the agree-

ment. There were some negotiations between the parties in 1854. *Held*—That the original agreement was not surrendered, and that it might be enforced on a petition filed in 1862. *Ib.*

M., seised and possessed of certain real, chattel real, and personal property, including property in N., held for lives renewable, subject to a lease for ninety-nine years from February, 1762, devised all her property to R. and H., whom she named as her executors, upon trust, to pay certain annuities, and subject thereto devised her property to other persons. The will contained a power to the trustees and executors to sell or dispose of any portion of the property as they should think fit for the advantage of the parties interested. The testatrix died in 1819. H. alone proved the will, and obtained a renewal of the lands of N. in his own name as trustee; and in 1824 one of the persons beneficially entitled to these lands executed a renewed lease of this at an increased rent, in the preparation of which he acted as solicitor. The devised property having become deficient for the payment of the annuities, the annuitants, about 1844, went into possession and receipt of the rents and profits of all the devised property. On the expiry of the lease of 1762 the annuitants filed their cause petition against the lessees under the lease of 1824, claiming thereby to hold discharged of this lease. *Held*—That the receipt of the increased rent by the annuitants from 1844 did not operate as a confirmation of the lease by them, and that they were entitled to hold discharged from the lease. *Metcalf v. Ryves*, 14 Ir. Ch. Rep. 558, Ch.; a. c. 8 Ir. Jur. N. S. 405.

LEGACY.

A certain legacy, payable to the legatee at twenty-one, was charged primarily on the testator's personalty, and on his realty, failing sufficient personal assets. At his death the personal assets were sufficient, but owing to a devastavit by the executors, became, at some subsequent unascertained time, inadequate. The legatee (the petitioner) attained twenty-one in 1849. The petition was filed on the 26th of January, 1863. *Held*, first, the mere non-enforcement of payment from the executor, no laches to estop the legatee. *In re Massy's estate*, 14 Ir. Ch. Rep. 355. L.E.C.

Secondly, the real estate of the testator is liable to the payment of the legacy. *Ib.*

Semble, there might have been laches if the executors had appropriated a fund for payment of the legacy, and that fund had been permitted to remain in the executor's hands. *Ib.*

Donatio mortis causa.] Where testator knew that he was in his last illness and delivered several articles into the possession of his sister as a gift in case he should die, and where also immediately before his death he told her that he gave her his gold repeating watch which was on the table in his bedroom, but which he did not deliver into her possession, and which she did not take possession of until after his death. *Held*—that the several gifts were good as *donationes causa mortis*. *Lyster v. O'Sullivan*, 9 Ir. Jur. N.S. 242. Master Litton.

LEGACY DUTY.

Practice as to enforcing an account of legacy duty by attachment against an accountable party not being a personal representative, trustee, or legatee. *In re J. C., an accountable party for legacy duty*, 9 Ir. Jur. N.S. 254. Exch.

The exemption from legacy duty of "any legacy given for any purpose merely charitable," contained in the 5 & 6 Vic. c. 82, s. 38, applies only where the charitable purpose for which the legacy is given is described in and by the will. Therefore, where a testatrix bequeathed the residue of her real and personal property to A. and B. and the survivor of them, his heirs, executors, administrators, and assigns, and requested that the intentions expressed in her will might be carried into effect, without stating in the will what those intentions were, but contemporaneously with the execution of the will sent a letter to A. and B., stating that she had made the bequest to them in the full confidence that they would found a convent for the education of poor female children, *Held*—That the personal representative of A. and B. was liable to legacy duty upon the amount of the residue bequeathed. *The Attorney General v. Cullen*, 14 Ir. C. L. Rep. 137. S.C. 8 Ir. Jur. N.S. 189. Exch.

LIBEL.

Plea of publication by mistake.] To a summons and plaint for composing and publishing a certain libel (which libel in substance charged that the plaintiff, while in defendant's employment as his shop assistant, received certain monies due to defendant by a customer, which he, the plaintiff, failed to account for, and fraudulently converted same to his own use), defendant pleaded in effect, after stating facts by which he was induced to believe the truth of the charge in the libel set forth, that the libel complained of was in the form of a letter intended by the defendant to be written and addressed to the plaintiff, and to be received only by him; that the letter was written *bona fide*, and without malice, and was intended to obtain payment of certain monies received by the plaintiff while in defendant's employment, and that the letter was sealed and by pure mistake directed to one K., and not to the plaintiff; that K. was then the employer of the said plaintiff, and received same in due course of post. On demurrer to the defence it was *held*, that the averment of publication by mistake was no answer to the cause of action. *Fox v. Broderick*, 9 Ir. Jur. N.S. 91; s.c. 14 Ir. C. L. R. 453. Exch.

Plea of privileged communication.] To an action by the plaintiff, an importer of French brandy, for falsely and maliciously writing and publishing of him the following words:—"Now as to Mr. S., I warn him that I am willing to leave the matter to arbitration; as to his conduct, I did not say half enough—it more resembles that of a freebooter than that of an honourable British merchant." The defendant pleaded that the defendant published a notice saying that he had tasted the brandy of some of the parties who got prize medals, and it was as vile stuff as ever was made; that the plaintiff employed B., an attorney, to write to him; that the defendant stated it was not

to the plaintiff's brandy he referred but that of some other person, upon which the plaintiff required to get from the defendant a sample of the brandy the defendant meant, and required that the defendant, at his own expense, should procure an advertisement to be inserted in the newspapers fifty times, stating that it was not to the plaintiff's brandy he alluded, but that it was of an excellent quality; and further required that the defendant should pay him a sum of £20, the plaintiff alleging that he had incurred expense to that amount; that the defendant applied both to the plaintiff and B., an agent of the plaintiff, and that both the plaintiff and his agent referred him to B.; that B. wrote to him, threatening immediate proceedings if the £20 was not paid and the other terms fulfilled; that the defendant believed said demand to be extortionate, and had an interest in endeavouring to induce the plaintiff and B. to abstain from taking legal proceedings against him; and acting *bona fide*, wrote and published the words in question in a letter to B. without malice, and did not publish them except to the said B. *Held*—That this defence disclosed a privileged occasion. *Sayers v. Beggs*, 9 Ir. Jur. N.S. 337. C.P.

Action for a libel contained in a letter addressed by the defendant to an attorney, who had been employed by the plaintiff to sue a third party for a sum of money alleged to be due to him, and the purport of which letter was to dissuade the attorney from proceeding with the suit. The letter went on to charge the plaintiff's wife with having created a turmoil in the neighbourhood. The defendant pleaded that the plaintiffs were the tenants of a party to whom the defendant was land agent, and A. was bailiff of the estate; that in pursuance of an agreement between the parties, and by the direction of the defendant, A. had sold the interest of the plaintiffs in their holdings, which sum A. afterwards duly applied in pursuance of the terms of the agreement, but which application the plaintiffs had refused to ratify, and employed the attorney to sue A. for the amount; and that under the circumstances as aforesaid the defendant did write and publish the said letter, believing the matter therein stated to be true, and to protect his said servant, the said A., from vexatious litigation, as he lawfully might, for the causes aforesaid. *Held*—That this was a good plea of privileged communication, and that notwithstanding the absence of an averment that the publication was *bona fide* and without malice, it sufficiently appeared that the writing of the letter was written exclusively for the purpose mentioned in the latter clause of the defence, which excluded the inference of malice. *Halloran and wife v. Thompson*, 14 Ir. C. L. Rep. 384. S.C. 8 Ir. Jur. N.S. 332. Exch.

Held also—That if the defence showed that the privilege had been exceeded, the alleged excess was a matter only for the jury to consider on the question of malice, and did not vitiate the defence. *Id.*

Indictment for at Quarter Sessions.] The Court of Queen's Bench will not grant even a conditional order for a writ of mandamus commanding a Court of Quarter Sessions, which has already exercised soundly its judicial discretion in the matter to send up to the grand jury a bill of indictment for the publication of

a malicious libel instead of postponing it to the next Assizes. *In re William Jones Armstrong*, 14 Ir. C. L. Rep. 97, Q.B.; s. c. 7 Ir Jur. N. S. 77.

LICENSE.

To an action for breaking and entering the plaintiff's close, and erecting abutments thereon and refusing to remove them, the defendants pleaded that the same were built for the necessary support of a party wall between premises held by them as tenants to one C., and the close in question, and that same were built with the consent of the occupier who held the said close as tenant of C., and pursuant to an agreement between the defendants and C., and that the plaintiff became occupier of said close as tenant to C. after the same were built. Upon demurrer to replication, that the alleged consent and agreement were not contained in any deed nor in any note or instrument in writing, and that C. had revoked his consent, judgment was given for the plaintiff. *Connolly v. Alliance Gas Company*, 9 Ir. Jur. N.S. 67. C.P.

LIMITATIONS (STATUTE OF).

In 1812, lands, held for lives renewable, were conveyed by A to the use of himself for life, remainder to B and his heirs. A died, and in 1813, B, who did not appear to have ever gone into possession, by marriage articles, agreed to settle the lands on himself for life, remainder to his wife for life, remainder to the petitioner. In 1814 a renewal was granted to the heir-at-law of A. In 1827, B died, when the petitioner's right under the articles accrued. A, and those claiming under him, remained in undisturbed possession from 1814 to 1862. *Held*, that the petitioner's rights under the articles were barred by the Statute of Limitations. *Rossiter v. Rossiter*, 14 Ir. Ch. Rep. 247, R.

Held also, that although the petition did not pray for a specific execution of the articles, yet as the claim was founded on them, it was by *laches*, independently of the Statute of Limitations. *Ib.*

A creditor filed a claim on a judgment against the owner, calculating interest by charging all the interest which accrued since the judgment, and giving credit for rents received by him out of a portion of the estate of which he had been put in possession by the owner, which calculation left a balance due exceeding six years' interest. The creditor contended that his possession of part of the estate prevented the operation of the Statute of Limitations. *Held*—That claimant was only entitled to six years' interest from date of filing petition. *In re Browne's and Beytagh's Estate*, 9 Ir. Jur. N.S. 155. L.E.C.

Pleading. The plaintiff having brought an action against the defendant for the breach of an agreement to execute a lease of lands of which he had been the tenant, and for false representation and fraudulent concealment in reference to the same, the defendant, by leave of the Court, pleaded seven defences to the count upon the agreement. The defendant applied to the Court for liberty to plead the Statute of Limitations in addition to the pleas already pleaded, he having omitted to do so within the right time by mistake. *Held*—That as the defences disclosed a case of acquiescence on the part of the plaintiff in al-

lowing his rent to fall into arrear and permitting himself to be ejected, and the land to be re-set to a third person without making a claim on the foot of the alleged agreement, the defendant was entitled to every legal defence, and might therefore plead the Statute of Limitations (Christian, J., *dissentiente*). *Archbold v. Earl of Howth*, 9 Ir. Jur. N.S. 247. C.P.

And, (per Christian, J.) that the defendant was in the position of one seeking a favour from the Court; that the Court had a duty to look into the circumstances of the case; and that as there were pleas on the record which exhausted the merits, it would be unfair to allow the defendant to defeat the plaintiff by the Statute of Limitations in case the latter should succeed on the merits. *Ib.*

See MORTGAGE.

MAGISTRATE.

Where a case stated by magistrates was struck out, it not having been transmitted, and notice of it not having been served as required by the statute, the Court refused to give costs against the appellant. *Conway v. Richardson*, 9 Ir. Jur. N.S. 7. Q.B.

MALICIOUS PROSECUTION.

An action does not lie for maliciously causing to be issued and served a trader debtor summons under "The Irish Bankruptcy and Insolvency Act, 1857," upon foot of a debt falsely alleged to exist, and so causing the plaintiff to attend publicly in the Bankrupt Court, whereby the plaintiff was injured in his credit and was prevented from attending to his business, and incurred costs in resisting said proceedings. (Hayes, J., *dissentiente*.) *Lunham v. Wakefield*, 9 Ir. Jur. N.S. 106. Q.B.

MANDAMUS.

Action for mandamus under the Common Law Procedure Act (Ireland), 1856. A summons and plaint recited certain Acts of Parliament and awards made in pursuance of them by the Commissioners of Public Works, by which the Lower Bann navigation and all locks, weirs, &c. thereto belonging were made to vest in the defendants as a body corporate; and by which powers to levy tolls in respect of the use of the navigation, and to make bye-laws and prosecute and enforce penalties against persons who would obstruct the free passage of the water were conferred. It then stated that the plaintiff was entitled to the exclusive right of fishing for eels in a portion of the Lower Bann River, within the jurisdiction of the defendants, and complained that the navigation was obstructed by stakes and poles, and that the channel and navigation had been frequented by poachers who obstructed the plaintiff's fishermen and intercepted the eels. The plaintiff claimed a writ of mandamus to compel the defendants to cause the stakes and poles to be removed. *Held*, upon demurrer by the defendants, that the summons and plaint disclosed no cause of action against the trustees, and no grounds entitling the plaintiff to a writ of mandamus. *Hastings v. The Lower Bann Navigation Trustees*, 9 Ir. Jur. N.S. 7. C.P.

See LIBEL.

MANOR.

Whatever may be the origin of the distinction, there is a settled distinction between the case of a lord of a manor re-acquiring lands once severed from the manor by escheat and by re purchase. In the former case the lands become re-united to the manor so as to pass by a previous devise of it, but in the latter case this is not so. *Delacherois v. Delacherois*, 9 Ir. Jur. N.S. 255. H. of L.

A patent from the Crown, 2 Car. 1, granted lands to H., with power to create manors thereof. A later patent re-granted the lands to H., and declared that certain of such lands, including the lands of B., should form the manor of D. In 1721 the then owner of the manor of D. made a fee-farm grant of the lands of B. to L., paying rent and doing service therefore at the court of D. The manor courts had been held at D. from before the time of living memory, and the occupiers of the lands of B. attended these courts. In leases of B. the tenant was bound by covenants to do suit to the manor courts of D. *Held*—That there was evidenceto go the jury that there was, in 1721, a manor of D., comprising the lands of B. as part of its demesne. *Ib.*

Quære—Whether the effect of the deed of 1721 was to vest the lands of B. in L., wholly severed from the manor of D., or to be holden as of the manor of D. *Ib.*

MARSHALLING OF ASSETS.

A. being possessed of two estates, X. and Y., both estates were sold in the Landed Estates Court. X. was subject to a mortgage and also to prior incumbrances. Y. was subject to the prior incumbrances, but not to the mortgage. There was also a subsequent judgment affecting both estates. *Held*—That the mortgagee was entitled to have the securities marshalled so as to have the prior incumbrances paid, in the first instance, as far as possible, out of the produce of the lands of Y., and that the subsequent judgment creditor had no equity modifying the mortgagee's right in that respect. *In re Scott's estate*, 14 Ir. Ch. Rep. 63. Ch. Ap.

MARSHALSEA.

The marshal has the custom of the Marshalsea, and is responsible for the escape of prisoners in all cases (except where the escape is caused by the act of God or the Queen's enemies). Where, therefore, a prisoner escaped from out of the marshalsea, and where such escape was not caused by the act of God or the Queen's enemies, but where it happened through the negligence of the officers of the prison, the marshal shall be answerable, although since the passing of the 19 & 20 Vic. c. 68, s. 17, he no longer has the power of selecting his own officers—of appointing competent, or of removing incompetent ones from their posts in the keeping of prisoners confined in said marshalsea. *Hoccy v. Caulfield*, 9 Ir. Jur. N.S. 134. Exch.

MASTER AND SERVANT.

Wrongful dismissal. *Semble*, a master who has dismissed a servant may justify the dismissal by shewing that at the time of the dismissal the servant had committed an act which justified it, though the mas-

ter did not assign it as the ground of the dismissal nor even know of it. *Sed quære, Cassons v. Skinner* (11 M. & W. 161); *Kenny v. Chisholm*, 9 Ir. Jur. N.S. 357. C.P.

Action by servant against master for negligence. A summons and plaint which complained—that the defendants were in the possession and occupation of a certain distillery, and lofts and stores connected therewith; that P. S. deceased, was employed by the defendants as a labourer, to do certain works in and about the said distillery at night; averment, “that at the time aforesaid, the said P. S. deceased, as such labourer, had, whilst so employed, access by the license of the defendants to one of the said lofts at night, and by such license as aforesaid used one of the said lofts for the purpose of sleeping during the intervals of the night, when he was not actually engaged in his employment; yet, the defendants, well knowing the premises, wrongfully and negligently permitted a certain aperture then being in the floor of the said loft to remain open, without being properly guarded and lighted, by reason whereof the said P. S. while passing in the night along the floor of the said loft, in pursuance of the said license, fell through the said aperture, and was thereby wounded and injured, and by reason of the wounds and injuries thereby occasioned to him, as aforesaid, the said P. S. afterwards died.” *Held* bad on demurrer, inasmuch, as no facts were disclosed on the plaint which would cast the duty of guarding and lighting said aperture on the defendants. *Sullivan v. Waters*, 9 Ir. Jur. N.S. 112, Exch.; s. c. 14 Ir. C. L. Rep. 460.

MORTGAGE.

Effect of Statute of Limitations. The payment of money to the mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its integrity and force with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent. Therefore, if estates A., B., and C. are included in one mortgage, and the owner of A. pay the interest, the mortgagee is not barred by 3 & 4 Wm. IV., c. 27, s. 40, and 7 Wm. 4 & 1 Vic. c. 28, from his remedy against B. & C. *Chinnery v. Evans*, 9 Ir. Jur. N.S. 281, H. of L.

A receiver of the rents of a mortgaged estate is the receiver of a mortgagor, and any payment made by such receiver, by order of the Court, is payment in law by the legal agent of the person liable to pay within the meaning of 3 & 4 Wm. IV., c. 27, s. 40. *Ib.*

The assignment by a mortgagor of outstanding terms to a trustee for the purchaser is not a possession of a prior incumbrancer within the meaning of 3 & 4 Wm. IV., c. 27, s. 42, so as to entitle the mortgagee to more than six years' arrears of interest. *Ib.*

Quære, whether the payment of interest on a mortgage by a mere stranger would be a payment within 3 & 4 Wm. IV., c. 27, ss. 40, 42. *Ib.*

Waiver of clause of re entry for non-payment of interest. A mortgage deed contained a proviso making the principal money payable, in case any

half-yearly payment of interest should be postponed for more than forty days, and the clause of re-entry provided that this stipulation should not be considered as waived by any subsequent acceptance of interest. The mortgage money and interest were payable in Ireland, but upon one of the half yearly gales of interest becoming due, the mortgagee was not in Ireland to receive it. The forty days' grace expired before the mortgagor, by the mortgagee's directions, remitted it by a letter of credit. Before the next half-year's gale was due, the mortgagor accepted a bill for the amount, at the mortgagee's request, and for his convenience. *Held*, that there was no forfeiture; and if there had been, that it would have been waived by the transactions relating to the next gale of interest. *Re Taaffe's estate*, 9 Ir. Jur. N.S. 18, L. E. C.; s. c. 14 Ir. Ch. Rep. 347.

Equitable mortgage by deposit of title-deeds.] The Landed Estates Court have power to sell the interest created by a lease containing a covenant against assignment, when the lease has been deposited by way of equitable mortgage. *Ex parte Domville; In re Fowler, owner*, 14 Ir. Ch. Rep. 19, Ch. App.

NOTICE.

Constructive notice.] X. by his will, devised the interest in a lease for a term of years to A. and B., subject to certain charges thereby created, and appointed A. and C. his executors. A. and B. subsequently executed to D. a mortgage of the premises comprised in the lease, but did not produce the original lease, nor deduce their title to it, the indenture of mortgage merely reciting that the premises had been demised to X., and were "now vested in A. and B., or one of them," for the residue of a term of years, and no mention being made of the will of X., under which A. and B. derived, nor the charges created thereby. *Held*, that the mortgagee was guilty of gross negligence in not requiring the deduction of a mortgagor's title from X., and therefore was affected with constructive notice of the charges created by the will of X. *Re Oldens, bankrupts*, 9 Ir. Jur. N.S. 1, Ch. App.

Rorke, the owner of certain lands, and also a solicitor, executed to Stein a mortgage of the lands, dated March 29th, 1856, but by arrangement between the parties, not registered until April 3rd, 1859. On the 7th of March, 1859, Rorke made a lease, on fine, of the same lands to Maher: the lease was registered on March 16th, 1859. Rorke prepared the lease, and had it registered, for which Maher paid him costs out of pocket only. Maher employed no other solicitor in the transaction, nor had he ever employed Rorke as his solicitor in any other transaction. *Held*, that Rorke was Maher's solicitor in the transaction; and that Maher must, therefore, be held to have had, through Rorke, notice of the prior unregistered mortgage, and that the lease should be postponed to the mortgage accordingly. *In re Rorke's estate*, 14 Ir. Ch. Rep. 442; s. c. 8 Ir. Jur. N.S. 245. Ch. App.

OFFICER.

Setting aside summons and plaint in action against officer of Court.] The Court will set aside a summons and plaint in an action for a mandamus brought

against its officer for refusing to receive a pleading in a criminal case, tendered after issue joined, and after the record had been sent from the Crown office to the Assizes. *Rea v. Nagle*, 9 Ir. Jur. N.S. 81, Q. B.

PARTNERSHIP.

Constitution of.] J. W. and W. W., trading under the style of "J. and W. W.," and W. G., entered into an agreement, by which W. G., "in consideration of the salary and others hereinafter expressed," bound himself to manage the business of J. W. and W. W., under their superintendence, for three years: and in consideration of the services so to be rendered, J. W. and W. W. bound themselves to pay to W. G. a salary of £500 for each year of his engagement: and further, W. G. was to be "entitled to a sum equivalent to one third part of the free profits for the aforesaid space of three years of the business of J. W. and W. W." The agreement contained a provision for taking balances at times to be fixed by J. W. and W. W., who were to be entitled each to take credit for a salary of £500 before ascertaining the free profits; and it was also provided that while the salary of £500 should be payable to W. G., the other sums to which he should be entitled should not be demandable by him during the period of his engagement, but should be payable in three instalments after its conclusion. *Held*, that this agreement did not constitute a partnership as to third parties between J. W. and W. W. on the one hand, and W. G. on the other, so as to make W. G. a partner as to third parties in the firm of "J. and W. W." *Shaw v. Galt*, 9 Ir. Jur. N.S. 165, Q. B.

H., who was the sole proprietor of a wholesale woollen and cloth establishment in Dublin, agreed with M. to become the manager and partner in a separate and larger concern in the same trade in Huddersfield, which had been conducted by and belonged to M.; and it was arranged at the same time that M. should come to Dublin to superintend the separate business which was there carried on by H., though upon no definite and conclusive agreement, but with the object of testing the capacity and value of the concern, and ascertaining whether it was sufficiently profitable to be continued. It was further agreed that at the expiration of a year, M. should have an option of becoming a partner in the Dublin house, and should be entitled to a share of the profits, if any, of that year, but should receive no remuneration nor any portion of the profits, if he elected not to join in the Dublin business. M. never exercised his option of becoming a partner, but having left Ireland and apparently abandoned the concern, died before the expiration of the year of trial. *Held*, that M. had not by his superintendence become a partner in the Dublin business, and that, consequently, a claim made by the executors of M. to be admitted as creditors of the estate of H. for goods sold and cash supplied by the Huddersfield house to the Dublin concern should be allowed. *In re Alexander Hall*, 9 Ir. Jur. N.S. 321, Ch. App.

A testator, after giving legacies to his daughters, bequeathed to his two sons, C and D, the remainder of his property in equal proportions, of whatever kind

it might consist at the time of his death. He directed the business of the mills of X to be carried on, and a certain sum to be applied to that purpose, and the remainder of his capital to be invested in fee-simple estates, so that each of his sons should have his portion independently of the other; that they were not to be of age for the purposes of his will until they were twenty-five, and if one died without issue under that age, his property should go over to the other. The testator was entitled to a sum of £4,061, as a partner in the mills of Y. C. died under twenty-five. *Held*, that the profits realised with the sum of £4,061, during C.'s life, belonged to him, and were not capital to be invested in land. *Pilworth v. Mosse*, 14 Ir. Ch. Rep. 163, R.

The testator's partner in the mills of Y, after his death, paid a sum of £5,421, which he appropriated to the payment, in the first instance, of the £4,061, due at the testator's death, and the balance to subsequent profits. *Held*, that the profits realised subsequently to C's death, were divisible between his representative and D. *Id.*

But, *semble*, if there had been no appropriation by the partner, the payment would have been applicable, first, to the payment of the profits realised after the testator's death, and the balance and profits subsequently to C's death, would as capital have belonged to D. *Id.*

PLEADING (LAW).

Count in action for fraudulent misrepresentation.]

A count in the summons and plaint which complained "that the defendant was possessed of a grey mare called Polly, which, as defendant well knew, was unsound, and the said defendant, by the fraudulently concealing from the plaintiff that the said mare was unsound, induced the plaintiff to buy the said mare for £59, which the plaintiff paid the defendant, whereby the plaintiff lost the said £59," ordered to be amended by inserting between the words "unsound" and "induced," the words following, "and representing to him that it was sound." *Fitzgerald v. Thompson*, 9 Ir. Jur. N.S. 53, Exch.

Pleading in action for breach of contract.] A summons and plaint which seeks to recover damages for a partial breach of contract; but shows that the plaintiff is entitled to recover for a breach of the entire contract, will be set aside upon demurrer. *Kinsley v. Hackett*, 14 Ir. C. L. Rep. 58, Exch.

Want of averment of request.] A count for "money due by the defendant to plaintiff for the wages and salary of the plaintiff as nursetender to the defendant," *Held* bad on demurrer. *M'Phail v. Little*, 9 Ir. Jur. N.S. 267, Q.B.

Summons and plaint, amendment of.] A paragraph of a summons and plaint which left it in doubt whether it contained one or two causes of action, and whether the plaintiff relied on the defendant's relation as her attorney and solicitor, or on an express promise by him as the foundation of the duty, the breach of which was complained of, was directed to be amended in those particulars. *Wyse v. Lewis*, 9 Ir. Jur. N.S. 84, O. P.

Setting aside pleadings.] To a summons and plaint for assaulting and imprisoning the plaintiff's wife, the

defendant substantially pleaded by way of justification that the defendant was a collector of public cess, and that the plaintiff had acted as his servant in collecting the said public cess, and that having collected and obtained certain moneys he "retained same, and did not pay over same, or any part thereof to defendant; that having been informed, and verily believing that plaintiff had fraudulently embezzled said moneys, and having reasonable cause for suspecting that plaintiff's wife, well knowing said moneys to have been fraudulently embezzled as aforesaid, had the said moneys in her possession at the time of the alleged assault and imprisonment, defendant gave her into custody," &c. The defence was ordered to be amended on the ground that there was no positive allegation that a felony had been committed. *Dowd v. Percy*, 9 Ir. Jur. N.S. 140, Exch.

To an action for breach of promise of marriage the defendant pleaded "that the defendant made the said agreement upon the faith and under the belief that the plaintiff had always been and then was a chaste and modest woman, and of correct habits and conduct, and of good character and reputation, whereas the plaintiff, before and at the time of the making of the said agreement in plaint mentioned, was a woman of unchaste and immodest behaviour, and of incorrect and immoral habits and conduct, and of bad character and reputation, which the defendant first discovered after making the alleged agreement, and before the alleged breach thereof." *Held*, that the allegation of unchastity, immodest behaviour, and immoral habits, were too general accusations, and that the plea should have stated the names of the persons with whom the acts of unchastity were committed. *Gibbons v. Cusack*, 9 Ir. Jur. N.S. 13, Exch. s. c. 14 Ir. C. L. R. 285.

When the summons and plaint, which was for malicious prosecution, complained that the defendant, falsely and maliciously, and without reasonable or probable cause, on the 7th February, 1863, appeared before one W. M., a justice of the peace in and for the county of C., and charged the plaintiff that she did, on the 16th January, 1863, at Coote-hill Quarter Sessions, at the hearing of, &c., commit wilful and corrupt perjury in giving her evidence; and upon said charge defendant procured said W. M. to issue a summons in writing, signed by said W. M., wherein the defendant was complainant, and the plaintiff was defendant, whereby the plaintiff was commanded to appear as defendant on the hearing of said complaint, &c.; "and the plaintiff saith that in obedience to and pursuance of said summons she did personally appear at the time and place mentioned in said summons at said petty sessions before certain justices in and for said county presiding at such sessions; but the defendant not having any grounds or evidence to support said false and malicious charge, did not swear any depositions against the plaintiff before the said justices, and the defendant has not further prosecuted his said complaint, but has deserted and abandoned same, and the said prosecution is wholly ended and determined." Defendant pleaded thereto "That the defendant did support the said charges by sworn evidence before the said justices, who thereupon duly made an order that information s

should be sent forward to the assizes in and for said county, and that the defendant has not deserted or abandoned his said complaint and prosecution, nor is same ended and abandoned, as in said counts alleged, and therefore," &c. *Held*, that the defence should be set aside as raising an immaterial issue as to whether the evidence taken before the magistrates was reduced to writing or not. *Scorr v. Murphy*, 9 Ir. Jur. N.S. 89, Exch.

Sham defence.] Where a defendant pleads a single defence, traversing a material fact in the plaint, the Court will not try its truth or falsehood on affidavit. *O'Brien v. Tagaret*, 14 Ir. C. L. Rep. App. v. Q.B.; s. c. 8 Ir. Jur. N.S. 27.

Defence of other action pending.] To an action of ejectment for non-payment of rent the defendant pleaded, "That before this suit the plaintiff issued a summons and plaint out of the Court of Common Pleas in Ireland against the defendant in an action of ejectment for non-payment of rent for the same lands as in the summons and plaint herein mentioned, and the plaintiff and the said defendant were respectively plaintiff and defendant in said former suit, and that the said former suit was still depending." Defence set aside on the ground that it was not averred that the rent for the non-payment of which the present action was brought was the same as the rent claimed in a pending action. *Cuffe v. Holmes*, 9 Ir. Jur. N.S. 12. Exch.

Pleading evidence.] A summons and plaint for malicious prosecution which pleaded matters of evidence by way of inducement was held bad. *Moynihan v. Barry*, 9 Ir. Jur. N.S. 176. Exch.

New assignment.] When to an action for breach of promise of marriage the defendant pleaded, firstly, a denial of the promise; secondly, that at the time of the making of the contract alleged in summons and plaint the defendant was an infant under the age of twenty-one years, to wit, of the age of nineteen years; and that within a reasonable time after he had attained the age of twenty-one years he avoided and annulled the said contract; thirdly, a rescission of the contract; leave was given to now assign to the effect that the contract in said defence referred to was not that upon which the plaintiff sued, but was a contract and agreement made after the defendant reached the age of twenty-one years. *Tallon v. Hassard*, 9 Ir. Jur. N.S. 35. Exch.

POST OBIT.

The assignees of a post obit security take it with notice of all its incidents; and in order to establish the validity of the security they must show that a fair consideration was given for it. *Cooke v. The Marquis of Donegal*, 9 Ir. Jur. N.S. 41. Ch.

POWER OF APPOINTMENT.

A testatrix had an exclusive power of appointing by will a sum of money among her children, and having by her will duly exercised this power, in a subsequent part of her will she bequeathed certain legacies to the appointees of the fund, on condition that they should settle not only these legacies but their appointed shares on themselves for life, then to their issue absolutely; and in case they did not comply with

these conditions, she declared that these legacies were to be absolutely forfeited, and in that event she made a gift over. The appointees contended, that as this was an attempt to impose a fetter on the appointed shares, this condition was altogether void, and that they were entitled to both the legacies and their appointed shares absolutely, and free from any condition. *Held*, notwithstanding *Moriarty v. Martin* (3 Ir. Ch. R.), that as to the appointed shares this was a mere superadded condition, and therefore void; and that it did not raise the case of election in favour of the grandchildren. *Held*, as to the legacies, on the authority of *Boughton v. Boughton* (2 Ves.) that there was an express condition, and that unless this condition was complied with, the appointees forfeited their claim. *Blackett v. Lamb* adopted; *Moriarty v. Martin* commented on. *King v. King*, 9 Ir. Jur. N.S. 182. Ch.

In 1772 L., upon his marriage, settled renewable freeholds to the use of himself for life, with remainder upon trust to the eldest son of the marriage till he should attain twenty-one; on his attaining twenty-one, upon trust to convey to him absolutely. There was power in the deed for the settlor to revoke the limitation to the eldest son, and to re limit to the sons of the marriage in such priority as he should think fit. P. was the eldest son of the marriage, and attained his age before 1802. In 1802, by deed, reciting the settlement of 1772, L. and P. conveyed the lands comprised in that settlement to trustees and their heirs to the use of L. for life, remainder as to part, to the use of such younger son or sons of L. as he should by deed or will appoint. *Held*—That L. could not under this power appoint to his younger sons any greater than life estates. *Lamphier v. Drapes*, 14 Ir. Ch. Rep. 33. Ch.

Lands held under a lease of lives renewable for ever were conveyed by deed to a trustee. By a subsequent deed the trustee declared that the previous assignment had been accepted by him "to the uses and for the trusts following: upon trust, to permit A. and B. his wife, to hold one-third of the lands during their joint lives, and the survivor for the life of such survivor, and, after the death of the survivor, to be held by such child or children of A. and B. as should be living at the death of the survivor, in such shares and proportions as A. in his lifetime or B., if she survived him, should appoint (if only one child, to take the whole); and as to one other third of the interest in the said lands upon trust for X., his heirs and assigns for ever; and as to the remaining third of the interest in the said lands upon trust for Y., his heirs and assigns for ever, and to no other use, intent, or purpose whatsoever." *Held* (*per curiam*) that as it was manifestly intended to dispose of the entire interest in the lands by this deed, the absence of words of inheritance in trust to the children of A. and B. did not prevent A. from appointing to one of the children the quasi fee of the lands. *In re Bayley's estate*, 9 Ir. Jur. N.S. 398. Ch. Ap.

PRACTICE (EQUITY).

A petitioner is not entitled to read from his petition the statement of a document to a copy of which the petition refers, although no affidavit has been filed

by the respondent. *Talbot v. Hamilton*, 14 Ir. Ch. Rep. 375. Ch.

Amendment.] H. tenant for life, with remainder to his children as he should appoint, in default of appointment to them equally appointed to his eldest son, subject to certain charges for his adult younger children. The tenant for life and the appointees joined in executing to the appellant a mortgage to secure a debt of the tenant for life. The eldest son afterwards filed a petition alleging the appointment to have been made in pursuance of an agreement between the tenant for life and the appellant, and that the mortgage was a fraud on the power. The petition also contained charges of actual fraud by the appellant upon the appointees. The petition prayed that the mortgage might be set aside as fraudulent and as a fraud on the power. *Held*—That at the hearing the petition might be amended by praying that the deed of appointment might be set aside. *Skelton v. Flanagan*, 14 Ir. Ch. Rep. 484. Ch. App.

Extension of time to set down petition for hearing.] See *Barber v. Tully*, 9 Ir. Jur. N.S. 105, Ch.

Dismissal for want of prosecution.] A mortgage cause to which a receiver had been extended who continued in receipt of the rents, *Held*, not to be within the operation of the 81st General Order of 1843. *Woodroffe v. Greene*, 14 Ir. Ch. Rep. 224, R.

A receiver was extended to a mortgage suit, and continued in receipt of the rents. Several interlocutory orders were made in the cause, but it was never brought to a hearing. *Held*, that after the expiration of ten years from the filing of the original bill it stood dismissed under the 81st General Order of March, 1843. *Mara v. Tibeaud*, 7 Ir. Eq. Rep. 556, commented on and distinguished. *Woodroffe v. Greene* 9 Ir. Jur. N.S. 370, Ch. App.

Effect of dismissal of suit upon new proceedings.] *Held*, on the authority of *Hunter v. Stewart*, 8 Jur. N.S. 317, that the dismissal of a suit is not an absolute bar to a new suit between the same parties, and in the same right, if new equities have arisen or ripened in the meantime. *Dolphin v. Aylward*, 9 Ir. Jur. N.S. 141, Ch. App.

Decrees.] Decrees of the Court, though erroneous, are binding, until set aside on re-hearing, or in a suit for the purpose. *Clanmorris v. Clanmorris*, 14 Ir. Ch. Rep. 420, R.

Letting in parties to prove after final decree.] The Court of Chancery will permit parties having demands against a fund, of which it has possession, for the purpose of administration, to come in and prove against the same, after and notwithstanding a previous final decree, and that, too, where said parties were open to the charge of gross negligence in not so coming in in due time. *Graves v. Davies*, 9 Ir. Jur. N.S. 385, Ch. App.

Practice in injunction suit.] A suit for injunction, in the nature of a writ of *estrepement* to restrain waste, when no answer is filed, and no account is sought, should not be brought to a hearing by the petitioner merely for the purpose of getting his costs of suit. *Harvey v. Ferguson*, 9 Ir. Jur. N.S. 341, Ch.

Security for costs.] The clerk of the Inspectors of Fisheries appointed under the 24 & 25 Vic., c.

109, whose salary is paid by the Paymaster General, though he resides out of the jurisdiction is exempt from giving security for costs. *Wynne v. Knox*, 14 Ir. Ch. Rep. 149, R.

Privilege of junior counsel.] Exceptions to a master's report cannot be opened by senior counsel without a junior. *Brereton v. Barry*, 14 Ir. Ch. Rep. 374, Ch.

Appeals.] Where there is an appeal from an order other than a decretal order, the appellant's counsel is entitled to begin. *Skelton v. Flanagan*, 9 Ir. Jur. 341, Ch. App.

It is not necessary, on an appeal from the Landed Estates Court, to deposit with the officer of the Court any sum of money. *In re Rea's estate*, 14 Ir. Ch. Rep. 395, Ch. App.

Practice on Petty Bag side of Court of Chancery.] Motions on the Petty Bag side of the Court of Chancery must be made in term. *The Queen v. Swan*, 9 Ir. Jur. N.S. 362.

The Petty Bag side of the Court of Chancery is not a Court of common law within the meaning of the Common Law Procedure Act. *Ib.*

PRACTICE (LAW.)

Substitution of service.] An action was brought in Ireland against a defendant residing out of the jurisdiction, upon an English judgment. Portion only of the original consideration for the judgment being money paid by the plaintiff for the defendant in the defence of an action here, arose in this country. Upon a motion being made for an order to substitute service of the summons and plaint grounded upon an affidavit stating that a great part of the cause of action arose within the jurisdiction, the judge gave liberty to amend the summons and plaint by adding paragraphs on the original considerations for the English judgment, and made a conditional order for substitution of service of the summons and plaint so amended. The summons and plaint was accordingly amended as directed, and several new paragraphs were added, one only, founded on the money paid as above stated, being for a cause of action which arose within the jurisdiction. Upon motion to make absolute the conditional order for substitution of service, the Court held that the affidavit above mentioned did not disclose the true state of facts, and discharged the conditional order. *Whyte v. Hill*, 9 Ir. Jur. N.S. 288, Q. B.

Quere—Whether the Court can direct substitution of service of a writ of summons and plaint containing paragraphs upon several distinct causes of action of which one only has arisen within the jurisdiction, and all the others have arisen out of it. *Ib.*

After a company had ceased to exist, a member of it instituted against it an action. The Court refused to substitute service of the summons and plaint on two gentlemen, one of whom had been the attorney, and a director of the company; and the other of whom had been its secretary. *Fayle v. Kingstown Waterworks Company*, 14 Ir. C. L. Rep. app. x. Q. B.; s. c. 7 Ir. Jur. N.S., 397.

The 34th section of the Common Law Procedure Amendment Act (Ireland) 1853, does not apply to actions of ejectment; but under section 197, the

Court has power to substitute service of an order on any party who has been properly made a defendant in an action or ejectment, and to direct the mode of service which may be most effectual. *Poole v. Griffith and others*, 14 Ir. C. L. Rep. app. xx. Q. B.

Amendment.] To an action for the conversion of the goods of the plaintiff, the defendant pleaded a traverse of the conversion of all the goods except five, and as to those five, defendant averred that they were not the goods of the plaintiff.—To interrogatories exhibited, the defendant's answer was likewise a traverse of the conversion of all the goods except five and no more, and that these were not the property of the plaintiff. On the trial the defendant admitted having the possession of other three articles, and as to these, defendant also denied that they were the property of the plaintiff; thereupon, after the defendant's case had closed, defendant asked leave to amend the plea by adding a traverse of the plaintiff's property in said three articles; this the learned judge refused, and the jury consequently found as to those three for the plaintiff. *Held*, that the amendment ought to have been allowed. *Leo v. Kearns*, 9 Ir. Jur. N.S. 318, Exch.

Amendment without leave of Court.] Where a summons and plaint in ejectment was issued, the venue in the margin not being the county where the lands lay, and which was stated in the body of the writ; and on the same day the mistake was corrected without order of the Court and the writ resealed. *Held*, that the error amounted to a mere misprision, and that the correction of it without order did not vitiate the further proceedings in the action. *Hanbury v. Jones*, 9 Ir. Jur. N.S. 5, Q. B.

Application for leave to reply and demur.] Where an application is made for liberty to reply and demur, grounded on the affidavit of the plaintiff's attorney, it was objected that the affidavit should be made by the plaintiff and not by his attorney. *Held*, that the attorney's affidavit was sufficient. *Fox v. Broderick*, 9 Ir. Jur. N.S. 17, Exch.

Suggestion of death.] A co-defendant died pending the argument of a bill of exceptions taken at the trial by the defendants, and the plaintiff entered up judgment of *venire de novo* against all the defendants. On motion by the plaintiff that a suggestion of the death should be entered on the record, and the record, if necessary, be amended, *Held* that the stat. 9 Wm. 3, c. 10, s. 7 (Ir.) applied. *Whalley v. Lord Massereene*, 9 Ir. Jur. N.S. 417. C.P.

Extension of time for trial.] Where pursuant to the 106th section of the Common Law Procedure Act (1853), the defendant had entered a rule, "that the plaintiff proceed to trial at the assizes next after the expiration of twenty days from the service thereof," and where the plaintiff afterwards did not go to trial within the time specified, the Court on motion extended the time limited in said rule on being satisfied that there was no laches on the part of the plaintiff. *Colclough v. Colclough*, 9 Ir. Jur. N.S. 213; s.c. 14 Ir. C. L. Rep. 523. Exch.

Trial by proviso.] The 178th General Order applies to cases of trial by proviso. *Gardiner v. Gardiner*, 14 Ir. C. L. Rep. app. xxxi. Q.B.

Bill of exceptions.] *Quare* as to the practice of

'inserting in the bill of exceptions the findings of the jury upon collateral questions left to them by the judge. *Thelwall v. Yelverton*, 14 Ir. C. L. Rep. 188; s.c. 7 Ir. Jur. N.S. 347. C.P.

Interrogatories.] The defendant in an action under the Bills of Exchange Act (24 & 25 Vic. c. 43,) having obtained leave to plead thereto grounded on his affidavit that he had a good defence to the action, applied under the 56th section of the Common Law Procedure Act of 1856 for liberty to administer interrogatories to the plaintiff before defence filed. *Held*, per Fitzgerald and Deasy, B.B. that the motion must be refused, on the ground that there appeared no special reason for discovery, but they declined to give any opinion on the point that interrogatories could be administered before defence filed.

Per Pigot, C.B.—The defendant is entitled to exhibit interrogatories before defence filed—a case of extreme urgency having been made out. *Reynolds v. Lemon*, 9 Ir. Jur. N.S. 216. Exch.

Commission to examine witnesses.—Order made for a commission to examine witnesses to issue, the affidavit on which the application was made stating that the evidence of the witnesses sought to be examined was necessary and material, but not stating that it was admissible. *Davis v. M'Mahon*, 9 Ir. Jur. N.S. 257. Q.B.

Privileged documents.] The plaintiff having been dismissed from his situation of hatchman in the prison of the Marshalsea in consequence of a certain report made by the Inspector-General of Prisons to the Lord Lieutenant, brought an action for a libel contained in said report against the defendant, the said Inspector-General. On application to the Court for an order that the defendant should furnish to the plaintiff certified copies of all minutes and notes in the power, possession, or procurement of the defendant, of the evidence of the several witnesses at the investigation upon which said report was founded, as also a certified copy of said report, it was *held* that the said several documents were privileged communications, and that the motion should be refused with costs. *M'Elveny v. Connellan*, 9 Ir. Jur. N.S. 171. Exch.

Compromise.] Circumstances held to amount only to a negotiation pending, and not to a compromise. *Hanbury v. Jones*, 9 Ir. Jur. N.S. 5. Q.B.

Staying proceedings in detainue.] An application by the defendant to stay proceedings in an action of detainue, on the terms of the defendant giving up to the plaintiff the goods detained, and of paying all costs, and also a certain sum named by defendant for damages, was held to be defective in not leaving it optional to the plaintiff to proceed or not at his own risk. *Lyons v. Keller*, 9 Ir. Jur. N.S. 381. Exch.

In detainue and trover the Court will, on application of the defendant, stay proceedings on the delivery of the goods and the payment of costs up to the time of the delivery; and in the event of the plaintiff refusing such terms the Court will permit the defendant to deliver up the goods, the plaintiff to pay the costs incurred subsequent to the delivery, in the event of his not recovering more than nominal damages in respect of the detention. *Gallagher v. Nolan*, 9 Ir. Jur. N.S. 382. Exch.

Costs.—At the trial of an action in July, 1861, for

the diversion of a water-course, a view-jury went out to inspect the *locus in quo*. Those acting for the defendants having made unfair representations to the view jury respecting the causes of action, the plaintiff withdrew his record. The defendant did not within a month enter a rule for costs, but obtained a verdict in a subsequent trial of the same cause of action. *Held*, upon motion by the plaintiff, that the taxing officer be directed to review his taxation, 1. That the Court had jurisdiction to entertain the question of the costs of the abortive trial, anything in the 105th section of the Common Law Procedure Act, 1853, to the contrary notwithstanding. 2. That the delay in bringing forward the motion being partly attributable to the defendant, the plaintiff had not committed such laches as disentitled him to relief. 3. That a case of tampering with the view-jury by the agents of the defendant having been made by the plaintiff and not specifically contradicted by the defendant, the plaintiff was entitled to be declared not liable to pay the defendant's costs of the abortive trial. 4. That the plaintiff was not entitled to be paid by the defendant his own costs incurred in the abortive trial, though in an extreme case it would be competent to the Court to make the defendant pay them. *Atkinson v. Mills*. 9 Ir. Jur. N.S. 250. C.P.

Where plaintiff entitled to half costs only.] An action brought by a client against an attorney for negligence, the summons and plaint averring a retainer of the defendant by the plaintiff, is an "action of contract," within s. 243 of the Common Law Procedure Act, 1853; and the plaintiff in such an action having recovered less than £20, is only entitled to half costs. *Quan v. Frazer*, 9 Ir. Jur. N.S. 268. Q.B.

An action of contract having been brought to recover the sum of £109 10s. 11d., the parties agreed to refer the subject-matter of the action to arbitration, and a submission was entered into which contained the following provision: "That the costs of the action, and incident to the consent and award to be made thereon, and of the arbitration shall abide the result of the said award." An award was made in favour of the plaintiff for £18 10s. 10d. On taxation the taxing officer refused to allow the plaintiff full costs, as he had recovered a sum less than £20. On motion that the taxing master be required to review his taxation in that respect, *Held*, that by the provision with respect to costs in the submission the parties had contracted themselves out of the 243rd section of the Common Law Procedure Act, 1853; that the true construction of that provision in the submission was, that the right to full costs should follow the legal result independently of the amount recovered, and therefore that the plaintiff was entitled to full costs. *Owens v. Vanhomrigh*, 14 Ir. C. L. Rep. 362. S. C. 7 Ir. Jur., N.S., 200. Q.B.

Wigens v. Cook, 6 C.B. N.S. 784, and *Jones v. Jones*, 7 C.B. N.S. 832, followed. *Ib.*

Costs where countermand of trial served late.] Where countermand of notice of trial was served by the plaintiff a day late, and notwithstanding the countermand the defendant went on to incur expense in preparing for trial, and appeared in court, *Held* (he having entered a rule for costs of the day for not

countermanding in sufficient time) that he was entitled only to the costs incurred up to the service of the countermand, and not to the costs subsequently incurred. *Tottenham v. McGuiney*, 9 Ir. Jur. N.S. 287. Q.B.

Security for costs.] A plaintiff, when he is *de facto* resident in Ireland, though he has come thither for a temporary purpose and has a foreign domicile, is exempted from the necessity of giving security for costs. *Redmond v. Mooney*, 14 Ir. C. L. Rep. app. xvii. Q.B.

Attachment order.] An attachment order, under the Common Law Procedure Act (Ir.), 1853, can be obtained only by judgment creditors at common law. *Commissioners of Charitable Donations and Bequests for Ireland v. John Archbold*, 14 Ir. C. L. Rep. 67, s.c., 7 Ir. Jur., N.S., 74. Q.B.

A. executed a bond and warrant of attorney to B., upon which judgment was obtained, and subsequently, a conditional order under the garnishee clauses of the Common Law Procedure Act, 1856, to attach a debt due by C. to A. Upon motion to make absolute this order the assignees of A., who had in the meanwhile become an insolvent, intervened, and the Court made the order absolute; but directed the money to remain in Court to abide the result of a motion by the assignees to set aside the judgment. Upon this motion the Court directed the assignees to bring an action against B., and directed B. to admit the receipt of the money. Upon the trial of the action B. failed to sustain the judgment, and set up a deed of prior date, assigning to her the same debt as had been sought to be attached. The jury being unable to agree, upon a renewal of the motion by the assignees to set aside the judgment, and an application to have the money in Court paid to them, *Held*, (Christian, J., *dissentiente*), that there was nothing in the previous proceedings nor in the order of the Court directing the action, to prevent B. from relying upon a security different from that which was the foundation of the garnishee proceedings. *Goodfellow v. Hunter*, 9 Ir. Jur. N.S. 48. C.P.

Held, (per Christian, J.) that the case was analogous to that of an interpleader order; that B. had been put to her election, and having made her election and failed to sustain the security on which she elected to rely, that the assignees were entitled to the fund in court. *Ib.*

PRESUMPTION.

On the 24th of October, 1812, lands held under a lease of lives renewable for ever were conveyed by A. R. to the use of himself for life, with remainder to J. R., his second son, in quasi fee. J. R., who did not appear ever to have gone into possession of the lands, by marriage articles, dated the 9th of October, 1813, agreed to settle the lands on himself for life, remainder to his wife for life, remainder to the petitioner. In 1814 A. R.'s eldest son and heir-at-law took out a renewal of the lease, in which he was stated to be the assignee of A. R.'s interest. In 1827 J. R. died, and in 1851 J. R.'s wife died, and the petitioner's right accrued. The heir-at-law of A. R. and those claiming under him remained in uninterrupted possession of the lands from 1814 until 1862. There was some evidence, not altogether satisfactory, that A. R. died some time

in 1814, and a letter was produced which proved that he was alive on the 28th of September, 1813. *Held*—That as his son, J. R., was married on the 9th of October following, there was a presumption that A. R. survived the date of the marriage, and that the petitioner's rights under the marriage articles were not barred by the Statute of Limitations. *Rossiter v. Rossiter*, 9 Ir. Jur. N.S. 373. Ch. Ap.

PRINCIPAL AND AGENT.

An agent of an insurance company having authority to solicit insurances and receive proposals, held to be a general agent whose representations would bind the company.—*Splents v. Lefeuvre*, 9 Ir. Jur. N.S. 62. Ex. Ch.

Letters written by such an agent to the company, and from the company to him, held inadmissible against the representatives of a party who had effected an insurance with the company. *Ib.*

A. being entitled to a life estate in certain lands, with remainder to his wife B. for life, and C. being entitled to an annuity, and D. having a judgment against A. and a policy of insurance, A. B. C. and D., in consideration of a sum of £350 advanced to A., conveyed to E. the lands, annuity, and policy of insurance respectively, subject to redemption; and it was provided that A. should become tenant to E. of those lands at a yearly rent in case of non-payment of the interest and premiums on the policy; and A. B. and C. appointed F. irrevocably their attorney to receive the rents of the mortgaged premises and the annuity, for the purpose of paying (after receiver's fees and outgoings) the interest and premiums of the policy, and for the purpose out of the annuity of investing a sum to form a fund for payment of the principal, and of paying the balance of the annuity to C. and of the rents to A.; and the sums secured by the judgment and policy of insurance, when they should be paid, after deducting the £350 and interest, were to be applied by E. to pay D. any demand due to her by A., and the balance to A.; and it was provided that F. should not act as receiver until the interest or premium on the policy should be in arrear. F. entered into receipt of the rents (as he alleged, under a subsequent power of attorney from A.) and of the annuity, no portion of which he invested to form the fund for payment of the annuity, and applied the rents for the purposes of A. and in payment of the interest of a mortgage due to himself, F., by the directions of A., and the annuity in payment of the interest on the £350. with the consent of C., who had before such consent taken the benefit of the Insolvent Act. *Held*—That F., as agent of C. as to the annuity, was liable to account with her assignee. *McDowell v. Reed and others*, 14 Ir. Ch. Rep. 192. R.

Secondly—That A. could not revoke the power of attorney in the mortgage deed. *Ib.*

Thirdly—That F. was not agent or trustee for C. as to the lands, and therefore was not bound to account to her assignee for by-gone rents. *Ib.*

Semble—B. being only a surety, her life estate is not liable after the death of A. to repay the sums paid out of the annuity of C. for interest and premiums on the policy. *Ib.*

Quære—Whether F. should have credit for pay-

ments out of the annuity contrary to the directions of the mortgage deed made with the consent of C. after her discharge as an insolvent. *Ib.*

PRIORITIES.

Where upon a motion allowed to be made after the settlement of the final schedule of incumbrances in the Landed Estates Court, an order was made by which an unregistered judgment was postponed to a registered deed, and also to several intermediate registered judgments, and soon after that order the owner of the unregistered judgment made an arrangement with the owner of the registered deed whereby the latter withdrew his claim and consented that the order should be rescinded, it was *held* (reversing the decision of a judge of the Landed Estates Court), that the order was not a final adjudication of the priorities of the parties equivalent to a decree in Chancery; and that the order ought to be rescinded, and the priorities placed in the order in which they originally stood on the first schedule. *In re Scott's estate*, 14 Ir. Ch. Rep. 57. Ch. Ap.

PROBATE (COURT OF.)

Pleadings.] Where a plea alleged that the will propounded in the declaration had been revoked by a later will, the date of which was not known, the provisions of which were inconsistent with those in the will alleged, and which had been given by the deceased to the plaintiff, the Court required a replication to be filed by the plaintiff. *Greer v. Waterson*, 9 Ir. Jur. N.S. 418. Pr.

Death of defendant pending suit.] In case of the death of a defendant pending suit, the Court will not, within fourteen days from his death, allow a citation to issue, on behalf of the plaintiff, to the defendant's next of kin to accept or refuse letters of administration. *Norton v. Casey*, 9 Ir. Jur. N.S. 383. Pr.

New trial.] Where an important witness in the case, who had ample opportunities of knowing the capacity and testamentary intentions of the testator, and had written letters at the time to the defendant detailing the facts not consistently with the evidence which he gave at the trial, the judge directed the jury not to be content with only striking out his evidence if they disbelieved it, but that it reflected on the entire case of the defendant. *Held*—a correct direction. Where there is no allegation of surprise, mistake, accident, or newly-discovered evidence, a new trial is not considered requisite, even where the title to an inheritance is involved. *Campbell v. Campbell*, 9 Ir. Jur. N.S. 39. Pr.

Question of kindred, how to be raised.] In interest cases, where the kindred of either party is disputed, the question should be raised by petition, by way of peremptory exception, and not by affidavit. *Corcoran v. Duggan*, 9 Ir. Jur. N.S. 17. Pr.

Onus of proof, where question of legitimacy raised.] In interest cases, where legitimacy is disputed, the onus of proof lies on the party alleging legitimacy. *Corcoran v. Duggan*, 9 Ir. Jur. N.S. 18. Pr.

Practice where legitimacy contested.] In cases by petition, questioning the legitimacy of a person who had taken out letters of administration as a next of kin, the proper course is, when an answering affida-

vit has been filed and an issue raised, to apply to the Court for its directions as to the mode of trial of that issue, and not to file additional affidavits. *Cannon v. McIntyre*, 9 Ir. Jur. N.S. 383. Pr.

Citing heir-at-law.] Where an executor has warned a caveat filed by a next of kin, who has appeared, he is entitled then to an order giving leave to cite the heir-at-law. *Coplestone v. Nicholas* (33 L.J. Pr. 57) considered. *In the Goods of Loftus*, 9 Ir. Jur. N.S. 97. Pr.

Binding heir-at-law by proceedings.] Where the heir-at-law of the deceased is also a next of kin, and it is desired to bind him by the proceedings as to the real estate, it is proper to apply to the Court for an order to allow him to be cited. *In the Goods of Rankin*, 9 Ir. Jur. N.S. 38. Pr.

Citation of legatees under former will.] Where a suit was pending at the suit of the executor in a will to establish it, and the validity of the residuary and executorial clauses was disputed by one of the legatees, the Court directed a motion to fix the mode of trial to stand over to allow time for such legatee to cite the legatees in a former will lodged in the registry, to see proceedings in order to bind them. *Kelly v. Dunbar*, 9 Ir. Jur. N.S. 383. Pr.

Costs.] Where executors and residuary legatees under an earlier will impeached a later one, on the grounds of incapacity of the testatrix, and undue influence and fraud practised upon her, and not only failed to sustain those pleas, but were themselves by the evidence plainly guilty of fraud and contrivance in the preparation of the earlier will, they were condemned in the costs of the suit though they were put forward to sustain charitable gifts in that will. Next of kin being also legatees under such fraudulent will, and not impeaching it but impeaching the last will, which was decreed for—refused costs. But next of kin, not being legatees in and impeaching such will, allowed the costs of the pleadings, &c. But under the circumstances, the Court considering it unnecessary for their protection to appear, none of the next of kin were allowed the costs of the trial of the issue. *Gamble v. Robinson*, 9 Ir. Jur. N.S. 55. Pr.

Where final judgment is postponed after argument, additional court fees on the day of the delivering of judgment are necessary, and also refreshers to counsel. *Ib.*

Where a will of an aged person was drawn from instructions taken by her spiritual adviser, who, though not taking any beneficial interest under it, yet took most extensive fiduciary powers as sole trustee and executor for the benefit of the next of kin; and an alleged memorandum containing such instructions was not forthcoming; and the will was drawn from such memorandum by the attorney of the clergyman, who did not see the testatrix in reference thereto nor witness it; and the draft made by the attorney was not shown to the testatrix nor produced at the trial, the Court gave the next of kin their costs out of the estate, though the will was established. *Keogh v. Wall*, 9 Ir. Jur. N.S. 418. Pr.

Costs. Next of kin.] The rule of the Prerogative Court as to favoring next of kin as to costs still holds; and therefore in this case on account of the great age of the testator and the peculiar position of

the principal legatees, the Court thought the next of kin should be excused from paying costs, though they had pleaded incapacity and undue influence, and withdrew from the case during its progress. *Douce v. Reed*, 9 Ir. Jur. N.S. 39. Pr.

Costs against heir-at-law.] An heir-at-law who pleaded fraud and undue influence as to the making of a codicil, and did not make due inquiries of the drawer of the will and others as to the circumstances, and who put forward a witness whose evidence was palpably untrue, and known to be so by the defendant, who failed altogether in his opposition, was condemned in costs. An heir-at-law stands on the same ground as to costs as a next of kin. *Campbell v. Campbell*, 9 Ir. Jur. N.S. 95. Pr.

Costs in case of consent.] In a suit between a residuary legatee in a will (there being no executor named in it) and the next of kin, touching the validity of that will, where, after a plea filed by the next of kin, the parties consented that the proceedings should cease, and the plaintiff (the residuary legatee) should have his costs in the cause out of the estate, and the defendants should pay their own costs, the Court refused to make that consent a rule of Court as regarded the costs. *Smith v. Brunker*, 9 Ir. Jur. N.S. 38, Pr.

Costs of cases sent to the Quarter Sessions.] *Semble*—the Court of Quarter Sessions has not a discretion as to costs in cases sent there by the Probate Court, but must award costs according to the Civil Bill Act, to the successful party. The Probate Court will not give additional costs beyond what the Chairman had jurisdiction to award. *Flinn v. Flinn*, 9 Ir. Jur. N.S. 383. Pr.

RAILWAY COMPANY.

Defence in action against, for negligence.] To an action against a railway company for negligence in not making and maintaining sufficient fences for separating certain lands taken for the railway from the adjoining lands, whereby a horse belonging to the plaintiff strayed upon the said railway and was killed, and also for negligence in not making a sufficient culvert, the defendants pleaded that the works in question were accommodation works, and that while the plaintiff was occupier of the land taken by the defendants an arbitrator duly appointed in pursuance of the Railway Act, Ireland, 1851, duly made his award directing the works which should be made and maintained, which award was not traversed in respect of the said works, and which award did not direct the making or maintaining of the works in question. *Held*—a good plea. *Lockhart v. Irish North Western Railway Company*, 9 Ir. Jur. N.S. 236. S.G. 14 Ir. C. L. Rep. 385. C.P.

Held also—That the award of the arbitrator was an adjudication within the 67th section of the Common Law Procedure Act, 1853, and that it was not necessary to set out in the pleading the facts or matters which conferred jurisdiction. *Ib.*

Bankruptcy of.] A railway company incorporated by Act of Parliament is a joint stock company within the provisions of the Irish Bankruptcy and Insolvency Act, 1857, and therefore liable to be made bankrupt notwithstanding the 11 & 12 Vic. cap. 45, and the

13 & 14 Vic. cap. 83. *Re the Bagnalstown and Weaford Railway Company*, 9 Ir. Jur. N.S. 239. Bank.

Construction of stat. 7 & 8 Vict., c. 85.] By the 7 & 8 Vict., c. 85, s. 12, all railway companies incorporated are bound to convey the military and others mentioned, together with half a cwt. of personal luggage along with each person, at the rates and in the manner in said section provided for, and all public baggage, stores, arms, and ammunition, and other necessities and things (except gunpowder and other combustible matters) at charges not exceeding twopence per ton per mile, the assistance of the military being given in loading and unloading such goods:—where, therefore, a brigade was moved from K to C, and where a portion of said brigade was conveyed by the defendants in their carriages, along their line of railway from K to C., the other and greater portion being marched along the high road, but where the whole baggage of both moving bodies of said brigade was carried by defendants along their line of railway, it was thereupon insisted by the defendants that they were not bound to convey as public luggage any greater proportion at the rate of twopence per ton per mile, than the baggage which belonged to the number of military who were travelling along their line. The Attorney-General on the other hand insisted that the defendants were bound to carry the entire baggage as public baggage (except combustible materials), at the rate of twopence per ton per mile of the moving body, a sufficient number of the military being sent to load and unload same. *Held*, that the defendants were bound to convey as public luggage the entire baggage of the brigade (except gunpowder and other combustible matter) at the rate of twopence per ton per mile, from K. to C., quite irrespective of how the brigade was moved, whether conveyed by the defendants in the carriages, or marched along the high road.—*The Attorney-General v. The Great Southern and Western Railway Company*, 9 Ir. Jur., N.S., 85; s. c. 14 Ir. O. L. Rep. 447.

RENEWAL.

A sum of £800 was, by agreement between the tenant for life and the tenants, and with the sanction of the Court, paid to the credit of the matter, in full for all renewal fines and interest, in respect of a lease for lives renewable for ever, bearing date the 2nd day of January, 1699, and of which no renewal had ever been granted; and a condition of sale was inserted on the rental, that the purchaser should execute a renewal to the tenants. *Held*, that as the renewal was the act of the Court, and as what was lost to the inheritance was restored to it by giving it the £800 which was added to the *corpus* of the fund, the personal representative of a deceased tenant for life was not entitled to any part of the £800. *In re Tibeaud's estate*, 14 Ir. Ch. Rep. 322, L. E. C.

Semble—The personal representatives of parties who have not executed a renewal, have no claim for fines upon a subsequent renewal. *Ib.*

A tenant for life, professing to act in pursuance of the 3 G. 3, c. 84, s. 41 (Ir.) made in 1780 a lease for lives renewable for ever, of twelve acres of ground, for the purpose of a bleach-green. This lease con-

tained a covenant to keep the bleach-green and buildings in good and sufficient repair. The tenant having ceased to use the lands as a bleach-green, permitted them to be used applied to other purposes. *Held*, that he was not entitled to obtain a renewal of the lease.—*Bennett v. Richardson*, 14 Ir. Ch. Rep., 1, Ch.; s. c. 8 Ir. Jur., N. S., 61.

An owner in fee demised to A for lives renewable for ever, the right of quarrying mill-stones, &c., over a manor, part of which manor was afterwards sold to B in fee (and on which there were open quarries worked by A) without any mention of this right. A and B. never were privies; no renewals were ever had from B, but they were regularly given by the owners of the principal part of the manor. *Held*, that though 120 years had elapsed, A was entitled to a renewal from B on paying a proportional part of all previous renewal fines. *Kyle v. O'Connor*, 9 Ir. Jur. N. S. 103, Ch.

All the persons entitled to the lessee's interest should be made parties, in suits for renewal of the lease. *Colclough v. Smith*, 14 Ir. Ch. Rep. 127, R.

One of the lives in a renewal was described as "B C the younger, son of B C of Sion, aged fifteen years or thereabouts." There were two persons of the name of B. C.; one, the eldest son of H C of Sion, who was fifteen years old; the other, the fourth son of B C of Kildalvin, who was nine years old. *Held*, on the evidence, that the latter was the *cestui que vie*. *Ib.*

But the tenant having tendered the renewal fine and interest from the death of the former, without objection on that ground on the part of the landlord, *Held*, that the tender was sufficient to save a forfeiture, under the Tenantry Act. *Ib.*

There is no general rule as to what shall be deemed a reasonable time for payment of the renewal fine. But the Court granted a renewal where a tender had been made just within six months of the demand, there being no fraud on the part of the tenant, and no circumstance to establish default except the lapse of time. *Ib.*

Advertisements in the *Gazette*, &c., under the 2nd section of the Tenantry Act, are not a sufficient demand, where the head-rent is paid to the landlord by an agent for the tenants. Such agent ought to be served with notice, if the landlord shall find any difficulty in discovering his tenants or their assigns. *Ib.*

Semble, where a demand of a renewal fine has been inserted in the *Gazette*, under the second section of the Tenantry Act, the demand shall not be deemed to have been made on the day of the publication of the first advertisement. *Ib.*

Costs given to a respondent in a decree for renewal of a lease, under the circumstances of the case. *Ib.*

When a lessee under a lease for lives renewable for ever, in taking out a renewal named and described the *cestui que vie* so ambiguously, that it was uncertain which of the two persons was meant, one of whom died thirteen years before the other; the landlord claimed fines from the first death, the tenant offered them from the last death. *Held*, that the tenant ought to have named the life distinctly and clearly, and not having done so he must suffer the consequence, and must pay renewal fines from the first

death. *Colclough v. Smyth*, 9 Ir. Jur. N. S. 101, Ch. App.

A lease for lives renewable for ever was made in 1706. In 1762 an underlease was made of part of the lands demised by the lease of 1706. In 1851, the interest in the lease of 1706 was sold in three lots by the Incumbered Estates Court, and conveyed, by separate deeds, to A, B, and C. The whole of the lands demised by the lease of 1752 were comprised in the lot sold to C, and the conveyance was made subject to that lease. The lots sold to A and B were conveyed discharged of the lease. C was also entitled to five-ninths of the interest in the lease of 1752. D was entitled to the remaining four-ninths. *Held*, that C alone, without A and B, was the proper grant ing party to a fee-farm grant under the Renewable Leasehold Conversion Act. *Palmer v. Slaney*, 14 Ir. Ch. Rep. 540, R.

Held also, that D. was entitled, under the Act, to require a fee-farm grant from C. *Ib.*

Where the immediate lessee of see lands is bound by covenant to renew the sub-lease of a portion *toties quoties*, the sub-lessee may, by delay, lose the right of compelling specific performance of the *toties quoties* covenant, although he has, by the sub-lease, covenanted to pay his proportion of the fine within one month after notice of the amount, even though no notice of the amount of the fine, such as would found an action of covenant, had been given, if it appeared that he might reasonably have known the amount which he ought to pay. *Blake v. Collum*, 14 Ir. Ch. Rep. 375, Ch.

Tenantry Act.] A lease with a covenant for perpetual renewal, on payment of a peppercorn fine, over and above the annual rent thereby reserved, is within the Tenantry Act (19 & 20 G. 3, c. 30, Ir.) *Williamson v. Tuckey*, 14 Ir. Ch. Rep. 405, R.

A notice demanding possession of the lands, is a sufficient demand to work a forfeiture under the Tenantry Act. *Ib.*

A landlord, who had purchased the reversion in a lease for lives renewable for ever, upon payment of a peppercorn fine, in June, 1860, served a notice demanding possession, the lives in the lease having expired. He afterwards refused to renew, except upon payment to him of the whole arrear of rent due, including that which accrued before his purchase, to a portion of which only he was entitled. A petition for a fee-farm grant was presented in June, 1861, and a cause petition was filed, by direction of the Court. *Held*, that as the landlord had demanded more than he was entitled to, the right to a renewal had not been forfeited. *Ib.*

But the tenant, not having tendered the rent due to the landlord, was decreed to pay the costs of the suit, and of the petition for a fee-farm grant. *Ib.*

Septennial fines.] If a lease for lives, with a covenant for perpetual renewal, imposes a penalty on the tenant for not renewing, the landlord is not entitled to septennial fines in lieu of the penalty; nor is he entitled to elect between the septennial fines and the penalty. *Ware v. French*, 14 Ir. Ch. Rep. 534, R.

crown bond) which followed the uniform course of practice in the office, overruled. *The Queen v. Bannan*, 9 Ir. Jur. N. S., 15, Exch.

SETTLEMENT.

By deed of settlement executed on the marriage of A. with B., A. granted certain lands of which he was seised in quasi fee to trustees, to the use of himself for life, remainder to the trustees for a term of ninety-nine years if B. should so long live, upon trust to pay to B. out of the rents and profits an annual jointure of £400; and as to the surplus rents, upon certain trusts for the issue of the marriage. The settlement contained a proviso, that if the rents and profits should at any time during the term of ninety-nine years be insufficient to pay B.'s jointure it should be lawful for the trustees, by the direction in writing of B., to raise the deficiency by mortgage or demise of the lands for any term of years. There was no issue of the marriage. B. survived A.; and by her will, after reciting that there were due to her certain arrears of her jointure, bequeathed those arrears to C. B. had not in her lifetime given to her trustees any directions in writing to raise the arrears by mortgage or demise of the lands. Her executor filed a petition in the Landed Estates Court for a sale of the fee of the lands. *Held*—That B.'s will did not amount to a direction in writing to her trustees within the meaning of the proviso in the settlement, and that they had therefore no power to create a term for the payment of the arrears; and that there was no estate in the lands which the Court could sell for the purpose of raising the arrears of the jointure. *In re St. George's estate*, 14 Ir. Ch. Rep. 447; s. c. 9 Ir. Jur. N.S., 277. Ch. Ap.

A marriage settlement contained a limitation of the husband's estate to the daughters of the husband as tenants in common in fee-simple. *Held*—That such limitation, so far as it extended to the daughters of a future marriage, did not come within the doctrine of *Clayton v. Lord Wilton*, because its avoidance, as to such daughters, could not prejudice its validity so far as it affected the daughters of the marriage, and that, as regards the former class it could not in the absence of special reasons be deemed to have been stipulated for by the husband, whose estate was being settled, nor by the wife. *Held*, therefore, that as to those daughters it was voluntary, and would therefore be void as against a purchase for valuable consideration. *In re Collin's estate*, 14 Ir. Ch. Rep. 506. L.E.C.

By a marriage settlement two sums of £1000, one the property of the husband, the other that of the wife, were vested in trustees in trust to pay the interest from time to time, as received, or to permit and suffer the wife to receive and take "the said two several sums of £1000 respectively and all interest, benefit, and advantage arising or to arise therefrom," to her separate use; "said two several sums to be so received and taken" in full for her jointure and in bar of dower; and in case the husband should survive her, to permit him, during his life, to receive said two several sums and all interest, &c. derivable therefrom, with power of appointment of said two several sums among the issue of the marriage to the husband; and in default of appointment, to such issue, in equal shares; and in default of issue surviving at the death

SCIRE FACIAS.

A demurrer taken to a writ of *scire facias* (on a

of the husband, the said sums were to be disposed of as the husband should appoint. Provided, that when the husband should acquire property in lands producing £200 a-year, and he should settle a jointure of £200 a-year on the wife, subject to the same limitations as the said sums were declared subject to, it should be lawful for him to receive the said two sums for his own use. There was no issue of the marriage who survived the husband. He died before the wife, without having settled any jointure or made any appointment of the fund.

Held, first,—That the wife took only the interest of the fund for her life.

Secondly,—That the husband was entitled to the interest of the fund for his life, with a general power of appointment over the principal.

Thirdly,—That no appointment having been made by him, there was a resulting trust in favour of the administrator of the husband as to £1000, and a similar trust to the wife's executor as to the other £1000. *In re Lane's trusts*, 14 Ir. Ch. Rep. 523. R.

Construction of marriage articles.] By marriage articles the intended husband, in consideration of the marriage and the intended wife's fortune, agreed to convey lands to trustees in trust for himself for life; and in the event of his intended wife surviving him, to the use of his intended wife and the child or children of the intended marriage; and if no child of said intended marriage, then to the use of the wife, her heirs, &c. *Held*—That a settlement in pursuance of the articles should give to the wife an estate for life, with remainder to her children. *Rossiter v. Rossiter*, 14 Ir. Ch. Rep. 247. R.

By marriage articles J. R. the intended husband, in consideration of the marriage and of the fortune of E.O'M., the intended wife, agreed to convey lands held under a lease of lives renewable for ever to trustees, in trust for himself for life, and in the event of E.O'M. surviving him "to the use of the said E.O'M. and the child or children of the said intended marriage; and if no child of the said intended, then to the use of E.O'M., her heirs, executors, administrators, and assigns for ever." *Held*—That a settlement in pursuance of the articles should give an estate for life to E.O'M., with remainder to the issue of the marriage. *Rossiter v. Rossiter*, 9 Ir. Jur. N.S. 373. Ch. Ap.

Void as against purchaser for value as regards children of second marriage.] A marriage settlement contained a limitation of the husband's estate to the daughters of the husband as tenants in common in fee. *Held*—That such a limitation did not come within the doctrine laid down in *Clayton v. Lord Wilton*, so far as it affected the daughters of a future marriage, because its avoidance, so far as it affected such daughters, did not in any way prejudice its validity as to the daughters of the marriage; and that as regards the former class, it could not, in the absence of special reasons be deemed to have been stipulated for by the husband, whose estate was being settled, nor by the wife. *Held*, therefore, that so far as it affected that class it was voluntary, and therefore void against a purchaser for value. *In re Cullin's estate*, 9 Ir. Jur. N.S. 117. L.E.C.

SHERIFF.

Interpleader.] A sheriff having seized goods under a *fi. fa.*, a claim was lodged by the holder of a bill of sale. The interpleader order directed the goods to be sold, and their produce to be lodged in Court pending the trial of the issue. The jury found that all the goods seized were included in the bill of sale held by the plaintiff, save goods of the value of £23. *Held*—That the plaintiff in the interpleader issue was entitled to the costs of the interpleader order and issue, and also to draw the amount produced by the goods covered by his bill of sale, free of sheriff's poundage; that the plaintiff and the defendant in the issue should pay the sheriff the expenses of the sale in the proportion to which they were entitled—the sheriff to have his poundage only upon the sum to which the execution creditor was found to be entitled. *Vanston v. Symes, Wynne v. Vanston*, 14 Ir. C. L. R. app. iii. Exch.

The sheriff is entitled to get from the plaintiff who succeeds as claimant in an interpleader issue the expenses of keeping live stock seized under a *fi. fa.*, of which the plaintiff might, upon giving security to the sheriff, have obtained possession. *Taaffe v. Tyrrell and Stannell*, 14 Ir. C. L. Rep. app. xxvii. Q.B.

STATUTE.

The Belfast Improvement Act, stat. 8 & 9 Vic. c. cxlii. after giving to the town council power to impose rates, and to light, &c. the borough, enacts in s. 276, "that it shall be lawful for the council from time to time to declare and direct what districts within the limits of this Act shall be lighted and watched under the authority of this Act, and in like manner from time to time to declare and direct whether any and what districts shall be added to the parts already lighted and watched; and the districts so appointed to be lighted and watched as aforesaid, and the districts from time to time to be added thereto, shall be considered as the district to be lighted and watched by the council, under the authority of this Act, until the same shall be altered by the council;" and it then provides "that the owners or occupiers of any messuages, houses, shops, buildings, or premises not within the district so from time to time set out, lighted, and watched, shall not be subject or liable to the payment of any of the rates by this Act directed to be raised." The occupier of a messuage not within the district set out, lighted, and watched, was rated; he did not appeal against the rate, and not having paid it, a summons was issued against him, an order for payment made, and finally his goods were distrained. *Held*—That by reason of the section given above, the town council had no jurisdiction to make the rate, which therefore was illegal and void; and that the party rated and distrained upon was not bound by his non-appeal, and might bring his action against the magistrate who issued the warrant of distress and the bailiff who executed it. *Murphy v. Lyons*, 9 Ir. Jur. N.S. 346. Q.B.

The Belfast Borough Extension Act, 1853, st. 16 & 17 Vic. c. 114, in section 6 provides, "that so long as any demesne situate within the said borough shall be of an extent of not less than forty acres, and shall be in the occupation of the owner thereof or his

under-tenant, and in which streets shall not have been laid out and formed, and on which dwelling-houses shall not have been built, the owner or tenant of such demesne shall not be rated in respect of such demesne, or in respect of any mansion-house or other building situate therein and occupied therewith," unless he shall require to be so rated. *Held*—That this section creates merely an exemption from rating, and does not oust the jurisdiction of the town council; and that the case of exemption must be made by appeal on the part of the party rated, and cannot be raised in an action of replevin. *Ib.*

Weights and measures.] The deductions prohibited in the 13th section of the 25 & 26 Vic. c. 76 (the Weights and Measures, Ireland, Amendment Act, 1862), are deductions from the weight, not the price, of any article sold by weight. *Megarry, ap.; M'Cullagh, resp.*; 14 Ir. C. L. Rep. 151, Exch. s.c. 8 Ir. Jur. N.S. 195.

Drainage Acts.] The 16 & 17 Vic. c. 130, s. 36, deprives all persons injured by the works of the Drainage Commissioners of Ireland of the right of proceeding by action or suit to recover damages or compensation, but substitutes certain proceedings before an arbitrator. In case the commissioners do not serve the notice prescribed by the 13th section of that statute, an injured party is deprived of all remedy save by mandamus. A notice was served upon the owner of land injured by the commissioners, stating that the latter were willing to make the plaintiff compensation for the injuries complained of, and were willing to take all steps necessary to ascertain the amount of such compensation in case the party injured and the commissioners should differ about the same. *Held*—That the fact of the person injured not having replied to that notice was no answer to the charge of non-service of the notice prescribed by the 16 & 17 Vic. c. 130, s. 13. *King v. Hornsby, Beere v. Same, Bagnall v. Same*, 14 Ir. C. L. Rep. 28. Exch.

The limitations contained in the 10th section of the 18 & 19 Vic. c. 110 are imported into the provisions of the 9th section of the statute, consequently the enrolment of the final award pursuant to the 16 & 17 Vic. c. 130 is an answer now as it would have been before the passing of the 18 & 19 Vic. c. 110, to a summons and plaint, which does not show that the injuries are such as compensation could be made for under a further award. *Ib.*

To an action for a writ of mandamus to enforce the holding of an arbitration under the 16 & 17 Vic. c. 130, it is a good plea that the injuries complained of occurred six years before the enrolment of the final award, or six months before the enrolment of the supplemental award, pursuant to the 18 & 19 Vic. c. 110. *Ib.*

TENANT IN COMMON.

The summons and plaint in an action brought for the breach of a covenant in a lease contained two counts. The first stated that the estate and interest of the lessee in the lease came to the defendant by assignment. The second set out the title of the defendant, stating that the lessee had left his widow and three daughters (one of whom was the defendant)

him surviving, and by his will devised his property to his widow for life, and after her death share and share alike between the three daughters in such manner as the widow should divide; and that the widow did divide the property, and gave the premises demised by the lease to the defendant. The defendant traversed the assignment, and traversed the division by the widow. The plaintiff proved at the trial that the defendant had occupied the premises with her husband, had redeemed them when an ejectment was brought against her, had asked from the plaintiff a renewal of the lease as representative of the lessee, and that subsequently to her husband's death her agent and solicitor had managed the property. He also proved the lease, the lessee's will, the lessee's death, and the death of the lessee's widow; but he gave no evidence of any provision having been made for the two sisters, nor any evidence of the execution by the widow of her power of division. The judge directed a verdict for the defendant, reserving liberty to have it changed into one for the plaintiff, the Court to be at liberty to draw the same inferences from the evidence, which the jury could have done.

Held, 1.—That though the two counts made the case differently, the plaintiff was not precluded from relying upon the first—*Christian, J., dissentiente*. 2. That there would have been evidence to go to the jury that the defendant was owner of the whole of the premises—*Christian, J., dissentiente*. 3. That the defendant's case being that she was a tenant in common, there was no question for the jury, as she ought to have pleaded in abatement and not in bar—*Christian, J. dissentiente*. 4. That the verdict ought to be entered for the plaintiff—*Christian, J. dissentiente*. *Shee v. Gray*, 9 Ir. Jur. N.S. 270. C.P.

And per *Christian, J.*, that the object of the rule which enables a landlord to rely on the possession of the defendant is to relieve the landlord from ignorance, and not to relieve him from the necessity of proving a title, every step of which he knows. *Ib.*

And that if everything be as consistent with a positive as a negative, it is the duty of the judge to interfere. *Ib.*

And that the plaintiff could not succeed unless he proved two things—first, that there was other property for the sisters, and secondly, that the power was executed by the widow. *Ib.*

And that to presume the execution of a power from four years' possession would be opening a new chapter in the law of evidence. *Ib.*

And that the acts deposed to were the acts which a tenant in common had a right to perform. *Ib.*

TENANT FOR LIFE AND REMAINDERMAN.

Indemnification of life estate.] A. being seised in fee of certain estates, executes in 1809 a voluntary settlement, which, after reciting simply that those estates were subject to an annuity to his wife in case she should survive him, and subject also to certain charges amounting to £3,000, settles the estate on himself for life, remainder to his children in the usual manner. A. afterwards contracted debts which were secured by judgment on his life estate. In 1831, A. on the marriage of his eldest son, executed a deed confirming the limitations of the former deed, and

died in the year 1861. The sum of £3000, recited in the deed of 1809, as charged on the estates, was paid off out of the rents and profits of the life estate, and the subsequent creditors on the life estate now sought to have the life estate indemnified for these payments by the inheritance, contending that by the recital in the deed of 1809 this sum was made a charge on the inheritance. *Held*, reversing the decree of the Court below, that the life estate was entitled to be indemnified, for that by the recital the intention of the settlor appeared that this sum was to be a charge on the inheritance, and that it was not necessary for the settlor to specially exempt his own life estate from these payments. *Dolphin v. Aylward*, 9 Ir. Jur. N.S. 141. Ch. Ap.

TENANCY IN TAIL—DISENTAILING DEED.

A disentailing deed, executed in pursuance of the Act for the Abolition of Fines and Recoveries (4 & 5 W. 4, c. 92), is valid if enrolled within six months from the time of its execution, although such enrolment has not taken place until after the death of the tenant in tail who executed the deed. *In re Piers's estate*, 14 Ir. Ch. Rep. 452, Ch. App.; 8 Ir. Jur. N. S., 401.

The 66th section of the 4 & 5 W. 4, c. 92, applies only to disentailing deeds executed by the same tenant in tail, and not to deeds executed by successive tenants in tail. Therefore, where A, a tenant in tail, executed a disentailing deed, which was enrolled within the six months prescribed by the statute, but not till after A's death, and B, a succeeding tenant in tail, executed a disentailing deed to a purchaser for value after A's death, which was enrolled prior to the enrolment of the deed executed by A, it was *held* that the deed executed by A was entitled to priority over the deed executed by B. *Ib.*

The Act for the Abolition of Fines and Recoveries has no application to the enrolment of a disentailing deed by a tenant in fee, nor to any disposition of lands otherwise than by a tenant in tail in pursuance of the Act. *Ib.*

TRUST.

A father advanced £1,000 in a partnership concern, for the benefit of his sons, A and B, reserving to himself power, if they died, to substitute two other sons for them. The partner gave credit in his books to A. and B for £500 each. A and B both died under age, and after their death the partner, by the father's direction, transferred two sums of £500 each in his books to C and D, two other sons, but without adding any interest or profit thereto from the accounts of A and B. *Held*, that there was no trust created for C and D; that the partnership was with the father, and that the profits were his assets. *Pilworth v. Mosse*, 14 Ir. Ch. Rep. 163, R.

TRUSTEE AND CESTUI QUE TRUST.

When, in the inception of a trust, the funds are vested in two trustees, and one of them dies, the survivor is entitled to have the advice and co-operation of a new trustee before dealing with the principal of the trust funds in any way which involves a question

of discretion. *Livesay v. O'Hara*, 14 Ir. Ch. Rep. 12, Ch.

By marriage articles it was recited that the intended wife was entitled to certain legacies, which had not been reduced into possession, and were computed to amount to £2,000; and it was agreed that, in consideration of the wife's fortune, the husband should execute a bond, conditioned for the payment of £2,000, with warrant of attorney to confess judgment, which should be vested in trustees, in trust, that they should, when they should think fit, call in the amount secured, and invest the sum so realised in the funds or on mortgage, and permit the husband to receive the interest for his life, or until he should become bankrupt or insolvent, or enter into a composition with his creditors; and after his decease, or on his becoming bankrupt, &c., to permit the wife to receive the interest for her separate use for life, and after her decease, in trust for the issue of the marriage. The articles contained a covenant with the trustees, that if, at any time during the coverture, any real or personal estate or property should descend or devolve, or become vested beneficially in the wife, or any person in trust for her, the husband should do all necessary acts to vest same in the trustees, upon the aforesaid trusts. The trustee paid two of the legacies recited in the articles, which came to their hands, to the husband, who was a trader, while he was solvent, but did not enter judgment on the bond until three years after the marriage, when he was insolvent, though they registered the warrant of attorney. *Held*, that the covenant did not apply to the legacies recited in the articles, and therefore the trustees were not guilty of a breach of trust in paying them to the husband. *Macken v. Hogan*, 14 Ir. Ch. Rep. 285, R.

Held also, that, as the husband had no land on which the judgment could be attached, the trustees were not guilty of a breach of trust by not entering the judgment forthwith. *Ib.*

Parties to suit for breach of trust.] The trustees of a settled fund committed a breach of trust by paying over the whole to the tenant for life. *Held*—In a suit brought by the *cestui que trust* in remainder against the trustees, for the recovery of the trust fund—that the representatives of the tenant for life were necessary parties. *Burrowes v. O'Brien*, 9 Ir. Jur. N. S. 23, R.

TURBARY.

A reservation of turbary is not repugnant to a grant of bog. *Beere v. Fleming*, 9 Ir. Jur. N. S. 44, Exch. Ch.

A reservation of turbary is only a reservation of a profit *a prendre*, and the Statute of Limitations, 3 & 4 Wm. 4, c. 27, does not apply in such a case. *Ib.*

VENDOR AND PURCHASER.

Conditions of sale.] A condition of sale provided "that the purchaser shall not be at liberty to require any evidence of the title of the lessors in the said lease, or any of them, or object, by reason of incumbrances, if any, affecting the title of such lessors; nor require the production of any title-deeds connected with the premises, prior to, or of previous date to the said lease, but shall admit that said lease has been duly

executed and acknowledged by all the parties thereto; and be satisfied with the same being handed over to them, and the title deduced therefrom to the owners." *Held* that this condition did not preclude the purchaser rejecting the title on the ground of objections to the lessor's title. *Musgrave v. McCullagh*, 14 Ir. Ch. Rep. 496, Ch.

Lessees for lives renewable for ever, granted to L, his heirs and assigns, at a rent. L's description did not answer the description of a lease for ever. *Id.*

WARRANT OF ATTORNEY.

As to filing within twenty-one days, under 20 & 21 Vict. c. 60, s. 334. A gives B a warrant of attorney to confess judgment, which is not filed as required by stat. 20 & 21 Vict. c. 60, s. 334, but within twenty-one days after the execution of the warrant judgment is marked, and the judgment registered under stat. 7 & 8 Vic. c. 90. The amount of the debt having been levied by sale of A's goods under a writ of *fi. fa.* issued on the judgment so marked, and A. having subsequently become bankrupt, *Held* (per Hayes and O'Brien, JJ.,) that an action would not lie against B at the suit of his assignees by reason of the sale, either in the form of trespass, trover, detinue, or money had and received; and (per Fitzgerald, J.,) that it would not lie in the form of trespass, trover, or detinue, but would lie in the form of money had and received to the use of the assignees. *Murphy v. Keefe*, 9 Ir. Jur. N. S. 123, Q. B.

WAY.

A lease dated June, 1848, and made in pursuance of an agreement made in 1802, demised certain premises, "with the rights, members, and appurtenances thereunto belonging, or in anywise appertaining." Evidence was given of the enjoyment of a right of way, by the occupiers of the demised premises over the premises of the lessor, under whom the defendants claimed, for more than forty years before action brought, and that the right of way in question was essential to the enjoyment of the demised premises. *Held*, that there was no unity of possession of the dominant and servient tenements in the lessor, upon the grant of the lease of 1848, sufficient to extinguish the right of way. *Kavanagh v. the Coal Mining Company of Ireland (Limited)*, 14 Ir. C. L. Rep. 82, Q. B.

Held also, that the right of way, being essential to the beneficial enjoyment of the demised premises, passed under the word "appurtenances." *Id.*

WILFUL DEFAULT.

The rule of pleading, which, in order to justify an account of wilful default against a land agent, requires some instance of such default to be charged in the petition, and proved at the hearing, is not satisfied by the petition containing a reference to accounts furnished by the agent, which shew remission of rents by the agent, even though there be evidence to shew that such remission was wrongful. *Pennefather v. Bolton*, 14 Ir. Ch. Rep. 535, Ch. App.; s. c. 8 Ir. Jur. N.S. 221.

WILL (CONSTRUCTION).

A testator, being seised of the lands of A, B, C, and D, under a lease, by his will, after reciting that he was possessed of a lease for lives renewable for ever of certain lands, which lands were denominated A, B, and C, directed that the aforesaid lands should, as soon after his decease as possible, be sold, and, after payment of his just debts, be equally divided between J. W. and S. L., as tenants in common, and not as joint tenants. He then specified the debts "affecting those lands," and after certain legacies, appointed J. W. residuary legatee of all his real and personal estate and effects. The specified debts were judgment-debts, which had been registered as mortgages against all the lands comprised in the lease. *Held*, that the lands of D. were included in the specific devise. *West v. Lawday*, 14 Ir. Ch. Rep. 209, R. (confirmed on appeal, 14 Ir. Ch. Rep. 340).

A testator bequeathed pecuniary legacies to each of his children, some of whom were minors, and he bequeathed the residue of his property, after payment of all his just debts, and funeral and testamentary expenses, and the several legacies bequeathed by his will, to be equally divided between all his said sons and daughters, and he directed that the "interest of the legacies" thereby given to such of his children as should not be of age at the time of his decease, should be paid to his wife, to be applied by her for and towards their maintenance and education. *Held*, that the interest of the respective shares of the residue, as well as that of the residuary legacies, was applicable to the maintenance of the minor children. *Guinness v. Guinness*, 14 Ir. Ch. Rep. 219, R.

Bequest of "all my right and title to my property in the town of R, namely, my dwelling-house and household furniture, and all things therein, especially my car, horse, and covered and side cars." *Held*, that bank notes, known by the testator to be in the house at the time the will was made, passed to the legatees. *Mahony v. Donovan*, 14 Ir. Ch. Rep. 262, R.; (confirmed on appeal, 14 Ir. Ch. Rep. 388.)

A testator bequeathed real estate to trustees, in trust, by and out of the annual rents, issues, and profits, to pay off and satisfy the several incumbrances which should, at the time of his death, remain really and truly affecting, or liens upon, the same or any part thereof; and also all such of his proper debts by himself contracted, and of his legacies, as his personal estate, thereafter for that purpose bequeathed, should or might be insufficient to satisfy; and after payment and satisfaction of all such incumbrances, debts, and legacies, to the use of his second son, B, for life, without impeachment of waste; remainder to his first and other sons in tail; remainder to his eldest son, A, for life; remainder to his first and other sons in tail; remainder to his daughters, as tenants in common in fee. He directed that his son B should receive £200 a year out of the rents for his support, to be increased, on his attaining the ages of sixteen and eighteen, to £300 and £400; and he directed his debts and younger children's fortunes to be paid out of his personal estate; and, if it should be insufficient, that the residue should be paid out of the savings of the estate devised to B, and not by sale or mortgage thereof. A leasing power was given to

A and B, when actually seised. Portions for the testator's daughters were charged on the estates, and the debts were directed to be paid by the personal estate, the surplus of which was to be laid out in the purchase of real estate, which was to be settled in strict settlement on A for life, to whom he devised the residue of his property. B, who was a minor at the testator's death, and was made a ward of Court, received, under orders of the Lord Chancellor, sums exceeding the allowance directed by the will to be paid to him during his minority. *Held*—That the incumbrances were charged on the annual rents of the estate devised to B., and not on the inheritance. *Clanmorris v. Clanmorris*, 14 Ir. Ch. Rep. 420. R.

Held also—That in a suit by the representative of B. to be recouped out of the personal estate for payment of incumbrances, the inheritor, who was a party and made a similar claim, could not have credit for the sums overpaid to B. by way of maintenance against the petitioner. *Id.*

Testator by his will directed as follows:—"I direct all my just debts to be paid by my executors and trustees hereinafter named, whom I also direct to pay the following legacies," (which amounted to £800)—"And as to my freehold estate of D., in the King's County, I devise and bequeath same to P. O'S. and T. D. O'F., whom I hereby nominate, constitute, and appoint executors of this my will upon the trusts" (therein mentioned; and as to his household furniture and other effects) "My will is, and I order and direct my said executors to sell same by auction, and out of the funds to be realised thereby, and also with the debts and costs due to me, when collected, to pay the several pecuniary legacies hereinbefore bequeathed by me." The creditors of testator having been paid out of the personal estate, which was insufficient to pay them and the legatees, it was contended that the pecuniary legatees were entitled to have the assets marshalled in their favour as against the devisees, and that the debts were well charged on the realty. *Held*—That the real estate was charged in aid of, but not in exoneration of, the personality, and that the personal estate was the primary fund for the payment of the debts. *Lyster v. O'Sullivan*, 9 Ir. Jur. N.S. 242. Master Litton.

A testatrix being seised of real estate made her will, dated the 10th day of May, 1849, and thereby did "give and bequeath to her brother-in-law, A., everything she might die possessed of, with the exception of her furniture, and appointed him her sole executor and residuary legatee." *Held*—That the real estate passed to A. under the will. *In re Gyles' estate*, 14 Ir. Ch. Rep. 311. L.E.C.

J. having three unmarried daughters, A. L. and C., bequeathed to A. and L. £2000 each, and to C. £2,500, to be invested for their benefit, and there to remain until their day of marriage; and in case one or more of his said daughters should die before her marriage, then the portion or portions of her so dying should go to and be divided between his surviving daughters, share and share alike; and if only one should survive, then to said one daughter; and if all his said daughters should die before their marriage, then their said portions should be divided between all his sons. Testator had also three married daughters.

G. married and died in the life of A., who died unmarried, leaving L. surviving. *Held*—That C.'s personal representative was entitled to a moiety of A.'s share. *In re Jackson's trusts*, 14 Ir. Ch. Rep. 472. Ch. Ap.

A testatrix devised real estate to trustees in trust for J. F. for life, remainder to his first and every other son in tail male, with several remainders over; and she devised the residue of her property to J. F. By a codicil, after reciting that she had by her will limited her estates to trustees upon trust for the use of J. F., with remainder to his issue in tail, and divers remainders over; and that since the making of her will J. F. had died, leaving an only child, A. F., who under the will would, as she believed, take an estate tail on her death, the testatrix declared it to be her will that the said A. F. should not become entitled to or take the estate so limited to him until he should have attained the age of twenty-three years; and she bequeathed a portion of the accumulations of the rents to J. F.'s sister, and directed that she should succeed to the estates next in remainder after the last remainder in the will. *Held*—That A. F. took a vested estate at the death of the testatrix, and was entitled to the rents from that period. *Dennis v. Frend*, 14 Ir. Ch. Rep. 27, R.

Testator by his will devised and bequeathed his interest in his freehold and chattel property to his grandson, J. C.; "but in case my said grandson, J. C., should happen to die before he attains the age of twenty-one or married," then over. *Held* (reversing the decision of a judge of the Landed Estates Court) that "or" should be read "and," and that J. C. had acquired an absolute estate having attained twenty-one, though he had not been married. *In re Clegg's estate*, 14 Ir. Ch. Rep. 70; s.c. 8 Ir. Jur. N. S. 21, Ch. Ap.

A testator bequeathed moneys lent on mortgage to A. for life, with remainder to his "first and other sons." The will also contained devises of fee-simple, freehold, and chattel lands to the first and other sons of A. successively. *Held*—That the first son of A. took the whole mortgage money absolutely. *In re Staunton, minors*, 14 Ir. Ch. Rep. 98, R.

Legacies were bequeathed to A, B, C. and D., to be paid to them on their marriage, but in case any of them married without the consent of their mother, then a gift over to the others; "and if any of them should die unmarried, or marry without such consent, then the sum so bequeathed should go and be paid to the survivors or survivor of them." A, married with consent, and dying left B, C. and D. surviving, who all died unmarried. *Held*—That A.'s personal representative was entitled to the three several legacies, and that the words "survivors or survivor" in the will ought to be read "others or other." *M'Blain v. Swanston*, 9 Ir. Jur. N.S. 122, Ch. Ap.

Testator, by will dated 6th December, 1807, gave and bequeathed "to his eldest daughter, M. S., all his estates in the lands of Newgarden, for and during the term of her natural life, with remainder to his grandson, D. S., and the heirs male of his body." On the 16th June, 1808, he made a codicil, "which he did thereby annex to his above will," whereby he bequeathed to his wife during her natural life the

lands of N. G., remainder to his daughter, M. S., and after her death to her grandson, D. S., omitting the words "heirs male of his body." *Held*—That the estate tail given by the will was not cut down to a life estate by the codicil. *Hunt v. Smith*, 9 Ir. Jur. N.S. 139, Exch.

A will, among other devises, contained the following—"I leave my third son, M. T., the lands of G. for ever, but in case he should die unmarried or without leaving lawful issue, in that case he may will one-half of it as he pleases, and the other half to go share and share alike between my surviving sons and their families, as my executors may think most wanting it." At the end of the will was the following clause—"All the bequests given my son R., my grandson M., and also my other three sons, M. C. and H., of my property, no part of it shall or will be liable, or pay any debt they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs." *Held*—That the two clauses must be read together and construed as one disposition; and that M. T. took an estate tail and not an estate in fee defeasible, in the event specified of the devisee dying without leaving lawful issue living at his death. *In re Meredith Thompson*, 9 Ir. Jur. N.S. 193; a.c. 14 Ir. Ch. Rep. 617, L. R. G.

An estate *pur autre vie* was devised to trustees to permit E., testator's eldest son, to have the use of same for his life, and after his death to permit the first and other sons of said E. to receive and have the profits for their lives, the eldest to be always preferred before the youngest, and on failure of issue male of said E., remainder to testator's second and other sons in tail male, remainder to testator's right heirs. *Held*—That the limitation of the life estates was precise and clear; and that the words, "on failure of issue," could not be imported from where they stood in the will, so as to create an estate tail to the prejudice of the life estates; and that the words "issue" or "children" not being used, it did not come within the rule of *Roddy v. Fitzgerald*. *Burke v. Tully*, 9 Ir. Jur. N.S. 344, Ch.

Meaning of word "issue." A testator directed the interest of the residue of his property to be paid to his three surviving daughters and his son-in-law, the husband of his deceased daughter A.; and as to the principal sum, he directed that the same should be vested (subject to certain bequests) for the issue of his late daughter A. and the issue of his other three daughters, so that after the decease of each of his respective daughters who should die and leave any issue that such issue which said daughters should leave should be entitled to receive the share of the interest of the property which his, her, or their mother respectively would be entitled to receive, and that the principal should be disposed of and given to such issue of his daughters respectively, share and share alike, on their respectively attaining the age of twenty-one years; or if female issue, on their attaining such age or marriage, with consent of their guardians thereafter mentioned: and if any of his said daughters should happen to die without leaving any issue, then that the share of interest which said daughter so dying would be entitled to should go the issue of his

surviving daughters and the issue of his deceased daughter A.; and the share of the principal sum whereon the same arose should go to the child or children of his said daughters; and if any of his daughters should die leaving children, and any of them should die before being entitled to receive his proportion, the surviving child or children, the issue of such daughter so dying should receive it; and he appointed guardians to his said grandchildren. *Black v. Campbell*, 14 Ir. Ch. Rep. 92, R.

A bequest to several legatees whose legacies were unequal, "to be equally divided between them in proportion to their legacies," thereinbefore given them. *Held*, on the context and general scheme of the will, that the division should be in proportion to the legacies. *Tubbot v. Gordon*, 14 Ir. Ch. Rep. 397.

Held also, that in ascertaining the proportions a legacy bequeathed to one of the legatees by a subsequent codicil should be taken into account. *Id.*

Trust void for uncertainty. A. K., by will bearing date the 12th February 1862, bequeathed to F. M. C. and E. his wife, all her property, "trusting to their charitable and pious recollection of the spiritual welfare of me and mine." On behalf of the Crown it was contended that this was a valid disposition of the property for charitable purposes, and that a scheme should be settled by the Court for that purpose. By the next of kin it was insisted that the trust was uncertain and void. *Held*—That the trust was void for uncertainty, and that the next of kin was entitled thereto. *McCarthy v. The Attorney-General*, 9 Ir. Jur. N.S. 4, Master Litton.

Revocation. A testator bequeathed £10,000 among his younger children, and his household furniture and live and dead stock to such of his daughters who should attain twenty-one; and he bequeathed other portions of his property, real and personal, to his children, and the residue of his property to his daughters. He made a codicil to his will, commencing thus:—"Codicil to my will of the, &c. Four of my children having died since the execution of said will, I alter the disposition of my property as follows." He bequeathed £4000 each to his three surviving daughters, and in case of one dying unmarried, her portion to go to the survivors; but in the event of more than one dying unmarried, her portion to go among his sons, as he was of opinion that £6000 was a sufficient portion for any girl; and he bequeathed to his two surviving sons the remainder of his property in equal proportions of whatever kind it might consist at the time of his death. He gave certain directions as to the management of mills which he held in partnership, devised his property over in the event of his sons dying without issue, and appointed executors of the codicil, as of "his last will and testament." *Held* that the bequest of the household furniture, &c. in the will was not revoked by the codicil. *Pilsworth v. Moss*, 14 Ir. Ch. Rep. 163, R.

The intention to revoke in a codicil must be as clearly expressed as the intention to devise in the will, otherwise the codicil will not operate as a revocation. A doubt, however reasonable, is not sufficient if the two instruments are not absolutely inconsistent. *Id.*

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APPENDIX TO THE IRISH JURIST,

CONTAINING

The Public General Statutes

PASSED IN THE SESSION 1864, AND 27 & 28 VICTORIA.

N.B. The Statutes relating to Ireland only are printed in full.

CAP. I.

An Act to authorize the Inclosure of certain Lands in pursuance of a Report of the Inclosure Commissioners for *England and Wales*.
[18th March, 1864.]

CAP. II.

An Act to enable the Right Honourable Sir John Laird Mair Lawrence to receive the full Benefit of the Salary of Governor General of *India*, notwithstanding his being in receipt of an Annuity granted to him by the *East India Company*.
[18th March, 1864.]

CAP. III.

An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.
[18th March, 1864.]

CAP. IV.

An Act for the Regulation of Her Majesty's Royal Marine Forces while on Shore.
[18th March, 1864.]

CAP. V.

An Act to apply the Sum of Five hundred and eighty-four thousand six hundred and fifty Pounds out of the Consolidated Fund to the Service of the Year ending the Thirty-first Day of *March* One thousand eight hundred and sixty-four.
[18th March, 1864.]

CAP. VI.

An Act to apply the Sum of Four million five hundred thousand Pounds out of the Consolidated Fund to

the Service of the Year One thousand eight hundred and sixty-four.
[18th March, 1864.]

CAP. VII.

An Act to amend the Law relating to Bills of Exchange and Promissory Notes in *Ireland*.
[28th April, 1864.]

9 G. 4, c. 24.

Sec. 1. *Notaries in Ireland not required to keep their offices open from 6 to 9 o'clock in the evening.*

2. *Notaries in Ireland not required to attend after 6 o'clock in the afternoon to receive payment of any bill or note.*

'WHEREAS an Act was passed in the ninth year of the reign of King *George* the Fourth, chapter twenty-four, intituled *An Act to repeal certain Acts, and to consolidate and amend the Laws relating to Bills of Exchange and Promissory Notes in Ireland*: And whereas it is expedient that the said Act should be amended, so far as relates to the hours thereby prescribed for keeping open the offices of public notaries in *Ireland*:' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act so much of the said Act of the ninth year of King *George* the Fourth, chapter twenty-four, as requires that all public notaries practising in *Ireland* shall keep their offices open from six of the clock in the afternoon until nine of the clock in the evening of any day, shall be and the same is hereby repealed.

2. From and after the passing of this Act, it shall

not be necessary for any notary public in *Ireland*, or any person for him, at his house or office, to be in attendance after the hour of six of the clock in the afternoon of any day, in order to receive payment of any bill or note; but every such bill or note whereof payment shall not be made or duly or legally tendered at or before such hour of six of the clock in the afternoon shall be considered to be and shall be dishonoured, to all intents and purposes; and thereupon such notary public shall and may note or protest the same for non-payment, any law, statute, or usage to the contrary notwithstanding.

CAP. VIII.

An Act to amend the Laws relating to Conveyancers, Special Pleadors, and Draughtsmen in Equity practising in *Ireland*. [28th April, 1864.]

Sec. 1. Commencement of Act.

2. Commissioners of Inland Revenue not to grant certificates to persons herein mentioned, except on their depositing an order from benchers of King's Inns authorizing the same.

3. Penalty on persons acting as attorneys, &c., unless qualified as herein provided.

'WHEREAS it is expedient to amend the laws relating to conveyancers, special pleaders, and draughtsmen in equity practising in *Ireland*, in the manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall commence and take effect on and from the fifth day of *February*, one thousand eight hundred and sixty-five.

2. From and after the commencement of this Act, it shall not be lawful for the commissioners of inland revenue or any of their officers to grant or issue to any person any such stamped certificate as is required to be taken out by every person in *Ireland* who, in the character of a conveyancer, special pleader, draughtsman in equity, or otherwise, shall, for or in expectation of any fee, gain, or reward, draw or prepare any conveyance of, or deed or instrument relating to any estate or property, real or personal, or any other deed or contract whatever, or any pleadings or proceedings in any court of law or equity, unless and until such person shall have left with the said commissioners or their proper officers an order of the benchers of the honourable Society of King's Inns at *Dublin*, granting him permission to take out such stamped certificate, or a copy of such order, certified under the hand of their treasurer, sub-treasurer, or clerk; and the said benchers, before they shall issue any such order, shall satisfy themselves of the qualification and fitness of the person applying therefor, and they shall prepare rules for the purpose of defining what qualification shall be required for such order: provided always, that such order or copy of such order, certified as aforesaid, once granted by the said benchers to any such conveyancer, special pleader, or draughtsman in equity, shall be held to be good and valid for the purposes of this Act until the same shall have been revoked for

misconduct by the said benchers, which they are hereby authorized to do; and in case any such order shall have been so revoked by the said benchers, they shall transmit to the commissioners of inland revenue, certified as aforesaid, a notice that such person is no longer entitled to such order, and that the same has been revoked accordingly: provided also that every conveyancer, special pleader, and draughtsman in equity who on the eleventh day of *January* one thousand eight hundred and sixty-four was legally qualified and acting as such shall be deemed a qualified and fit person, and as such entitled to an order of the said benchers to take out his stamped certificate, unless the contrary shall be shown to the satisfaction of the said benchers.

3. Every person who shall, for or in expectation of any fee, gain, or reward, in anywise act or practise as a conveyancer, special pleader, or draughtsman in equity in *Ireland*, without being duly qualified to act and practise as herein provided, other than and except barristers-at-law, and also solicitors, attorneys, proctors, or notaries, and other than and except officers in the public service of the state drawing or preparing official instruments applicable to their respective offices, shall forfeit and pay for every such offence a sum not exceeding twenty pounds nor less than five pounds, to any person who shall sue or prosecute for the same, either by action in any of her Majesty's superior courts of common law at *Dublin* or before the chairman in the civil bill court at quarter sessions, or before any court of petty sessions in *Ireland*, under the provisions of the Acts relating to summary jurisdiction in *Ireland*, or any of them: provided always that no conveyance, deed, or instrument merely transferring any shares or stock in any public company, and in which there shall be no trust or limitation of the said shares or stock, shall be deemed a conveyance, deed, or instrument within the meaning of this Act.

CAP. IX.

An Act to allow the making of Malt Duty free to be used in feeding Animals.

[28th April, 1864.]

Sec. 1. Malt may be made and used free of duty in the feeding of animals, if mixed with linseed, &c.

2. Persons making duty-free malt under this Act to give security against frauds.

3. Malsters under this Act to designate their malthouses.

4. Malt to be conveyed from store to grinding room under such regulations as commissioners shall appoint.

5. Malster to provide a secure room for grinding and mixing malt.

6. Malt to be mixed with linseed cake or meal, &c.

7. Malster to keep an account of all mixed malt sent out, and of the name of the person to whom sent.

8. Penalty for separating malt from linseed cake or meal mixed therewith.

9. Persons found unlawfully removing malt from a malthouse entered under this Act to be

dealt with in manner directed by sect. 32 of 18 & 19 Vict., c. 94.

10. *Provisions of former Acts relating to malsters and the making of malt to be applied to the purposes of this Act.*
11. *Justices making malt under this Act not to be disqualified from granting alehouse licences.*
12. *Continuance of Act.*

‘WHEREAS it is expedient to allow malt to be made duty-free to be used in the feeding of Animals:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for any person who shall give such security as herein-after required in that behalf, and upon taking out a proper licence as a malster, to make malt, under the provisions of this Act in a malthouse approved by the commissioners of inland revenue for the sole purpose of being consumed in the feeding of animals, and all malt which shall be so made and which shall be mixed with linseed cake or linseed meal as herein-after directed in such malthouse, or with such other substance as may hereafter be approved by the said commissioners, shall be free from the duties of excise chargeable on malt; and it shall also be lawful for any malster (not being a distiller) who shall be entitled to make malt for the purpose of being consumed in the distilling of spirits under the provisions of the Act passed in the eighteenth and nineteenth years of her Majesty’s reign, chapter ninety-four, to mix malt with the materials aforesaid for the sole purpose of being consumed in the feeding of animals, upon his complying with the provisions and regulations of this Act.

2. Every person who shall intend to make malt duty free under the provisions of this Act shall enter into a bond to her Majesty, with two or more sufficient sureties to the satisfaction of the commissioners of inland revenue, and in such sum as the said commissioners shall think proper, conditioned to the purport or effect following; (that is to say,) that such malster shall duly make into malt all corn and grain which shall be received into any such malthouse as aforesaid, and shall not take, send out, remove, or deliver from any such malthouse as aforesaid any malt, except malt duly mixed with some material prescribed by this Act in that behalf, and removed in conformity with the provisions of this Act, and shall not convey away, hide, or conceal any malt or corn or grain contrary to any of the provisions of this Act, or of any Act in force in relation to malsters or the making of malt; and the condition of such bond shall also contain all such further terms and stipulations as the commissioners of inland revenue shall deem to be necessary or proper for enforcing compliance on the part of such malster with the terms and provisions of this Act, and the regulations which the said commissioners may make in pursuance thereof, or for preventing frauds in relation to the malt to be made by such malster; and such malster shall give a fresh bond, with such sureties as aforesaid, when and as

often as he shall be required so to do by the said commissioners, and in default thereof he shall not be entitled to make malt duty free under the provisions of this Act.

3. Every person who shall make malt under the provisions of this Act shall paint or place and fix in letters distinctly legible, three inches at the least in height, and of a proper and proportionate breadth, conspicuously upon the principal gate, door, or entrance of his malthouse, his Christian and surname, together with the words “Entered to make malt to be used in feeding animals,” and shall preserve and keep the same so painted or placed and fixed, and shall repaint and renew the same as often as occasion shall require.

4. All malt made under the provisions of this Act shall be deposited in a storeroom provided by the malster and entered with the excise for that purpose, and shall be conveyed to and from the room in which the same is intended to be ground as herein-after mentioned upon such notice to the officer of excise and under such regulations as the commissioners of inland revenue shall direct and appoint in that behalf.

5. The malster shall provide at his own expense a safe and secure room or rooms in his malthouse, to be approved in writing by the proper collector and supervisor of the district, for the purpose of grinding and mixing the malt made by him in such malthouse; and all such rooms so to be provided as aforesaid shall be properly secured to the satisfaction of the said collector and supervisor, and shall be at all times kept locked by the proper officer of excise, and neither the malster nor his servants or workmen shall be admitted therein, except upon such a notice in writing to be given by the malster to the officer as the said commissioners shall direct.

6. All malt made under the provisions of this Act shall, before the removal thereof from the malthouse in which the same shall have been made, be ground and thoroughly mixed with one tenth part at the least of its weight of ground linseed cake or linseed meal or other substance as aforesaid; and all such malt, and the said material to be mixed therewith, shall be ground to such a degree of fineness and in such manner as the said commissioners shall direct or approve, and shall be mixed together in a quantity not less than forty bushels at a time in the presence of an officer of excise by such means and in such manner as shall be directed or approved by the said commissioners; and for any refusal or neglect on the part of the malster to comply with the requirements of this clause, or any of them, the malt and also the material mixed or intended to be mixed therewith shall be forfeited.

7. The malster shall keep an account, in such form as the commissioners shall supply to him for that purpose, of the quantity, by weight or measure as the commissioners shall require, of all malt mixed as aforesaid which he shall from time to time send out or deliver from his malthouse, with the respective dates of such sending out or delivery, and the name and place of abode of the person to or for whom such mixed malt shall be so sent or delivered, together with such other particulars respecting the same as the said commissioners shall require in that behalf.

8. All malt which shall be found mixed with linseed cake or linseed meal or other substance as aforesaid shall be deemed to have been mixed under the provisions of this Act, and if any person shall separate or attempt to separate any malt from any material with which the same shall have been mixed as aforesaid, or shall use any malt which shall have been so mixed as aforesaid in or for the brewing of beer or distilling of spirits, he shall forfeit the sum of two hundred pounds, and all such malt and material shall be forfeited.

9. If any person shall be found taking or removing malt, or any corn or grain making into malt, from any malthouse or premises on the principal or outer gate whereof the words "Entered to make malt to be used in feeding animals" shall be painted, placed, or fixed, and not being malt mixed with such materials as aforesaid, and removing under and according to the provisions of this Act he shall be dealt with in like manner and be liable to the like penalty and punishment as are prescribed in the thirty-second section of the said Act passed in the eighteenth and nineteenth years of her Majesty in the case of a person offending as therein mentioned.

10. All the provisions, regulations, penalties, and forfeitures contained in the several Acts of Parliament now in force in relation to malsters or the making of malt, and also the provisions contained in the sections herein-after enumerated of the said Act of the eighteenth and nineteenth years of her Majesty's reign, chapter ninety-four, that is to say, sections six, eleven, thirteen, fourteen, fifteen, sixteen, eighteen, nineteen, twenty, twenty-four, twenty-five, twenty-six, twenty-seven, and thirty-one, so far as they relate to malsters not being distillers, and so far as the same shall be consistent with the express provisions of this Act, shall be applied and put in execution with respect to malsters and the making of malt under this Act as fully and effectually to all intents and purposes as if the same had been repeated and specially enacted, *mutatis mutandis*, with reference to malsters and the making of malt under this Act.

11. No justice of the peace shall be disqualified from acting in or about the granting or transferring of licences to persons to keep inns, alehouses, victualling houses, or public houses, or in any discussion or adjudication relating to the same, by reason of his making or mixing malt under the provisions of this Act, or of his dealing in, selling, or retailing any malt so made and mixed as aforesaid; anything in any Act or Acts to the contrary notwithstanding.

12. This Act shall continue and be in force for five years from the passing thereof, and until the end of the then next session of Parliament, and shall then expire, except as to any act done or offence committed, or any penalty or forfeiture previously incurred.

CAP. X.

An Act to continue for a further Period certain Provisions of the Union Relief Aid Acts.

[28th April, 1864.]

CAP. XI.

An Act to apply the Sum of Fifteen Millions out of

the Consolidated Fund to the Service of the Year One thousand eight hundred and sixty-four.
[28th April, 1864.]

CAP. XII.

An Act to amend the Laws relating to the warehousing of British Spirits. [28th April, 1864.]

- Sec. 1. *British Spirits in duty-free warehouse may be removed to a separate room to be bottled for exportation or for ships' stores.*
2. *How Spirits shall be bottled and packed.*
3. *Bottled Spirits may be removed to a ship or to customs warehouse as Spirits in casks.*
4. *Distiller may reduce Spirits with water in a warehouse specially approved for that purpose to any strength at which he might lawfully send the same out of his stock.*
5. *Separate room to be provided for racking duty-paid Spirits.*
6. *Allowance upon the deficiency arising from the vating of Spirits in warehouse increased to one per cent.*
7. *Duty to be paid on quantity of Spirits actually delivered from warehouse, where no fraudulent or improper deficiency.*
8. *When any deficiency beyond natural waste is found in Spirits in warehouse, the duty on the quantity originally warehoused to be paid immediately.*
9. *Spirits fraudulently concealed, abstracted, or removed from warehouse to be forfeited, and distiller or proprietor of warehouse to forfeit £200.*
10. *Distiller or proprietor of Spirits or warehouse opening or gaining access to warehouse, except in presence of an officer, to forfeit £500.*
11. *British Spirits may be removed from excise to customs warehouse, and may be delivered from customs warehouse for home consumption.*
12. *Allowance of twopence per gallon on British Spirits deposited in customs warehouse not to be paid until Spirits actually exported.*
13. *Powers and provisions of Customs Acts to be applied to British Spirits warehoused in customs warehouses under this Act.*
14. *Bonds to be given in form approved by commissioners.*
15. *Penalties to be recovered as other excise penalties.*
16. *Sections 129, 132, 133, 134, and 147 of the Act 23 & 24 Vict. c. 114, repealed.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Any plain British Spirits deposited in an excise warehouse without payment of duty may be removed by the distiller or proprietor of such spirits, on giving twenty-four hours previous notice to the officer of excise to a special and secure building, room, or place to be provided by the distiller or the proprietor of such

warehouse, and to be approved by the commissioners of inland revenue; and such spirits may be there bottled and packed for exportation or for use as ships stores in the manner herein-after directed, and under such regulations and during such hours as the said commissioners shall appoint in that behalf: provided always, that such building, room, or place shall be adjacent to but shall have no internal communication with the said warehouse, and shall not be situate in the same court or yard, or have any communication with the premises of a rectifier, dealer in or retailer of spirits; and provided also, that the distiller or proprietor of the said warehouse shall give security by bond for such building, room, or place.

2. Such spirits, after removal as aforesaid, shall be drawn off into imperial or reputed quart or pint bottles, and shall be packed in cases, each case to contain any number of dozens of bottles, but not less than one dozen quarts or two dozen pints; and all such cases shall be fastened and secured, and shall be legibly painted or branded with such particulars and marks as the said commissioners shall direct: and if any deficiency shall be found at any time in the quantity of spirits belonging to such distiller or proprietor exceeding two *per centum* upon the quantity which he shall have removed into the same building, room, or place, since the last account was taken, he shall be charged with the duty upon so much of such deficiency as shall exceed the said rate of two *per centum* on the quantity last aforesaid.

3. Spirits, when bottled and packed in the manner directed by this Act, may be removed without payment of duty, to a ship, or to a customs warehouse, for exportation or use as ships stores, under the like security and subject to the like conditions as in the case of spirits in casks delivered out of warehouse for the like purpose.

4. Any plain *British* spirits of a strength not less than forty-three *per centum* above proof deposited in the name of a distiller in an excise warehouse without payment of duty may be removed by such distiller without payment of duty to a general warehouse to be provided and secured, and under the like bond, as any other general warehouse for the deposit of *British* spirits without payment of duty under the laws of excise, and to be specially appointed or approved by the commissioners of inland revenue for the purpose of receiving spirits to be mixed with water; and such spirits when deposited in such last-mentioned warehouse may, under such regulations as the said commissioners shall make in that behalf, be mixed with water in a vat or vats to be provided by the distiller, and constructed to the satisfaction of the said commissioners, and may be reduced therein to any strength at which spirits are allowed by the one hundredth section of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen, to be sent out of or removed from a distillery or the stock of a distiller; provided always, that the water to be used in reducing the strength of such spirits shall be supplied only through a service pipe which shall pass through a meter placed in the said last-mentioned warehouse, such pipe and meter to be constructed, laid down, and fixed to the satisfaction of the said commissioners,

who are hereby authorized to require when they shall think it necessary any change or alteration to be made therein, or in the laying down or fixing of the same respectively.

5. The commissioners of inland revenue may require a separate room, secured to their satisfaction, to be provided by a distiller or proprietor of an excise warehouse for the racking of spirits upon which the duty has been paid; and the officer of excise shall keep an account, at hydrometer proof, of all spirits belonging to such distiller or proprietor of spirits which shall be received into such room and lawfully sent out therefrom; and if upon taking an account of the stock of such spirits at any time, a greater quantity of spirits shall be found in such room than, according to the said account, ought to remain therein, the excess shall be charged with duty, and if such excess shall amount to more than one *per centum* on the quantity of spirits which shall have been brought in since the last preceding account taken of the stock of spirits of such distiller or proprietor of spirits in such room as aforesaid, such excess shall be forfeited, and the distiller or proprietor of such spirits shall forfeit the sum of twenty shillings for every gallon of such excess.

6. In lieu of the allowance of one half *per centum* allowed by section one hundred and nineteen of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen, in the case of any deficiency which shall occur during the operation of vatting, blending, or racking of spirits in warehouse, an allowance not exceeding one *per centum* shall be made in the case of any such deficiency, and the same allowance shall be made in the case of any deficiency which shall occur during the mixing with water and racking of any spirits reduced under the provisions of this Act.

7. On the delivery of any cask or package of spirits from the excise warehouse in which the same shall have been deposited without payment of duty, the proper duties shall be charged and paid upon the quantity of spirits actually found in such cask or package at the time of the delivery thereof by weight, measure, or gauge, as the commissioners of inland revenue may direct; provided that if the quantity of spirits contained in such cask or package shall be found by weight, measure, or gauge to be less than the quantity contained therein when the same was deposited in the said warehouse, and if the said commissioners shall not be satisfied that such deficiency has not been caused in the whole or in part by any fraudulent abstraction, then the duty shall be charged and paid upon the whole quantity of spirits contained in such cask or package at the time when the same was deposited in the warehouse according to the account then taken thereof, or upon such portion thereof, as the said commissioners shall think fit.

8. If any officer of excise shall at any time find a greater deficiency (whether calculated by weight, measure, or gauge) in the quantity of spirits which should be contained in any cask or package deposited in any excise warehouse without payment of duty than can be accounted for by natural waste or other legitimate cause, the commissioners of inland revenue may require immediate payment of the duty

on the quantity of spirits originally warehoused in such cask or package; and if such duty be not paid by the distiller or proprietor of such spirits in whose name the said cask or package shall be warehoused, on demand made in writing by any officer of excise, the said distiller or proprietor shall forfeit double the value of the said duties; and no spirits which may be deposited in any such warehouse as aforesaid in the name of such distiller or proprietor shall be transferred to any other person or delivered out of such warehouse until such distiller or proprietor shall have paid the amount of such duties or forfeiture as aforesaid.

9. If any spirits shall be fraudulently concealed in or removed from the excise warehouse in which the same shall have been deposited without payment of duty, or if any spirits shall be abstracted from any cask or package which shall be deposited in any such warehouse, all such spirits, and all spirits with which the same may be put or mixed, and all spirits remaining in such cask or package, together with the said cask or package, shall be forfeited, and the distiller, or the proprietor or tenant of the warehouse, (if such concealment or abstraction shall have taken place in, or such removal have been made from, any general warehouse,) shall forfeit the sum of two hundred pounds.

10. If any distiller or proprietor of spirits, or any proprietor or tenant of any excise warehouse used for the deposit of spirits without payment of duty, or if any person or persons in the employ of any distiller or proprietor of spirits, or proprietor or tenant of such warehouse, shall open or gain access to any excise warehouse used for the deposit of spirits without payment of duty, except in the presence of an officer of excise acting in the execution of his duty as such officer, or shall abstract any spirits from any cask or package therein, the distiller or proprietor of spirits, or proprietor or tenant of the warehouse as aforesaid, who, by himself or by any person in his employ, shall commit any such offence as aforesaid, shall forfeit the sum of five hundred pounds.

11. Any plain *British* spirits to which no sweetening or other matter which shall alter the strength thereof has been added may, upon security by bond being given, and under such regulations as the commissioners of customs and inland revenue respectively may from time to time make in that behalf, be removed from any excise warehouse to, and be deposited without payment of any duty in, any customs warehouse which shall be situate in premises separate and distinct from any other premises in which duty-paid spirits or wine are kept; and any such spirits so deposited may upon the like security, and under such regulations as aforesaid, be removed to any other customs warehouse situate as aforesaid, or to any general excise warehouse; and such spirits may be delivered for home consumption from any customs warehouse in which the same shall be deposited upon payment of the proper excise duties thereon, to be ascertained according to the laws and regulations now in force with respect to spirits in an excise warehouse; and the said duties shall be collected by the officers of customs under the direction of the said commissioners of customs, who shall cause a separate account to be kept, and to be furnished to the said commissioners of inland revenue, of all such duties collected and received; and the amount thereof shall from time to

time be paid over to the account of the receiver-general of inland revenue at the Bank of *England*, and shall be dealt with and applied in the same manner as other monies arising from duties of excise.

12. The allowance of twopence *per* gallon granted by section four of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and twenty-nine, to any distiller or proprietor of spirits in respect of *British* spirits deposited in a customs warehouse, shall not be paid until a certificate from the proper officer of customs shall be produced to the officer of excise appointed to pay the said allowance that such spirits have been actually exported or used in the said warehouse for fortifying wines, or for any other purpose to which foreign or colonial spirits may be applied under the laws or regulations of the customs.

13. All the powers, provisions, clauses, regulations, pains, and penalties contained in or imposed by any Act or Acts relating to the customs as to the warehousing, custody, and delivery out of warehouse, whether for exportation, for use as ship stores, or for home consumption, of goods liable to a duty of customs, and as to any deficiencies therein or allowances thereon, so far as the same respectively are or shall be applicable, in all cases not hereby expressly provided for, and so far as the same shall not be superseded by and shall be consistent with the express provisions of this Act, shall be observed, applied, enforced, and put in execution with reference to any *British* spirits deposited in any warehouse of customs under the provisions of this Act, and to the proprietors or owners of such spirits.

14. Any bond or security required to be given by or under the authority of this Act shall be entered into to her Majesty, with one or more sufficient surety or sureties, and in such amount and with such conditions as the commissioners of customs or inland revenue respectively shall direct and approve.

15. The penalties and forfeitures imposed by this Act shall be sued for, recovered, levied, mitigated, and applied by the same ways, means, and methods, and in like manner, as penalties and forfeitures may be sued for, recovered, levied, mitigated, and applied under the laws of excise in that behalf.

16. Sections 129, 132, 133, 134, and 147 of the Act passed in the twenty-third and twenty-fourth years of her Majesty's reign, chapter one hundred and fourteen, shall be and the same are hereby repealed, except as to anything done or which ought to be done, or as to any offence committed, or any penalty or forfeiture incurred, before the commencement of this Act.

CAP. XIII.

An Act to further extend the Time for making Enrolments under the Act passed in the Twenty-fourth Year of the Reign of Her present Majesty, intituled *An Act to amend the Law relating to the Conveyance of Lands for Charitable Uses*, and otherwise to amend the said Law. [13th May, 1864.]

CAP. XIV.

An Act to confirm certain Provisional Orders under "The Land Drainage Act, 1861." [13th May, 1864.]

CAP. XV.

An Act for making better and further provision for the more efficient Despatch of Business in the High Court of Chancery. [13 May, 1864.]

CAP. XVI.

An Act to confirm the Appointment of *Henry Pendock St. George Tucker Esquire* as one of the Judges of Her Majesty's High Court at *Bombay*, and to establish the Validity of certain Proceedings therein. [13 May, 1864.]

CAP. XVII.

An Act for the Abolition of Vestry Cess in *Ireland*, and for other Purposes relating thereto. [13 May, 1864.]

Sec. 1. *No vestry in Ireland to levy rate after commencement of Act.*

2. *Powers of vestry with respect to deserted children to cease.*

3. *The Acts for relief of destitute poor in Ireland to apply to destitute deserted children.*

4. *Every vestry clerk, cess collector, beadle, engine keeper, &c. deprived of any salary or emolument by this Act to be compensated.*

5. *Parish officers deprived of salary, fees, &c. to be compensated.*

6. *Acts and parts of Acts in Schedule repealed.*

‘WHEREAS it is expedient to abolish vestry cess in *Ireland*, and to make other provisions in relation thereto:’ Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same as follows:

1. From and after the passing of this Act it shall not be lawful for any vestry called or holden in or for any parish, union, chapelry, or place in *Ireland* to make or levy any compulsory rate or assessment for any purpose whatsoever.

2. From and after the passing of this Act it shall not be lawful for any vestry in *Ireland* to appoint overseers of deserted children; and all other powers now exercised by vestries with respect to the charge, maintenance, and education of deserted children shall wholly cease and determine.

3. From and after the passing of this Act, the several Acts in force for the relief of the destitute poor in *Ireland* shall be and are hereby declared to be applicable to all cases of destitute deserted children which are now relieved or relievable, under the Acts relating to parish vestries, or under the Grand Jury Act, or any other Act for the relief of deserted children.

4. Every vestry clerk, cess collector, beadle, engine keeper, and other officer of any parish in the city of *Dublin* who shall be deprived of any salary, fees, or emoluments by the operation of this Act, shall be entitled to have an adequate compensation by way of a sum of money in gross, or annuity, at the option of and to be assessed by the town council of *Dublin*, regard being had to the manner of his appointment to the said office, and his term or interest therein, length of service, and all other circumstances of the case; and every person entitled to such compensation shall,

within three months from the passing of this Act, unless in the meantime an agreement shall have been come to between him and the said town council as to the amount of such compensation, deliver to the town clerk, a statement under his hand, setting forth how long he shall have held his said office and the amount received by him and his predecessor in office every year during the period of five years then last past, or such lesser period as he shall have held his said office next before the passing of this Act on account of salary, fees, and emoluments, and containing a declaration that same is a true statement, and also setting forth the sum claimed by him as such compensation; and the said town clerk shall lay such statement before the council, who shall take the same into consideration and determine thereon; and if the council shall not determine on such claim within six months after the same shall have been delivered to the town clerk, such claim shall be considered as admitted; and if the council shall so require, the person preferring such claim, on receiving notice in writing signed by the town clerk, shall attend at any meeting of the said council or any committee thereof, and shall then and there answer all such questions as shall be asked by any member of the said council or committee touching the said claim, and shall produce all vouchers, books, and papers in his possession, custody, or power relating thereto; and immediately upon a determination being made by the said council or committee touching such claim, the person preferring such claim shall be informed of the particulars of such determination by notice in writing under the hand of the town clerk; and in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon, it shall be lawful for him to appeal to the recorder at the quarter sessions for the city of *Dublin* next after the receipt of such notice from the town clerk, who shall thereupon make such order as to him shall seem just, and such order, signed by the recorder, shall be binding upon all parties; and the said council shall from time to time pay to every such person awarded compensation as aforesaid the money or annuity so granted or determined as and for compensation when and as the same shall respectively become due and payable; and in case such compensation shall be by way of annuity, the same shall be payable by half-yearly payments; and such compensation shall be provided for by a rate on the property in the city of *Dublin* liable to municipal taxation, and assessed as such other municipal charges are now assessed, such rate in no one year to exceed one penny in the pound of the valuation of such property; and such rate shall be called the special rate, and shall be solely applicable to the purposes of this Act, and to no other purpose whatsoever; and the collector-general of rates for the city of *Dublin* shall from time to time pay out of such rate to every such person the money or annuity so agreed upon or awarded as compensation, and shall include the said rate in his annual assessment, and take credit for the same in his account.

5. In the case of every parish officer in *Ireland* who shall be deprived of any salary, fees, or emoluments by the operation of this Act, it shall be lawful for any town council or town commissioners within the limits of whose respective jurisdictions such parish

may be situated to award such parish officers compensation for such loss of salary, fees, or emoluments in the manner hereinbefore enacted with respect to the city of *Dublin*, and with like appeal to the chairman of quarter sessions of the county in which such parish is situated.

6. From and after the passing of this Act the several Acts and parts of Acts in the schedule hereunto annexed shall be repealed, save so far as may be necessary for supporting or discharging any proceedings or liabilities had or incurred thereunder before the passing of this Act.

SCHEDULE to which the foregoing Act refers.

- 6 Geo. 1 (L) c. 15 sections 8 & 9.
- 11 & 12 Geo. 2, (L) c. 15.
- 13 & 14 Geo. 3, (L) c. 24.
- 3 Geo. 4, c. 35, section 4.
- 7 Geo. 4, c. 72, sections 10 & 51.
- 6 & 7 Wm. 4, c. 116, section 109.
- 7 & 8 Vict. c. 106, section 44.

CAP. XVIII.

An Act to grant certain Duties of Customs and Inland Revenue. [13 May, 1864.]

Sec. 1. *Grant of duties and drawbacks as specified in schedules annexed.*

2. *Provisions of former Acts to apply to this Act.*
3. *Commissioners of customs to provide standard samples of sugar for assessing duty.*
4. *Sect. 4 of 18 & 19 Vict. c. 97 repealed.*
5. *Occasional licences may be granted to persons who have taken out licences under 23 & 24 Vict. cc. 27 and 107, (Refreshment houses and wine Retailers); under 4 & 5 Vict. c. 85, (Beer retailers); and under 6 Geo. 4, c. 81. (Tobacco retailers.)*
6. *Tea licence at reduced rate to be granted only on overseer's certificate of rating.*
7. *Penalty on overseer, &c. refusing to grant certificate.*
8. *Half-yearly licences may be granted to hawkers.*
9. *Definition of "stock in trade."*
10. *Property insured subject to the reduced rate of duty to be distinguished in the policy and also in the quarterly accounts. Property and sums insured thereon may be distinguished by memorandum on existing policies.*
11. *Ad valorem duty chargeable on "settlements" payable under 13 & 14 Vict. c. 97, defined.*
12. *Settlement of sums of money secured by bonds, debentures, and other securities chargeable.*
13. *The value of shares in stocks and funds, and of sums secured by foreign or colonial securities, and of sums expressed in foreign or colonial currency, how ascertained and determined.*
14. *Provisions and regulations relating to proxies to apply to voting papers.*
15. *Income tax levied under section 40 of 16 & 17 Vict. c. 34 to be deducted from rent, interest, &c. at the rate payable during the period when the same was accruing.*

Most gracious Sovereign,

We, your Majesty's most dutiful and loyal subjects, the commons of the United Kingdom of *Great Britain* and *Ireland* in parliament assembled, towards raising the necessary supplies to defray your Majesty's public expenses, and making an addition to the public revenue, have freely and voluntarily resolved to give and grant unto your Majesty the several rates and duties hereinafter mentioned; and do therefore most humbly beseech your Majesty that it may be enacted; and be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, as follows:

1. There shall be charged, collected, and paid, for the use of her Majesty, her heirs and successors, the several rates and duties of customs, excise, stamps, and Income tax respectively specified and contained in the several schedules marked respectively (A), (B), (C), and (D), to this Act annexed, and there shall be allowed the several drawbacks specified and contained in the said schedule (A); and the said rates, duties, and drawbacks shall respectively take effect at or from the respective times, and shall continue to be charged, collected, paid, and allowed for and during the periods respectively specified or mentioned in that behalf in this Act or in the said schedules, and where no time is so specified for the commencement thereof the same shall commence and take effect from and after the passing of this Act, and where no period is so specified or limited for the duration thereof the same shall continue to be charged, collected, paid, and allowed respectively until parliament shall otherwise order; and the said several schedules shall be deemed to be part of this Act.

2. All the powers, provisions, clauses, regulations, allowances, and exemptions, forfeitures, pains, and penalties contained in or imposed by any Act or Acts, or any schedule thereto, relating to any duties or drawbacks of the same kind or description as the several rates or duties or drawbacks granted and allowed by this Act respectively, and in force at the time of the passing of this Act, and not hereby expressly repealed, or, as regards the income tax, in force on the 5th day of *April* one thousand eight hundred and sixty-four (except as hereinafter provided), shall respectively be in full force and effect with respect to the said rates, duties, and drawbacks by this Act granted and allowed respectively, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last-mentioned rates and duties, and the allowance and payment of the said drawbacks respectively, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this Act, as fully and effectually, to all intents and purposes, as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the rates, duties, and drawbacks by this Act granted and allowed respectively: Provided always, that nothing herein contained shall be construed to continue or revive the provisions contained in the

forty-second and forty-fourth sections of the Act passed in the twenty fifth year of her Majesty's reign, chapter twenty-two; and that for the purposes of this Act the year one thousand eight hundred and sixty-two, mentioned in the forty-third section of the said Act, shall be read as and deemed to mean the year one thousand eight hundred and sixty-four.

Customs.

3. For facilitating the due assessment of the duties on sugar, with reference to colour, grain, or saccharine matter, considered collectively as they affect the general quality of the sugar to be assessed with duty, the commissioners of customs shall provide and renew from time to time one or more sample or samples of each of the respective qualities, according to which sugar may be chargeable with duty upon importation into *Great Britain* or *Ireland*, such samples to be approved by the lords commissioners of her Majesty's treasury, and when so approved shall be deemed to be standard samples for the purpose of assessing the duty upon sugar, according as it may be equal to any of such samples on comparison therewith by the proper officer of customs; and no sugar shall be chargeable with the duty payable in respect of any particular quality or description for which a sample is provided as aforesaid unless the same shall be equal to such sample.

4. Section four of the Act of the eighteenth and nineteenth years of the reign of her present Majesty, chapter ninety-seven, shall be, and the same is hereby repealed.

Excise Licences.

5. It shall be lawful for the commissioners of inland revenue, whenever they shall consider it necessary for the accommodation of the public, to authorize any officer of excise to grant (upon payment of the respective duties in that behalf mentioned in schedule (B.) to this Act) an occasional licence in the several and respective cases herein-after mentioned; (that is to say,) to any person who shall have taken out an excise licence under the Acts passed in the twenty-third year of the reign of her Majesty, chapter twenty-seven, and the twenty-third and twenty-fourth years of the same reign, chapter one hundred and seven, respectively, to keep a refreshment house, or to sell by retail in a refreshment house foreign wine to be consumed therein; or an excise licence under the Act passed in the fourth and fifth years of the reign of King *William* the fourth, chapter eighty-five, to retail beer to be drunk or consumed in or upon the house or premises where sold; or an excise licence under the Act passed in the sixth year of the reign of King *George* the fourth, chapter eighty-one, to deal in or sell tobacco or snuff; and every such occasional licence shall authorize any such person as aforesaid to exercise and carry on the same trade and business as he shall be authorized to carry on by virtue of the licence granted under the said Acts respectively as aforesaid at any such place (other than the place for which his original licence was granted), and for and during such space or period of time, not exceeding three consecutive days at any one time, as the said commissioners shall approve, and as shall be specified in such occasional licence; provided that the said occasional licence shall

not protect any such person in the carrying on of any such trade or business as aforesaid, unless he shall produce such licence whenever requested so to do by any officer of excise, or by any constable or police officer, at the time of exercising such trade or business; and provided also, that the conditions and restrictions contained in the twentieth section of the Act of the twenty sixth and twenty-seventh years of her Majesty's reign, chapter thirty-three, relating to occasional licences, shall apply to the occasional licences to be granted under this Act (except in the case of occasional licences to sell tobacco or snuff).

6. No licence to trade in or sell coffee, tea, cocoa nuts, chocolate, or pepper at the reduced duty imposed by this Act on such licence shall be granted to any person who shall not produce, at the time of applying for such licence, to the officers of excise authorized to grant the same, a certificate in writing, signed in *England* and *Wales* by an overseer of the poor, or in *Scotland* by an inspector of the poor, of the parish, township, or place, or in *Ireland* by the clerk of the poor law union, in which parish, township, place, or union the house intended to be licensed is situated, certifying the sum at which the said house is rated to the last rate made for the relief of the poor of such parish, township, place, or union; provided that where in *Scotland* the house intended to be licensed is not separately rated to the poor on the ground of being let at a rent not amounting to four pounds *per annum*, such licence shall be granted upon a certificate signed by such inspector of the poor, certifying that such house is not so rated on the ground aforesaid; and any such licence which shall be granted without the certificate aforesaid, or upon a certificate which shall be false in any particular, shall be absolutely void; and no such licence at the reduced rate aforesaid shall authorize the sale of any of the articles mentioned therein at any other place than the house for which such licence shall be granted, anything in any Act to the contrary notwithstanding.

7. If any overseer of the poor, inspector of the poor, or clerk of a poor law union shall refuse to grant, when demanded, a certificate containing the particulars required by the preceding section, or shall grant a certificate which shall be false or untrue in any particular, he shall forfeit ten pounds.

8. Any licence to be taken out by a hawker, pedlar, or petty chapman in *Great Britain* may be granted for a period not exceeding six months, on payment of one half only of the amount payable for a yearly licence; provided that any such half-yearly licence shall continue in force until and upon the thirty-first day of *January* or the thirty-first day of *July*, as the case may be, next following the date thereof, and no longer.

Stamp Duties.

9. For the purposes of this Act with respect to the duty on insurances against loss or damage by fire, "stock in trade" shall be understood and deemed to mean goods, wares, and merchandise in the possession of the manufacturer thereof for sale, or in the possession of any manufacturer as materials to be used for the purpose or in the process of any manufacture, or in the possession of any trader for sale in the course of his trade, or in the possession of any person on

behalf of such manufacturer or trader, or in the possession of a licensed pawnbroker, being goods received by him in pledge.

10. In every policy by which any insurance from loss or damage by fire shall be made or renewed upon any stock in trade, machinery, implements, or utensils subject to the reduced rate of yearly percentage duty by this Act imposed, such stock in trade, machinery, implements, and utensils, and the sum or sums insured thereon, shall be specified and set forth separately from all other property on which any insurances shall be made by the same policy, and the quarterly accounts required by law to be kept and rendered by persons, corporations, and companies insuring against fire shall contain a separate and distinct account of all such insurances as aforesaid, and of the sums insured thereby respectively, and all other particulars relating thereto required by law to be specified or contained in such quarterly accounts: provided that where in any policy existing at the time of the passing of this Act property insured subject to the said reduced rate of duty shall not be separately and distinctly specified as herein required, it shall be lawful to distinguish the same and the sum or sums insured thereon by any memorandum to be written or endorsed in or upon such policy.

11. 'Whereas by an Act passed in the thirteenth and fourteenth years of the reign of her present Majesty, chapter ninety-seven, certain *ad valorem* stamp duties were granted and made payable under the head of "settlement" in the schedule thereto in respect of any definite and certain principal sum or sums of money, and any definite and certain share or shares in any of the government or parliamentary stocks or funds, or in the stocks and funds of the governor and company of the Bank of *England*, or of the Bank of *Ireland*, or of the *East India* Company, or of the *South Sea* Company, or of any other company or corporation and whereas it is expedient to explain and amend the said Act as herein-after mentioned: be it enacted, that the said duties so granted and made payable as last aforesaid shall be deemed to extend to and shall be chargeable upon or in respect of any definite and certain principal sum or sums of money of any denomination or currency, whether *British*, foreign or colonial, and any definite and certain share or shares in the stocks or funds of any foreign or colonial government, state, corporation, or company whatsoever, as well as upon or in respect of the shares, stocks, and funds specified in the said last-mentioned schedule.

12. And where any principal sum of money secured or contracted for by or which may become due or payable upon any bond, debenture, policy of insurance, covenant, or contract shall be settled, or agreed to be settled, or such bond, debenture, policy, covenant, or contract shall be settled, or assigned or transferred by way of settlement, or shall be agreed so to be, then and in any of such cases the same shall be deemed to be a settlement of such principal sum of money, and shall be chargeable with the same *ad valorem* stamp duties on the amount thereof accordingly: provided always, that where the subject of any settlement shall be a policy of insurance, then, if there shall not be any certain covenant, contract, or provi-

sion made for keeping up such policy, or for paying the premiums which may become payable in that behalf, the said *ad valorem* duty shall be chargeable only on the value of such policy at the date of such settlement.

13. And where the subject of any settlement chargeable with the said duties shall be any share or shares in any such stocks or funds as aforesaid, or any sum or sums of money secured by any foreign or colonial bond, debenture, or other security bearing a marketable value in the *English* market, then the value of such share or shares, and of such bond, debenture, or other security respectively, shall be ascertained and determined by the average selling price thereof on the day or on either of the ten days preceding the day of the date of the deed or instrument of settlement, or if no sale shall have taken place within such ten days, then according to the average selling price thereof on the day of the last preceding sale, and the said *ad valorem* duties shall be chargeable on such settlement in respect of the value so ascertained and determined; and the value of any sum or sums of money expressed in coin of a foreign or colonial denomination or currency shall be determined by the current rate of exchange on the day of the date of the deed or instrument of settlement, and the said *ad valorem* duties shall be chargeable in respect of the value so determined as last aforesaid.

14. The stamp duty by this Act imposed on a voting paper as described in Schedule (C.) to this Act may be denoted by an adhesive stamp, in like manner as the stamp duty on an instrument appointing a proxy; and all provisions and regulations relating to the particulars to be inserted in such last mentioned instrument, or to the cancelling or obliterating an adhesive stamp affixed thereto, and all penalties for any neglect or omission to comply with any such provisions or regulations, or for making or signing any such instrument on paper not duly stamped, or for voting or attempting to vote under any such instrument not duly stamped, shall be deemed to apply and shall be observed and enforced *mutatis mutandis*, in relation to any such voting paper as aforesaid.

Income Tax.

15. 'And whereas under and by virtue of the fortieth section of the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, persons liable to the payment of rent, yearly interest, or any annuity or other annual payment therein mentioned, are entitled and authorized on making such payment to deduct and retain thereout the amount of the rate of income tax which shall be payable at the time when such payment becomes due: Be it enacted, that the persons liable to and making any such payment as aforesaid shall be entitled and are hereby authorized to deduct and retain thereout the amount of the rate or a proportionate amount of the several rates of income tax which were chargeable by law upon or in respect of such rent, interest, annuity, or other annual payment, or the source thereof, during the period through which the same was accruing due, anything in the said recited Act to the contrary notwithstanding.

SCHEDULES.

SCHEDULE (A).

Containing the RATES and DUTIES OF CUSTOMS granted, and the DRAWBACKS allowed on the following Articles by this Act.

On and after the under-mentioned dates, in lieu of the duties of customs now charged on the articles under-mentioned, the following duties of customs shall be charged thereon, on importation into Great Britain or Ireland; that is to say,

On and after the fifth day of May one thousand eight hundred and sixty-four:

Sugar, viz: £ s. d.

Candy, brown or white, refined sugar, or sugar rendered by any process equal in quality thereto, and manufactures of refined sugar the cwt. 0 12 10

On and after the sixteenth day of April one thousand eight hundred and sixty-four:

Sugar, viz: £ s. d.

White clayed sugar, or sugar rendered by any process equal in quality to white clayed, not being refined or equal in quality to refined, the cwt. 0 11 8

Yellow muscovado, and brown clayed sugar, or sugar rendered by any process equal in quality to yellow muscovado or brown clayed, and not equal to white clayed the cwt. 0 10 6

Brown muscovado sugar, or sugar rendered by any process equal in quality thereto, and not equal to yellow muscovado or brown clayed the cwt. 0 9 4

Any other sugar not equal in quality to brown muscovado the cwt. 0 8 2

Cane Juice the cwt. 0 6 7

Mollasses the cwt. 0 3 6

Almonds, paste of the lb. 0 0 1

Cherries, dried the lb. 0 0 1

Comfits, dry the lb. 0 0 1

Confectionery, not otherwise enumerated the lb. 0 0 1

Ginger (preserved) the lb. 0 0 1

Marmalade the lb. 0 0 1

Plums preserved in sugar the lb. 0 0 1

Succades, including all fruits and vegetables preserved in sugar, not otherwise enumerated the lb. 0 0 1

On and after the under-mentioned dates, in lieu of the drawbacks now allowed thereon, the following drawbacks shall be paid and allowed on the under-mentioned descriptions of refined sugar on the exportation thereof to foreign parts, or on removal to the Isle of Man for consumption there, or on deposit in any approved warehouse, upon such terms and subject to such regulations as the commissioners of customs may direct, for delivery from such warehouse as ship stores only, or for the purpose of sweetening British spirits in bond, that is to say,

On and after the fifth day of May one thousand eight hundred and sixty-four:

Upon refined sugar in loaf, complete and whole, or lumps duly refined,

having been perfectly clarified, and thoroughly dried in the stove, and being of an uniform whiteness throughout; and upon such sugar pounded, crushed, or broken in a warehouse approved by the commissioners of customs, such sugar having been there first inspected by the officers of customs in lumps or loaves as if for immediate shipment and then packed for exportation in the presence of such officer and at the expense of the exporter, and upon candy, for every cwt. 0 12 10

Upon refined sugar unstoved, pounded crushed, or broken, and not in any way inferior to the export standard sample, No. 1., approved of by the lords of the treasury, and which shall not contain more than five per centum moisture over and above what the same would contain if thoroughly dried in the stove, for every cwt. 0 12 2

And on and after the twenty-first day of April one thousand eight hundred and sixty-four:

Upon sugar refined by the centrifugal or by any other process, and not in any way inferior to the export standard, No. 3., approved by the treasury, for every cwt. 0 12 10

Upon bastard or refined sugar unstoved broken in pieces, or being ground, powdered, or crushed, not in any way inferior to the export standard sample, No. 2., approved by the lords of the treasury for every cwt. 0 10 10

Upon bastard or refined sugar, unstoved, broken in pieces, or being ground, powdered, or crushed, not in any way inferior to the export standard sample, No. 4., approved by the lords of the treasury, for every cwt. 0 9 6

Upon bastard or refined sugar, being inferior in quality to the said export standard sample, No. 4., for every cwt. 0 8 2

In lieu of the duties of customs now charged on the under-mentioned articles on their importation into Great Britain or Ireland, the following duties of customs shall be charged on and after the first day of September, one thousand eight hundred and sixty-four; that is to say,

Wheat

Barley

Oats

Rye

Peas

Beans

Maize or Indian Corn

Buckwheat

Bear or bigg

} the cwt. 0 0 3

The duties of customs now charged on tea shall continue to be levied and charged—

On and after the first day of August one thousand eight hundred and sixty-four until the first day of August one thousand eight hundred and sixty-five, on importation into Great Britain or Ireland; that is to say,

	£	s.	d.
Tea	the lb.	0	1 0

SCHEDULE (B.)

Containing the duties of EXCISE granted by this Act; that is to say,

On sugar made in the United Kingdom on and after the sixteenth day of April one thousand eight hundred and sixty-four, in lieu of the duties of excise now chargeable thereon; (that is to say,)

Candy, brown or white, refined sugar, or sugar rendered by any process equal in quality thereto, and manufactures of refined sugar, the cwt. 0 12 10

White clayed sugar, or sugar rendered by any process equal in quality to white clayed, not being refined or equal in quality to refined, the cwt. 0 11 8

Yellow muscovado and brown clayed sugar, or sugar rendered by any process equal in quality to yellow muscovado or brown clayed, and not equal to white clayed, the cwt. 0 10 6

Brown muscovado sugar, or sugar rendered by any process equal in quality thereto, and not equal to yellow muscovado or brown clayed, the cwt. 0 9 4

Any other sugar not equal in quality to brown muscovado the cwt. 0 8 2

Mollasses the cwt. 0 3 6

On Sugar used in brewing:

For and upon every hundred weight, and so in proportion for any greater or less quantity than a hundred weight, of all sugar which on or after the sixteenth day of April one thousand eight hundred and sixty-four shall be used by any brewer of beer for sale in the brewing or making of beer 0 3 4

In lieu of the duty of excise on such last-mentioned sugar granted by any former Act.

On licences to sell tea, &c.:

For and upon any licence to be taken out yearly by any person to trade in or sell coffee, tea, cocoa nuts, chocolate, or pepper in any house rated to the relief of the poor at a sum less than eight pounds per annum, the duty of 0 2 6

In lieu of the duty of excise now payable upon such licence.

On occasional licences to refreshment house keepers, wine retailers, beer retailers, and tobacco dealers; (that is to say),

For and upon every occasional licence to the keeper of a refreshment house for each and every day for which such licence shall be granted Nil.

For and upon every occasional licence

to retail foreign wine to be consumed at the place where sold, for each and every day for which the same shall be granted 0 1 0

For and upon every occasional licence to retail beer to be consumed at the place where sold, for each and every day for which the same shall be granted 0 1 0

For and upon every occasional licence to deal in or sell tobacco or snuff for each and every day for which the same shall be granted 0 0 4

On licences to hawkers and pedlars:

For and upon any licence to be taken out after the first day of August one thousand eight hundred and sixty-four, by every hawker, pedlar, petty chapman, and every other trading person going from town to town, or to other men's houses, and travelling either on foot or otherwise, in Great Britain, carrying to sell or exposing to sale any goods, wares, or merchandise.

If such trading person as aforesaid shall travel and trade on foot, without any horse or other beast bearing or drawing burthen, and shall carry his goods, wares, or merchandise to and sell or expose for sale the same at other men's houses only, and not in or at any house, shop, room, booth, stall, or other place whatever belonging to or hired or occupied or used by him for that purpose in any town to which he may travel, the yearly duty of 2 0 0

And if such trading person shall travel or trade otherwise than as aforesaid, or with a horse or other beast bearing or drawing burthen, the yearly duty of 4 0 0

And if such trading person shall travel or trade with more than one horse or other beast bearing or drawing burthen, then for each and every horse or other beast with which he shall so travel the yearly duty of 4 0 0

In lieu of the duties now chargeable on licences to hawkers and pedlars in Great Britain.

And the trading persons described in the ninth section of the Act passed in the twenty-fourth and twenty-fifth years of her Majesty's reign, chapter twenty-one, shall be deemed to be hawkers and pedlars subject to the duties herein contained.

SCHEDULE (C.)

Containing the DUTIES of STAMPS granted by this Act in lieu of the Stamp Duties now chargeable on the several instruments, matters, and things in this Schedule mentioned.

FIRE INSURANCE.

In lieu of the yearly per-centage duty now chargeable for or in respect of any insurance from loss or damage by fire only, which shall be made or renewed

on or after the twenty-fifth day of June, one thousand eight hundred and sixty-four, of or upon any goods, wares, or merchandize, being stock in trade, or of or upon any machinery, fixtures, implements, or utensils used for the purpose of any manufacture or trade, there shall be charged and paid yearly a duty at and after the rate of one shilling and sixpence per annum for every one hundred pounds insured; and when any such insurance as aforesaid shall be made or renewed at any time between the twenty-second day of April, one thousand eight hundred and sixty-four and the said twenty-fifth day of June, for any period of time extending beyond the said last-mentioned day, there shall be charged and paid for and in respect of the time intervening between the making or renewing of the said insurance and the said twenty-fifth day of June, the yearly per-centage duty at and after the rate chargeable on the said twenty-second day of April, and for and in respect of any subsequent period, including the said twenty-fifth day of June, and the rate of duty chargeable according to this resolution; and no return or allowance of duty, except at and after the last-mentioned rate, shall be made in respect of time unexpired, or otherwise, on any such insurance as aforesaid which shall have been made or renewed before the said twenty-second day of April one thousand eight hundred and sixty-four.

Letters or powers of attorney, proxies, &c.; (that is to say),

For and upon any letter or power of attorney:

For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds:

If the value of such stocks or funds shall exceed £20 . . .	£1 0 0
And if such value shall not exceed £20 . . .	0 5 0

For the receipt of dividends or interest of any of the Government or Parliamentary stocks or funds, or of the stocks, funds, or shares of or in any joint stock company or other company or society whose stocks or funds are divided into shares and transferable:

	£ s. d.
If the same shall be for the receipt of one payment only . . .	0 1 0
And if the same shall be for a continuous receipt or for the receipt of more than one payment . . .	0 5 0

For the receipt of any sum of money, or any cheque, note, or draft for any sum of money not exceeding £20 (except in the cases aforesaid) or any periodical payment (other than as aforesaid) not exceeding the annual sum of £10 . . .

0 5 0

Letter or power of attorney, commission, factory, mandate, or other instrument in the nature thereof:

For the sole purpose of appointing, nominating, or authorizing any person to vote as a proxy or otherwise at one meeting of the proprietors or shareholders of any joint stock or other company, or of the members of

any society or institution, or of the contributors to the funds thereof, or at one meeting of any body exercising a public trust, in the United Kingdom, or to vote at one parish meeting of heritors or proprietors of real or heritable property in Scotland . . .

0 0 1

Voting paper; (that is to say),

Any instrument for the purpose of voting by any person entitled to vote at any such meeting as aforesaid in any part of the United Kingdom . . .

0 0 1

For and upon any letter or power of attorney made by any petty officer, seaman, marine, or soldier serving as a marine, or by the executors or administrators of any such person—

For receiving prize money or wages . . .

0 1 0

For and upon any letter or power of attorney of any other kind or commission or factory in the nature thereof . . .

1 10 0

Exemptions.

Any letter of attorney for the receipt of dividends of any definite and certain share of the Government or Parliamentary stocks or funds producing a yearly dividend of less than £3.

Any letter or power of attorney or proxy filed in any ecclesiastical court.

Appointment to Ecclesiastical Benefices, &c.

For and upon any donation or presentation, by whomsoever made, of or to any ecclesiastical benefice, dignity, or promotion:

Also for and upon any collation by any archbishop or bishop or by any other ordinary or competent authority to any ecclesiastical benefice, dignity, or promotion:

Also for and upon any institution granted by any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court, to any ecclesiastical benefice, dignity, or promotion, proceeding upon the petition of the patron to be himself admitted and instituted, and not upon a presentation:

Also for and upon any nomination by her Majesty, her heirs or successors, or by any other patron, to any perpetual curacy:

Also for and upon any licence to hold a perpetual curacy not proceeding upon a nomination:

Where the net yearly value of any such benefice, dignity, promotion, or perpetual curacy—

Shall exceed 50 <i>l</i> . and not exceed 100 <i>l</i> . . .	1 0 0
" 100 <i>l</i> . . . 150 <i>l</i> . . .	2 0 0
" 150 <i>l</i> . . . 200 <i>l</i> . . .	3 0 0
" 200 <i>l</i> . . . 250 <i>l</i> . . .	4 0 0
" 250 <i>l</i> . . . 300 <i>l</i> . . .	5 0 0

And where such value shall exceed 300*l*. . .

7 0 0

And also (where such value shall exceed 300*l*.) for every 100*l*. thereof over and above the first 200*l*. a further duty of . . .

5 0 0

Nota.—The yearly value of such benefice, dignity, promotion, or perpetual curacy in any and every of the cases aforesaid to be ascer-

tained and determined by the certificate of the ecclesiastical commissioners for England, and Ireland respectively, to be written on the instrument charged with duty; provided always, that two or more benefices, or a benefice and any other ecclesiastical preferment episcopally or permanently united shall be deemed one benefice only.

Also for and upon any collation, institution, or admission by any presbytery or other competent authority to any ecclesiastical benefice in Scotland 2 0 0

Exemptions.

1. Any collation or appointment by any archbishop or bishop to any cathedral, prebend, dignity, or honorary canonry having no endowment or emolument attached thereto.
2. Any institution proceeding upon a presentation.
3. Any licence to hold a perpetual curacy proceeding upon a nomination.

SCHEDULE (D.)

Containing the rates and duties of income tax granted by this Act.

For one year commencing on the sixth day of April one thousand eight hundred and sixty-four, for and in respect of all property, profits, and gains mentioned or described as chargeable in the Act passed in the sixteenth and seventeenth years of her Majesty's reign, chapter thirty-four, for granting to her Majesty duties on profits arising from property, professions, trades, and offices, the following rates and duties; (that is to say),

For every twenty shillings of the annual value or amount of all such property, profits, and gains, (except those chargeable under Schedule (B.) of the said Act) the rate or duty of sixpence.

And for and in respect of the occupation of lands, tenements, hereditaments, and heritages chargeable under Schedule (B.) of the said Act, for every twenty shillings of the annual value thereof—

In England the rate or duty of threepence:

And in Scotland and Ireland respectively the rate or duty of twopence farthing:

Subject to the provisions contained in section three of an Act passed in the last session of Parliament, chapter twenty-two, for the exemption of persons whose whole income from every source is under one hundred pounds a year, and the relief of those whose income is under two hundred pounds a year.

CAP. XIX.

An Act to enable Joint Stock Companies carrying on Business in Foreign Countries to have official seals to be used in such countries.

[13th May, 1864.]

Sec. 1. *Short title.*

2. *Power to companies to have an official seal.*

3. *Power to companies to appoint agents abroad to affix seals.*

4. *As to the duration of powers granted under section 3 of this Act.*

5. *Person affixing seal to document to certify the date when so affixed.*

6. *Companies not to exercise powers of Act unless authorized.*

7. *Section 55 of 25 & 26 Vict., c. 89, not repealed.*

'WHEREAS there have been and may be established in the United Kingdom companies whose business is to be carried on in countries not situate in the United Kingdom, and it is convenient and desirable that investments may be made, and mortgages, conveyances, and leases taken, and contracts and engagements entered into, on behalf of the company, in such countries, in the name of the company:' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Companies Seals Act, 1864."

2. Any company, under "The Companies Act, 1862," whose objects require or comprise the transaction of business, as herein-before mentioned, in foreign countries, may cause to be prepared an official seal for and to be used in any place, district, or territory situate out of the United Kingdom in which the business of the company shall be carried on, and every such official seal may and shall be a fac-simile of or as nearly as practicable a fac-simile of the common seal of the company, with the exception that on the face thereof shall be inscribed the name of each and every place, district, or territory in and for which it is to be used: provided that it shall be lawful for any such company as aforesaid from time to time to break up and renew any official seal or seals, and to vary the limits within which it is intended to be used.

3. Every company having or using any such official seal as is authorized by this Act may from time to time, by any instrument or instruments in writing under the common seal of the company, empower any agent or agents specially appointed for the purpose, or any local agent, board, committee, manager, or commissioner appointed under the provisions of the articles of association of such company, in any place, district, or territory situate out of the United Kingdom where the business of the company shall for the time being be carried on, to affix such official seal to any deed, contract, or other instrument to which the company is or shall be made a party in such place, district, or territory, and no other order of the company or the board of directors thereof shall be necessary to authorize any such seal to be affixed to any deed, contract, or other instrument.

4. Every power granted under the last preceding section shall, as between the company, their successors and assigns, on the one hand, and the person or persons dealing with the agent or agents, board, committee, manager, or commissioner named in the instrument conferring the power, and all parties claiming through or under such person or persons, on the other hand, continue in force during the period, if any, mentioned in the instrument conferring the power, or if no power be there mentioned then until notice of the revocation or determination of the power shall have been given to such person or persons as aforesaid.

5. Whenever any such official seal as aforesaid shall be affixed to any document, the person affixing the same shall, by writing under his hand, and written on the document to which the seal may have been affixed, certify the date when and the place where the same was affixed; and any document to which any such seal shall have been duly affixed within the district or territory or place the name whereof is inscribed on such seal shall bind the company in the same way and to the same extent and have the same force and effect as if it had been duly sealed with the common seal of the company.

6. The powers given by this Act shall be exercised by such companies only as are or shall be expressly authorized to exercise the same by their articles of association, or a special resolution passed according to the provisions of "The Companies Act, 1862," and shall be exercised by such companies subject to any directions or restrictions in their articles of association or the special resolutions contained.

7. Nothing in this Act contained shall operate to repeal the provisions of the fifty fifth section of "The Companies Act, 1862," but such section shall continue in force, and all acts done or to be done thereunder shall be as valid and effectual as if this Act had not been passed.

CAP. XX.

An Act to remove certain Restrictions on the Negotiation of Promissory Notes and Bills of Exchange under a limited Sum in *Ireland*.

[13th May, 1864.]

Sec. 1. *So much of 8 & 9 Vict., c. 37, as prohibits or restrains the negotiation in Ireland of notes and bills under 5l. repealed.*

2. Term of this Act.

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act so much and such parts of an Act passed in the eighth and ninth years of her Majesty's reign, chapter thirty-seven, as prohibits the drawing, making, and issuing, or restrains or imposes any penalty for or on account of the publishing, uttering, or negotiating in *Ireland* of any promissory or other note (not being a note payable to bearer on demand), bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of twenty shillings or above that sum and less than five pounds, or on which twenty shillings or above that sum and less than five pounds shall remain undischarged, made, drawn, or endorsed in any other manner than is directed by the said Act, or which requires or directs that all such notes, bills, drafts, or undertakings as aforesaid which shall be issued in *Ireland* shall be made, drawn, or endorsed according to the forms contained in the schedules to the said Act, shall be and the same is and are hereby repealed.

2. This Act shall continue in force for two years, and until the end of the then next ensuing session of Parliament.

CAP. XXI.

An Act to indemnify certain Persons from any penal Consequences which they may have incurred by sitting and voting as members of the House of Commons while holding the office of Under Secretary of State.

[23rd June, 1864.]

CAP. XXII.

An Act to amend the Laws which regulate the Registration of Parliamentary voters in Counties in *Ireland*.

[23rd June, 1864.]

25 & 26 Vict., c. 62. 13 & 14 Vict., c. 68.

Sec. 1. *Duty of the clerk of the peace as to additional polling places created under the first recited Act.*

2. *Duty of the clerk of the peace as to new or altered polling districts.*

3. *Duty of the clerk of the poor law union to write on the margin of the registry the name of the parish or other division in the polling district in respect of property wherein the name of the voter is on the list; and also on the supplemental lists. 13 & 14 Vict., c. 69.*

3. *Notice of claims to vote under 13 & 14 Vict., c. 69, to be given by the clerks of the peace. How notices of claims to vote are to be given by the clerk of the peace under this Act. Form of notice by claimant under this Act. Omission to serve notice by claimant in the form under this Act not to deprive him of his right to be inserted on the list.*

4. *Notices of objection, and lists of persons objected to, shall be given under this Act.*

5. *Clerks of the peace shall prepare alphabetical lists of voters in each polling district.*

6. *Such alphabetical lists to be the lists of voters in such polling district for the purposes herein-after mentioned.*

7. *Lists of voters to be revised by the chairman of quarter sessions for each polling district in like manner as provided by the 13 & 14 Vict., c. 69. Power of the said chairman to amend mistakes in the lists.*

8. *Separate lists of the polling districts to be numbered, arranged, and printed. How to be endorsed.*

9. *When new polling districts have been formed, or former polling districts altered, before this Act, under 25 & 26 Vict., c. 62, clerk of the peace to send a copy of the present register of voters to each clerk of poor law unions in the district. Duty of the clerk of the poor law union.*

10. *Clerk of the peace to make out alphabetical lists for each polling district, and print and publish them.*

11. *Duty of the assistant barrister to revise the lists. Court of Revision, where to be holden. Notice of the time and place for holding the court to be given.*

12. *Revised lists to be separately printed and arranged for each polling district.*

13. *The first register of voters after the passing of*

this Act to be the register between 30th Nov. next after its formation and 1st Dec. in succeeding year.

14. *Future revisions under 13 & 14 Vict., c. 69.*
15. *Duty of the clerk of the peace at the court of revision. Clerk of the poor law unions to attend courts of revision.*
16. *Court of revision to be deemed a court of revision under 13 & 14 Vict., c. 69, and a court of record.*
17. *Power to adjourn courts of revision.*
18. *Compensation to clerks of unions for additional duties under this Act.*
19. *Expenses incurred by the clerk of the peace in carrying into effect this Act provided for by presentment.*
20. *Interpretation of terms.*
21. *13 & 14 Vict., c. 69, incorporated with this Act.*

‘WHEREAS an Act was passed in the twenty-fifth and twenty-sixth years of the reign of her Majesty, intituled *an Act to amend the law relating to the duration of contested elections for counties in Ireland, and for establishing additional places for taking the poll thereat*, whereby (amongst other matters) it is enacted, that it shall be lawful for the Lord Lieutenant or other chief governor or governors of Ireland, by and with the advice of the privy council in Ireland, from time to time thereafter, on petition from the justices of any county or riding in Ireland in quarter sessions assembled, representing that the polling places for such county or riding are insufficient in number or inconveniently situated, and praying that the place or places mentioned in the said petition may be a polling place or polling places for the county or riding within which such place or places, is or are situate, or may be discontinued as such polling place or places, and that a barony or baronies, half barony or half baronies, or any portion thereof respectively, in such petition mentioned, may constitute a district for polling at a polling place in such petition mentioned (anything in an Act passed in the thirteenth and fourteenth years of the reign of her Majesty, intituled *an Act to shorten the duration of elections in Ireland, and for establishing additional places for taking the poll thereat*, providing that a barony, or half barony shall not be divided, to the contrary notwithstanding), or praying that any polling district or districts may be altered, and that any barony or half barony, or any portion thereof respectively, may be detached from any such polling district, and be annexed to any other polling district, as the case may be, to declare that any place or places mentioned in the said petition shall be a polling place or polling places for that county or riding, or shall be discontinued as such polling place or places, and that the barony or baronies, half barony or half baronies, or any portion thereof respectively, in such petition mentioned, shall constitute a district for polling at such polling place, and that the other polling districts of the said county or riding shall be altered accordingly, or to declare that any polling district or districts shall be altered, and that any barony or half barony, or portion thereof respectively, shall be detached from any such polling district, and be annexed to any other polling district; and whereas it is ex-

pedient to provide for the formation of separate lists of voters in the polling district or polling districts which may be constituted under the said Act, and also to provide for the formation of the lists of voters that may be detached from any polling district, and annexed to any other polling district, pursuant to the provisions thereof:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. From and after the passing of this Act, when any declaration or order for creating any additional polling place or polling places, and the polling district or polling districts for the same, or for discontinuing or altering any polling district or districts, shall be made for any county, and published in the *Dublin Gazette*, pursuant to the provisions of the said recited Act, the clerk of the peace for such county, when delivering or causing to be delivered, next after such publication, the precept or precepts which such clerk of the peace is now required by law to deliver or caused to be delivered to the clerk of every poor law union situate wholly or in part within his county, shall at the same time, and together with the said precept or precepts, deliver or cause to be delivered, to the clerk of every poor law union his additional precept, according to the form (numbered 1.) in the Schedule (A.) to this Act annexed, or to the like effect, and also one or more copies of such parts of the lists of registered voters then in force for such county as shall relate to the barony or baronies, half barony or half baronies, within such union, from or out of which a polling district or polling districts have been constituted under the said recited Act, and also such parts of the said lists as shall relate to any barony or half barony within such union any portion whereof shall have been detached from any polling district, and annexed to any other polling district, pursuant to the said recited Act.

2. Such clerk of the peace shall, together with such additional precept, at the same time also make and cause to be delivered to the clerk of such poor law union one or more of the forms (numbered 2, 3,) contained in the said Schedule (A.) specifying the portion or portions of such barony or baronies, half barony or half baronies, whereof such polling district or polling districts is or are constituted, as specified or declared in the declaration or order certified under the hand of the clerk of the privy council, and published in the *Dublin Gazette*, pursuant to the said recited Act, and also the barony or half barony, baronies or half baronies, any portion or portions whereof respectively may have been detached from any polling district or polling districts, and annexed to any other polling district or polling districts, as declared, certified, and published as aforesaid; and thereupon such clerk of the poor law union, after due inquiry, which he is required to make, with the assistance of the respective collector or collectors of poor rates for such respective barony or baronies or divisions thereof out of which such polling district or polling districts may be constituted, or from which any portion or portions thereof have been detached or annexed as aforesaid, shall and he is hereby required, in addition to what he is now required by law to do, to write in the margin opposite

the name of each person on the copy list of registered voters the name of the half barony, parish, townland and parish, part of parish and barony, respectively, or other division out of which, in respect of lands, tenements, or hereditaments therein, such person's name is on the list of registered voters, if such half barony, parish, townland, part of parish, part of townland and parish, or other division, constitute such polling district or polling districts or any part thereof, or form any portion of a polling district detached from and annexed to any other polling district; and such clerk of the poor law union shall in like manner, upon every supplemental list or supplemental lists of persons not appearing on the copy of the register of voters, and which he is now by law required to transmit to the clerk of the peace, write in the margin of such supplemental list or supplemental lists, opposite the names respectively of the persons transmitted to such clerk of the peace the name of the half barony, parish, townland, part of parish, part of townland and parish, or other division respectively, as the case may be, forming any polling district or polling districts or any part thereof, or forming any portion of a polling district detached from and annexed to any other polling district, if the name of such person shall have been inserted in such supplemental list or lists as the occupiers of lands, tenements, or hereditaments in such polling district or districts, or in any part thereof, or as the occupier of lands, tenements, or hereditaments in any portion of a polling district detached from and annexed to any other polling district; and such copies of the register of voters and supplemental list or supplemental lists, with all such marginal additions as aforesaid, signed by such respective clerk of the union, shall be the copies and lists to be verified for such polling districts as aforesaid by such clerk of the union and returned to the clerk of the peace, and shall be so verified pursuant to the provisions of an Act passed in the thirteenth and fourteenth years of the reign of her Majesty, intituled *an Act to amend the laws which regulate the qualification and registration of parliamentary voters in Ireland, and to alter the law for rating immediate lessors of premises to the poor rate in certain boroughs*, and shall be returned to such clerk of the peace within the time in that behalf in the said last-recited Act specified.

3. 'And whereas by the said last-recited Act it is enacted, that the clerk of the peace of every county shall, on or before the 22nd day of July in every year after one thousand eight hundred and fifty-one, publish in each barony a notice according to the form (numbered 8) contained in the schedule (A.) to that Act annexed, having first signed the same, requiring all persons entitled to vote in the election of a knight or knights of the shire to serve in parliament in respect of property wholly or in part in each barony, who shall not be upon the register for such barony of voters then in force, and shall not be on the supplemental list for such barony, and all persons so entitled to vote as aforesaid who being upon such register shall not retain the same qualification or continue in the same place of abode as described in such register, and who are desirous to have their names inserted in the register about to be made, to give or send to the clerk of the peace, at his office, on or before the fourth

of August then next ensuing, a notice in writing, by them signed of their claims to vote as aforesaid, and which notice is required to be according to the form of notice set forth in that behalf in the form (numbered 9) contained in the said schedule (A) to that Act annexed, or to the like effect: And whereas the said notice (numbered 8) and form (numbered 9) in the said schedule (A) are only applicable to persons entitled to vote or claiming to be entitled to vote in respect of property situate wholly or in part within any barony in a county in which the provisions aforesaid of the said first-recited Act have not been in force, and it is expedient to amend the same so as to make notices and forms to the like effect applicable to persons entitled to vote or claiming to be entitled to vote in respect of property situate wholly or in part within any polling district in any county constituted under the said first-recited Act, or in any portion of a barony or half barony detached from and annexed to any other polling district, pursuant to the said first-recited Act: Be it therefore enacted, that after any polling district shall be constituted, or any portion of a barony or half barony shall be detached from any polling district and annexed to any other polling district, pursuant to the said first-recited Act, in any county, the clerk of the peace in such county shall and he is hereby required, in the notice as to claims to vote to be given by him as aforesaid in the said form (numbered 8) in the said schedule (A), after the words "in respect of any property situate wholly or in part within any barony of this county," to add the words "or in respect of any property situate wholly or in part within any half barony or polling district, or in any portion of a barony or half barony detached from any polling district and annexed to any other polling district," as the case may be, and after the words "such barony" to add the words "or polling district;" and the said notice of claim to be given to the clerk of the peace shall be in the form (numbered 4) in the said schedule (A) to this Act annexed, or to the like effect; and the form for said notice should be annexed to the said notice given by the clerk of the peace: Provided always that the omission to serve such notice by the claimant, if otherwise a notice in his behalf be served pursuant to the said form (No. 9), shall not deprive such claimant of his right to be inserted in the list of voters for such half barony or polling district, or annexed polling district, as the case may be, if otherwise entitled thereto; but in all such cases, upon the revision of the lists of voters for such county, and upon evidence given before the assistant barrister that such claimant is entitled to have his name inserted on the list of voters in respect of property situate wholly or in part within such polling district, or within any portion of a barony or half barony detached from any polling district, and annexed to any other polling district, the assistant barrister shall and he is hereby required to insert the name of such claimant in the list of voters for such polling district or annexed polling district, as the case may be, and in respect of the property of such claimant therein.

4. All notices of objection required to be given to the clerk of the peace for such county, and notices of objection to be given to parties objected to by any person other than the clerk of the peace or clerk of the union, and lists of persons objected to required to

be published by the clerk of the peace pursuant to the said last recited Act, shall also be made, given, and published whenever the said first recited Act shall have come into effect as aforesaid in any county, inserting in such notices and lists, instead of the words barony, the name of the half barony, polling district, or other division in the lists whereof the name of the person objected to is inserted or claims to be inserted; and the provisions of the said last recited Act, and the schedule (A), Nos. 10–15, annexed thereto, with respect to the clerk of the union's supplemental list of the occupiers of lands, tenements, or hereditaments situate in a barony, and with respect to the clerk of the peace's lists of persons claiming to be entitled to vote in respect of property situate wholly or in part within a barony, shall also apply to such occupiers or persons claiming in respect of property situate wholly or in part within such half barony, polling district, or other division as aforesaid, inserting in such lists, instead of the barony, the name of the half barony, polling district, or other division as aforesaid.

5. The clerk of the peace in such county as aforesaid, upon the transmission to him next after this Act shall come into operation in any such county of the copies of the register for the several baronies therein by the several clerks of the poor law unions wholly or in part within said county, and supplemental lists with such marginal observations thereon as aforesaid, shall from such copies and lists, and within the time now prescribed by law for the making and publication of alphabetical lists of claimants, make out, according to the form (numbered 5), and pursuant to the directions in the said schedule (A) to this Act annexed, an alphabetical list for each polling district or other division into which such county or a part thereof may have been divided, pursuant to such first recited Act, and declaration or order of the privy council made thereon, of all persons entitled to vote in respect of property in such polling district or other division; and all such lists shall be made, printed, and published in the like manner and subject to the like provisions as now relate to the list of voters or claimants for each barony in any county in which the said first recited Act has not come into force as aforesaid, except as herein provided.

6. Such alphabetical list and such list of claimants, if any, as aforesaid, for every polling district or other division as aforesaid, with the marginal additions, if any, thereon, except such marginal additions as by this Act are required to be inserted in the copies of the register for the several baronies and supplemental lists by the clerks of the poor law unions as aforesaid, shall be deemed to be the list of voters of such half barony, polling district, or other division into which such county may have been divided as aforesaid for the purposes in the said last recited Act and hereinafter mentioned.

7. The chairman of quarter sessions of every county in which after the passing of this Act the said Act first-recited shall come into force as aforesaid, shall at the next court of revision for the registry of voters in the said county duly revise such lists of voters and lists of claimants in respect of property in such polling districts or other division, as the case may be, and adjudicate thereon and upon all objections thereto in like

manner, and with all the like power, authority, and jurisdiction, to all intents and purposes, and subject to the same right of appeal, as already provided by the said last recited Act with respect to the revision of the lists of the several baronies in such county, and the registry of voters in the said county, and the several lists of claimants and of persons objected thereto: Provided always, that if upon any revision to be holden under this Act it should appear to the satisfaction of such chairman of quarter sessions that the name of any person otherwise entitled to vote in such county remained in any baronial list, and which ought to have been inserted, pursuant to the provisions of this Act, in the list of the polling district or other division as aforesaid, or was erroneously inserted in one polling district or division instead of another, such assistant barrister shall thereupon expunge such name from such baronial list or polling district or division, and insert the same in the list of the polling district or other division in respect of property wherein the name of such person had been originally placed in such baronial list.

8. After the transmission of the lists of voters for the said county by the assistant barrister, signed by him, to the clerk of the peace, the said clerk of the peace shall in like manner, and subject to the like provisions as provided by the said Act with respect to baronial lists, cause the said lists for such half barony, polling district, or other division to be printed in a book or books, numbered and arranged, with the names in each polling district or other division in strict alphabetical order, and in such manner and form that the list of voters for each and every separate polling district or other division contained therein may be conveniently and completely cut out or detached from all the other lists of voters contained in the same book, in the same manner and for the same purposes as the list of voters for separate baronies are printed and arranged under the said last mentioned Act; and such separate lists shall be intitled according to the forms (Nos. 6, 7, & 8) in the said schedule (A) to this Act annexed, and endorsed with the name of the polling district and polling place therein according to the form No. 9 in the said schedule, and the same shall be delivered to the sheriff of the county, signed by the said clerk of the peace, within the time and for the purpose in the said last mentioned Act expressed.

9. 'And whereas before the passing of this Act, and after the said Act of the twenty-fifth and twenty-sixth years of the reign of her Majesty was passed, additional polling districts have been constituted, and other polling districts or parts of polling districts have been altered or discontinued in certain counties in *Ireland*, in pursuance of the said Act, and it is expedient that provision be made for ascertaining the voters in such new or altered polling districts, or for making separate lists of such voters, and which lists are required for the purpose of voting at the polling places appointed for such districts: Be it therefore enacted, that from and immediately after the passing of this Act the clerk of the peace in each county in *Ireland* in which any polling district has been heretofore constituted or altered under the provisions of the said Act shall transmit to the clerk of every poor law union respectively situate wholly or in part within any such

polling district, or within any barony or half barony, or any portion thereof detached from any former polling district, and annexed to any other polling district, two or more copies of the present register of voters of the barony or baronies, half barony or half baronies, from or out of which such new polling district has been constituted, or other polling district altered, with his precept, according to the form No. 1 in the schedule (B) to this Act annexed, together with one or more of the forms (numbered 2, 3) in the schedule (A.) to this Act annexed, or to the like effect, and containing the like particulars as hereinbefore provided with respect to polling districts that may be constituted or altered as aforesaid after the passing of this Act; and thereupon such clerk of the poor law union as aforesaid, after due inquiry, which he is required to make, with the assistance of the respective collector or collectors of poor rates for such respective barony or baronies or divisions thereof out of which such polling district or polling districts have been constituted, or from which any portion or portions thereof have been detached or annexed as aforesaid, shall and he is hereby required to write in the margin opposite the name of each person in the copy list of such registered voters the name of the half barony, parish, townland, and parish, part of parish and barony, or other division respectively, out of which in respect of lands, tenements, or hereditaments therein such person's name is in the list of registered voters, if such half barony, parish, townland, or any part thereof, or other division, constitute such polling district or polling districts or any part thereof, or any portion of a former barony or polling district detached from and annexed to any other polling district; and such copy or copies of registered voters, with such marginal additions only as last aforesaid, and no other marginal additions, shall be verified by such clerk of the union, pursuant to the provisions of the said Act of the thirteenth and fourteenth years of her Majesty, chapter sixty-nine, and shall be returned to the said clerk of the peace within the space of ten days next after the receipt thereof from such clerk of the peace as last aforesaid.

10. The clerk of the peace in such county as last aforesaid upon the transmission to him of the copies of the register of voters for the several baronies therein by the several clerks of the poor-law unions wholly or in part within said county, with such marginal additions as last aforesaid, shall from such copies, and without any unnecessary delay, make out, pursuant to the directions (No. 4) in the schedule (B) to this Act annexed, an alphabetical list for each polling district or other division into which such county or a part thereof has been divided, pursuant to such first-recited Act, and declaration or order of the privy council made thereon, of all persons upon such register of voters in respect of property in such polling district or other division; and all such lists shall thereupon be printed and published in the like manner and subject to the like provisions as now relate to lists of voters for each barony in any county in which the said first-recited Act has not come into force, except as herein is provided.

11. The assistant barrister of every such county as last aforesaid, shall at the sessions of the peace to be

holden in any such county next after the publication of such lists and the passing of this Act, duly revise such lists of voters so far as they relate to the arrangement and classification thereof in such polling district or polling districts or other division, as the case may be, and adjudicate thereon; and if it appears upon such revision that the name of any voter in such county remained on any baronial list, and which ought to have been inserted pursuant to the provisions of this Act in the list of the polling district or other division as last aforesaid, or was erroneously inserted in the list of one polling district or division instead of another polling district or division, such assistant barrister shall thereupon expunge such name from such baronial or other list, and insert the same in the list of the polling district or other division in respect of property wherein the name of such person had been originally placed in such baronial list: Provided always, it shall not be necessary for such assistant barrister to hold any such last-mentioned court of revision at the place or places in which the list of voters for the barony or half barony out of which or any part thereof such new polling district or other division had been constituted, but the said assistant barrister shall and may hold such court of revision at the sessions of the peace to be holden in any one or more of the divisions of the said county, as to the said assistant barrister shall seem fit, upon due notice being given by such assistant barrister to the clerk of the peace of such county of the time and place or times and places for holding such court of revision six days at least before the commencement thereof; and such notice shall be written or printed, posted, published, and distributed in like manner as already provided with respect to the revision of baronial lists, or as near thereto as the circumstances of the case will admit.

12. The said assistant barrister shall sign such lists, when so revised, and transmit the same to the said clerk of the peace, who thereupon shall cause the said lists for such polling district or other division to be immediately and separately printed and arranged in a book or books, in like manner as hereinbefore provided with respect to the lists of voters for each and every separate polling district or other division that may be constituted after the passing of this Act; and such separate lists shall be the lists of voters for polling at the polling places appointed for such polling districts or divisions, and shall be intitled according to the directions (No. 5) in the said schedule (B) to this Act annexed; and each such list shall be endorsed with the name of the polling district and polling place thereon, according to the form (No. 6) in the said schedule, and when so printed shall be signed by the said clerk of the peace, and delivered without delay to the sheriff of the said county, to be safely kept for the purposes in the said last-recited Act mentioned.

13. When the said Act of the twenty-fifth and twenty-sixth years of her Majesty shall come into force as aforesaid in any county in *Ireland*, after the passing of this Act, the printed book or books of the registry including the said printed book or books so signed by the clerk of the peace and given into the custody of the sheriff of the said county as aforesaid, shall, as regards the first register to be formed under this Act,

be the register of persons entitled to vote at any election of a member or members to serve in Parliament which shall take place in and for the same county between the last day of *November* in the year wherein such last-mentioned Act shall so come into force and effect the first day of *December* in the succeeding year.

14. After the first registry in any county or in any part thereof, under the provisions of this Act, all future lists of voters and of persons entitled to or claiming to vote for such new or additional polling districts or divisions in such county or in any part thereof, shall be made, published, and revised under and in pursuance of the provisions of the said Act of the thirteenth and fourteenth years of the reign of her Majesty aforesaid, or as near thereto as the circumstances of the case shall permit, except as herein is excepted.

15. The clerk of the peace of every such county shall attend each and every court of revision which shall be held in such county under this Act, with all such lists, notices, and returns as he is now required to produce or deliver to such assistant barrister for the said county, at the several courts of revision holden under the said recited Act, and that may be requisite for the revision of the lists or in pursuance of this Act, and according to the respective polling districts or other divisions constituted as aforesaid, and also with all lists of claimants and of persons entitled to vote in respect of property in the several polling districts or other divisions aforesaid that have been made out and arranged by such clerk of the peace pursuant to the provisions of this Act; and the clerks of the several unions wholly or in part in such county shall attend at the courts of revision holden in such county for such polling districts or other divisions aforesaid, wherein their respective unions or any part thereof may be situate, and produce all such books of rates, documents, papers, or writings in their possession, custody, or power, as they are now by law required to produce at the courts of revision holden under the said Act of the thirteenth and fourteenth years of her present Majesty, and if required by the said assistant barrister shall also produce all copy lists or tables of the townlands and parishes and barony or baronies within their respective unions as aforesaid, and also all lists of valuation and of every revision thereof which may have been theretofore lodged with such clerks of poor-law unions, or transmitted to them or to the respective boards of guardians of such unions by the commissioner of valuation in *Ireland*, and shall answer upon oath all such questions as such assistant barrister may put upon them touching any matter herein mentioned.

16. Every court of revision to be holden under this Act shall be deemed to be a court of revision under the said last-recited Act, and shall be a court of record; and the assistant barrister before whom such court shall be held shall have the like power and authority to fine the clerk of the peace, the under sheriff of the county, any collector of poor rates, or clerk of any union, respectively, who shall be guilty of any breach of duty under or in execution of this Act, any sum not exceeding five pounds, to be imposed by and at the discretion of such assistant barrister, such fines to be paid and appropriated in the like manner as by the said last-recited Act is provided with respect to

such fines that may be imposed under the provisions thereof.

17. In case it shall so happen that the chairman of the county, or any revising barrister, by death, illness, or other cause, shall not be in attendance to open any revision court appointed to be held for any county, district, or borough on the day appointed for opening the same, or, after having opened the same, shall not continue his attendance until the business of such revision court shall be completed, it shall be lawful for any one justice of the peace of the county, at the expiration of two hours from the time fixed for the opening of the said revision court, and not before, to open and adjourn such revision court, and so from time to time, and for such reasonable time as shall be sufficient for the Chancellor for the time being or keeper or commissioner of the great seal in *Ireland* to be informed of such death, illness, or absence, and to appoint some other person to do the duty of the said revision court, and for such person to repair to the place where such revision court should be held, and to take upon himself the execution of the said duty.

18. The guardians of the poor of each union, after this Act shall come into operation therein, may, by an order make such annual or other allowance out of the rates to the clerk of such union respectively, as compensation for the additional duty hereby imposed upon him, as the said guardians shall think proper; but no such order shall be acted upon or any payment made thereunder until the same shall be approved of by the poor-law commissioners, and the payment sanctioned by them.

19. All expenses incurred or to be incurred by the clerk of the peace in any such county as aforesaid in carrying into effect the provisions of this Act, including all additional expenses of forming and arranging the separate lists for the several polling districts, or other divisions as aforesaid, and the providing, printing, and publishing thereof, and all other expenses that may be hereby imposed on such clerk of the peace, shall be deemed and are hereby declared to be expenses incurred by the said clerk of the peace under the said Act of the thirteenth and fourteenth years of the reign of her present Majesty; and an account thereof shall be laid before the next presentment sessions of the county after the same shall be incurred, or shall be included in or added to the account of the expenses of the clerk of the peace which by the said Act are directed to be laid before the next presentment sessions of the county after the same shall have been incurred; and the grand jury of such county shall present for the same, or so much thereof as such presentment sessions or grand jury shall allow to be levied off such county, and to be paid in like manner as provided by the said Act.

20. In this Act and the schedules annexed hereto, unless there be something in the subject or context repugnant to such construction, the words "clerk of the peace" shall be construed to include the clerk of the peace or his deputy or other person for the time being acting for him, and having the custody of records relating to the registry of parliamentary voters; the words "assistant barrister" shall apply to and include the chairman of quarter sessions, and also the chairman of the sessions of the peace for the county of *Dublin*, and his deputy, or any barrister

duly appointed as deputy for an assistant barrister; the word "county" shall include a riding of a county; the word "polling district" shall be construed to include any barony or half barony, parish, townland, or any parts or portions thereof forming such polling district, and also any barony or half barony, or any portion thereof respectively, detached from one barony or polling district, and annexed to any other barony or polling district.

21. The said Act of the thirteenth and fourteenth years of the reign of her present Majesty, chapter sixty-nine, shall be incorporated and construed together with this Act, except so far as same is inconsistent herewith or repugnant hereto.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A.)

No. 1.

PRECEPT OF THE CLERK OF THE PEACE TO THE CLERK OF THE UNION IN PURSUANCE OF THE PROVISIONS OF THIS ACT. [To follow Precept No. 3, Schedule (A.) to 13 & 14 Vict., c. 69.]

And in pursuance of the provisions of the Act of Parliament of the twenty-seventh and twenty-eighth Victoria, chapter [this Act], you are herewith transmitted in the Form (No. 2) the name of the polling district of [the new polling district] and the several parts and divisions of the said barony [or baronies, as the case may be,] out of which the said polling district is constituted; and also in the Form (No. 3) the name of the barony, and the names of the portions thereof detached from the polling district of and annexed to the polling district of [the barony or polling district to which parishes, &c., are attached.] You shall also and within the time aforesaid, after due inquiry, which you are required to make, with the assistance of the respective collectors of poor rates (which assistance such respective collectors are required to give), upon the copy of the register of the said barony or division of the barony included in your union, write legibly in the margin of such copy, and opposite the names respectively of the persons in such copy, the name of the half barony, parish, townland, or other division as named and specified in the said Form (No. 2) sent herewith, in which half barony, parish, or other division or denomination the property is situate in respect whereof the names of such persons respectively appear on such copy of the register, and also in like manner in the margin of such copy of the barony of write legibly opposite the names respectively of the persons on such copy the name of the half barony, parish, townland, or other division [as the case may be], as named and specified in the Form (No. 3) sent herewith, in which half barony, parish, or other denomination or division the property is situate in respect whereof the names of such persons respectively appear on such copy of the register; and for the better enabling you to ascertain the half barony, parish, or other division in which such property respectively may be situate, you are at liberty to refer to and make use of any tables or lists of valuation and revisions thereof whereof any copies

or copy may have been lodged with you or transmitted to the board of guardians of your union by the commissioner of valuation in Ireland. You shall also in like manner, and with the like assistance and information, upon the margin of the supplemental list of persons not appearing in the copy of the register, and to be transmitted to me, write legibly opposite the names respectively of the persons on such lists the names of the half barony, parish, townland, or other division [as the case may be], as named and specified in the Forms (Nos. 2, 3) aforesaid, in which half barony, parish, or other division or denomination the property is situate in respect whereof the name of such persons respectively appear on such supplemental list; and such copy register and supplemental list, with such marginal additions, shall be signed, verified, and transmitted to me by you in like manner and within the time prescribed, pursuant to the provisions of the said Act of the thirteenth and fourteenth Victoria, chapter sixty-nine.

No. 2.

County of Polling district of
[State precisely, as published in the Dublin Gazette (if a half barony), the name of the half barony and parishes or parts of parishes or other denominations therein constituting such new polling district; or if the polling district be constituted out of parts of several baronies, townlands, parishes, or parts of parishes respectively, then state them accordingly as]—
The townland of in the parish of
and barony of , So much of the parish of
as is situate in the barony of . The
townlands of in the parish of and barony
of . The parishes of in the barony of
[as the case may be].

No. 3.

County of Polling district of
[State precisely, as published in the Dublin Gazette, the parts or portions of the barony or baronies detached from a former polling district, and annexed to another polling district, as thus]—
The parishes of in the barony of
So much of the parish of as is in the barony
of . The townlands of in the parish of
in the barony of detached from the barony
of [or polling district of] and annexed
to the barony of [or polling district of
as the case may be].

No. 4.

FORM OF NOTICE OF CLAIM TO BE GIVEN TO THE CLERK OF THE PEACE, PURSUANT TO THIS ACT.

County of Polling district of
To the clerk of the peace for the county of
I hereby give you notice, that I claim to be inserted in the list for this polling district of voters for the county of , and that the particulars of my place of abode and qualification are stated in the column below.

Dated the day of in the year
(Signed) A.B.

Christian name and surname of the elector at full length.	Place of Abode.	Station and amount of Qualification.	Townland or other denomination, street, lane, or other like place, and number of house (if any), and the parish and barony where the property is situate in this polling district, or name of the property, or the name of the occupying tenant (if any); or if the qualification consist of a rentcharge, then the name of the owner of the property out of which such rentcharge issues, and the parish and barony. (But if only certain townlands in the parish in which the property is situate be in the polling district, then state the townland, parish, and barony in which the property is situate.)

No. 5.

[The clerk of the peace shall, from the copies of the register and supplemental lists transmitted to him by the clerks of the respective unions, select the names of the persons entitled to vote in respect of property in the polling district, and make out and arrange the lists in alphabetical order as provided by this Act, for the purpose of revision by the assistant barrister, omitting in the margin opposite each name the parish, townland, or other division in which the property is situate, but inserting it in the last column, and may be thus entitled]—

County of Polling district of

The list of persons on the register of voters and clerks of the union supplemental list as entitled to vote in the election of a knight or knights of the shire for the county of in respect of property situate wholly or in part within the polling district of

Margin for entering Clerk of the Peace's objections.	Christian name and surname of each Voter at full length.	Place of Abode.	Nature and amount of Qualification.	Townland or other denomination, street, lane, or other like place, and number of house (if any), and the parish and barony where the property is situate, or name of the property and the name of the occupying tenant (if any); or if the qualification consist of a rentcharge, the name of the owner of the property out of which such rentcharge issues, and the parish and barony. (But if only certain townlands in the parish in which the property is situate be in the polling district, then state the townland, parish, and barony in which the property is situate.)

No. 6.

[If the polling district be a new or additional district formed out of a part of a barony or out of portions of several baronies it may be intituled thus]—

County of Polling district of

Copy of the register (so far as relates to the polling district of , consisting of

[Here state the several townlands, parishes, or other divisions constituting this polling district, as declared in the Dublin Gazette]) of persons entitled to vote at any election of a member or members of Parliament for the county of between 30th day of November 18 and the last day of December 18 .

Margin for entering Clerk of the Peace's objections as to others than electors.	Margin for column for entering Clerk of the Union's objections as to others than electors.	Number prefixed to each name on the Register.	Christian name and surname of each Person on the Register at full length.	Place of Abode.	Nature of (then) Qualification.	Amount of Qualification or Rating.	Townland or other denomination, street, lane, or other like place in this polling district, and number of house (if any), and the parish and barony where the property is situate, or name of the property and the name of the tenant (if any); or if the qualification consist of a rentcharge, the name of the owner of the property out of which such rentcharge issues, or one of them, and the parish and barony. (But if only certain townlands in the parish in which the property is situate be in the polling district, then state the townland, parish, and barony in which the property is situate.)

No. 7.

[If a former polling district be altered, and a portion of a barony or half barony has been detached therefrom, and other portions of a barony or baronies annexed thereto, it may be entitled thus]—

County of Polling district of

Copy of the register (so far as it relates to the polling district of , consisting of the barony of (except the parishes of townlands of in the parish of [as the case may be], and the parishes of in the barony of —

[Setting out the names of the several parishes, townlands, or other denominations, as declared in the Dublin Gazette.]

) of persons entitled to vote, &c. (as in No. 6).

The columns shall be in the like form as No. 6.

No. 8.

[If a portion of one barony or polling district have been annexed to another barony it may be entitled thus]—

Copy of the register (so far as it relates to the polling district of , consisting of the barony of and the parishes [or townlands, as the case may be] in the barony of annexed to such polling district

[Setting out the names of the barony and several parishes and townlands annexed, or other denominations, as declared in the Dublin Gazette.]

) of persons entitled to vote, &c. (as in No. 6).

The column shall be in like form as No. 6.

No. 9.

The endorsement upon the list of each polling district may be as follows:—

County of Polling district of
Polling place

SCHEDULE (B.)

No. 1.

PRECEPT OF THE CLERK OF THE PEACE TO THE CLERK OF THE UNION, IN PURSUANCE OF THE PROVISIONS OF THIS ACT.

To the clerk of the union of
County of Polling district of

In pursuance of the provisions of the Act of Parliament of the 27th and 28th Victoria, chapter [this

Act], you are herewith transmitted in the Form (No. 2) the name of the polling district of , and the several parts and divisions of the barony (or baronies, *as the case may be*), out of which such polling district is constituted, and also in the form (No. 3) the name of the barony, and the names of the portions thereof detached from the polling district of and annexed to the polling district of ; you are also sent a copy of the register of voters for the present year of the barony of (or the baronies of), from or out of which such polling district is constituted, or from which certain portions are detached and annexed to another polling district. You shall, within the space of ten days next after the receipt of such copy of the register, after due inquiry, which you are required to make with the assistance of the respective collectors of poor rates (which assistance such respective collectors are required to give), upon the copy of the register of the barony or division of a barony included in your union, write legibly in the margin of such copy, and opposite the names respectively of the persons on such copy, the name of the half barony, parish, townland, or other division (*as the case may be*), as named and specified in the said Form (No. 2) sent herewith, in which half barony, parish, or other division or denomination the property is situate in respect whereof the names of such persons respectively appear on such copy of the register, and also in like manner in the margin of such copy of the barony of write legibly opposite the names respectively of the persons on such copy the name of the half barony, parish, townland, or other division (*as the case may be*), as named and specified in the Form (No. 3) sent herewith, in which half barony, parish, or other division or denomination the property is situate in respect whereof the names of such persons respectively appear on such copy of the register; and for the better enabling you to ascertain the half barony, parish, or other division in which such property respectively may be situate, you are at liberty to refer to and make use of any tables or lists of valuation and revisions thereof of which any copies or copy may have been lodged with you or transmitted to the board of guardians of your union by the commissioners of valuation in Ireland; and such copy of the register, with such marginal additions as aforesaid, shall be signed by you, and verified in like manner, and pursuant to the provisions of the Act of Parliament of the thirteenth and fourteenth Victoria, chapter sixty-nine, and duly transmitted to me within the said space of ten days.

No. 2.

County of

Polling district of

[The clerk of the peace shall set out here precisely, as published in the Dublin Gazette, the particulars directed in the Form No. 2, to the precept in Schedule (A.) aforesaid.]

No. 3.

County of

Polling district of

[The clerk of the peace shall set out here precisely, as published in the Dublin Gazette, the particulars directed in the Form No. 3 to the precept in Schedule (A.) aforesaid.]

No. 4.

The clerk of the peace shall, from the copies of the register transmitted to him by the clerks of the respective unions, select the names of the persons entitled to vote in respect of property in the polling district, and make out and arrange the lists in the like manner as directed in Schedule (A. No. 5), omitting the supplemental lists, and shall be entitled as in the said form in said Schedule, omitting the supplemental list.

No. 5.

The clerk of the peace shall arrange the lists, and entitle them, and with the same columns, according to the Forms No. 6, 7, 8, in Schedule (A.) to this Act, or such one or more of them as may be applicable.

No. 6.

The Endorsement upon the list of each polling district may be as follows:

County of

Polling district of

Polling place

CAP. XXIII.

An Act to repeal Enactments relating to Naval Prize of War and Matters connected therewith or with the Discipline and Management of the Navy.

[23rd June, 1864.]

CAP. XXIV.

An Act to provide for the appointment, duties, and remuneration of agents for ships of war, and for the distribution of salvage, bounty, prize, and other money among the officers and crews thereof.

[23rd June, 1864.]

Sec. 1. *Short title.*2. *Interpretation of terms.*3. *Power for admiralty to apply Act to any of her Majesty's ships.*4. *Each of her Majesty's ships to have an agent.*5. *Ship's agent to be appointed by commanding officer.*6. *Instrument of appointment to be registered and filed.*7. *Persons in service of Crown, proctors, &c., incapable of being agents.*8. *Partnership body may be a ship's agent.*9. *Change of commanding officer.*10. *Office of ship's agent.*11. *Ship's agent to be amenable to high court of admiralty.*12. *Ship's agent to act for ship with respect to salvage, bounty, prize, &c.*13. *Taxation and payment of costs of officers and crew, agents, &c.*14. *Salvage, bounty, prize, and other money to be distributed according to order in council, &c.*15. *Payment of shares.*16. *Exemption from stamp duty.*17. *Forfeited shares and deduction of 5 per cent. to be carried to naval prize cash balance.*18. *Agent may be furnished with copies of accounts.*19. *Agent to receive per centage of 2½ per cent.*

20. *Apportionment of per-centage where more than one ship, or on change of agent.*
21. *Power to admiralty to direct investment pending distribution.*
22. *Power to high court of admiralty to decide questions relative to distribution, &c.*
23. *Saving rights of the Crown, captors, &c.*
24. *Not to affect appointments of agents under 26 & 27 Vict. c. 116.*
25. *Power to make orders in council.*
26. *Orders in council to be gazetted, &c.*
27. *Commencement of Act.*

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Naval Agency and Distribution Act, 1864.

2. In this Act—

The term "the lords of the admiralty" means the lord high admiral of the United Kingdom, or the commissioners for executing the office of lord high admiral:

The term "the high court of admiralty" means the high court of admiralty of *England*:

The term "ship of war" includes vessels of war:

The term "officers and crew" includes all flag officers, commanders, and other officers, engineers, seamen, marines, soldiers, and others on board any of her Majesty's ships of war.

3. Any ship or vessel belonging to her Majesty, and in actual service (other than a ship of war), may be declared by the lords of the admiralty to be a ship of war for the purposes of this Act; and all the provisions of this Act shall thereupon apply to such ship or vessel, and shall continue to so apply as long as she then continues in actual service, but no longer.

Appointment of ship's agent.

4. Each of her Majesty's ships of war shall at all times while in commission have, for the purposes of this Act, an agent styled the ship's agent, to be appointed in the first instance as soon as may be after the ship is put in commission, and afterwards from time to time as a vacancy in the office or other occasion may require.

5. The ship's agent shall be appointed from time to time at pleasure by the commanding officer of the ship for the time being by an instrument signed and attested in the form given in the schedule to this Act.

6. Any such instrument shall not have effect unless and until it is filed in the registry of the high court of admiralty, having been previously registered in the office of the accountant-general of the navy.

An official copy of any such instrument under the seal of the high court of admiralty shall be conclusive evidence thereof.

7. A person holding any office or employment in her Majesty's service or under the Crown, or a proctor, attorney, or solicitor, shall not be capable of being a ship's agent.

If any person being a ship's agent accepts any such

office or employment, or becomes a proctor, attorney, or solicitor, his appointment as ship's agent shall be thereby vacated.

8. A partnership body, not incorporated, may be appointed a ship's agent; and in that case the partners for the time being, or any one or more of them, may act as the agent; and any change of partners shall not affect the appointment.

The names of the partners shall at the time of appointment, and from time to time on any change happening, be registered in the office of the accountant-general of the navy, and in the registry of the high court of admiralty.

9. The appointment of the ship's agent shall not be affected by a change of the commanding officer of the ship.

10. The ship's agent shall at all times have an office or place of business within five miles of the general post office, *London*.

11. The ship's agent shall be subject to the jurisdiction and authority of the high court of admiralty as if he were an officer of the court, and in cases of any neglect or misconduct on his part shall be liable to be proceeded against and punished accordingly.

Duties of Ship's Agent.

12. It shall be the duty of the ship's agent, by himself or by a proper sub-agent appointed and remunerated by him, to take or cause or procure to be taken all steps and proceedings, and do or cause or procure to be done all things that may be necessary or proper to be taken or done for any purpose on behalf or in the name of the ship or of the officers and crew thereof, or any of them, in the several cases following:

In case of salvage services rendered to any ship or cargo, or otherwise, within the meaning of the enactments for the time being in force relating to merchant shipping:

In case of any breach of any law respecting national character or otherwise relating to merchant shipping:

In case of any seizure for breach of any law relating to the customs:

In case of any seizure or capture under any Act relating to the abolition of the slave trade:

In case of any matter arising out of an attack on or engagement with persons alleged to be pirates, afloat or on shore:

In case of any capture, re-capture, or destruction of any ship, goods, or thing in time of war or hostilities:

In case of any special service or other matter in respect whereof any grant, reward, or remuneration is payable.

Distribution of salvage, bounty, prize, and other money.

13. Where in any of the several cases aforesaid any money is distributable among the officers and crew of any of her Majesty's ships of war, the costs, charges, and expenses of the officers and crew and of the ship's agent, and all other (if any) costs, charges, or expenses properly chargeable against that money, shall be paid thereout before distribution thereof, all such costs, charges, and expenses being first taxed

and allowed by the proper officer of the court having jurisdiction in the case, and if there is no such court then by the registrar of the high court of admiralty.

14. In the several cases aforesaid, money distributable among the officers and crew of any of her Majesty's ships of war, so far as full provision respecting the distribution thereof is not made by or under any Act of Parliament other than this Act, shall be distributed under the directions of the lords of the admiralty in the shares in that behalf specified in any royal proclamation or order in council.

15. The several shares of any such money as aforesaid shall be paid to the persons entitled thereto, in such manner, and subject and according to such restrictions, conditions, and provisions as may from time to time be directed by order in council.

Any assignment, sale, or contract of or relating to any such money as aforesaid, payable in respect of the services of any petty officer or seaman, non-commissioned officer of marines or marine, other than such as may be made or entered into under the authority of and in conformity with any such order in council, shall be void.

16. All bills, orders, receipts, and other instruments drawn, given, or made under the authority or in pursuance of any such order in council by, to, or upon any officer or person in the service of her Majesty, or of the lords of the admiralty, shall be exempt from stamp duty.

17. All forfeited and unclaimed shares and balances of prize money, and a per-centage of five pounds in every one hundred pounds out of the proceeds of all prizes, and out of all grants to the royal navy and marines, and out of all bounty money, and also out of all other money distributable in the several cases aforesaid among the officers and crew of any of her Majesty's ships of war out of which such per-centage is at the commencement of this Act by law deducted, shall, under the direction of the lords of the admiralty, continue to be carried to and form part of the naval prize cash balance.

So much of the naval prize cash balance as the lords of the admiralty think expedient shall from time to time by her Majesty's paymaster-general under the authority and direction of the lords of the admiralty, be paid and transferred to the consolidated fund of the United Kingdom.

In case at any time a claim in respect of prize or bounty money is made which the naval prize cash balance is not sufficient to meet, there shall be paid out of the said consolidated fund a sufficient sum to meet such claim.

18. A ship's agent shall be entitled, on request, and on payment of reasonable expenses, to be furnished with copies from or extracts from any official accounts kept under or for the purposes of this Act in relation to any of her Majesty's ships of war for which he is agent.

Remuneration of Ship's Agent.

19. Before any such money as aforesaid is distributed among the officers and crew of any of her Majesty's ships of war there shall be paid, under the direction of the lords of the admiralty, to the ship's agent a per-centage of two and a half *per centum* on

the net amount actually distributable, as the sole and full remuneration of the ship's agent for his services in the case.

20. In the following cases—

Where more than one of her Majesty's ships of war are entitled to participate in any such money—

Where the ship's agent is changed pending proceedings—the ship's agent's per-centage shall, in case of difference, be apportioned between or among the respective agents of the several ships, or the several persons having been and being the ship's agent (as the case may be), in such manner as the registrar of the High Court of Admiralty thinks just, having regard to the duration and character of the services of the several agents in the case, subject to objection to the registrar's award to be taken before the judge of the Court.

Investment of Salvage, Bounty, Prize, and other Money.

21. Any money for the time being awaiting distribution, but for any reason not immediately distributable as aforesaid, may, under the direction of the lords of the Admiralty, be invested in or on any proper stocks, funds, or securities; and the proceeds of those stocks, funds, or securities, and any dividends or interest accrued due thereon, shall be distributed as the money invested would have been distributed if an investment had not been made:

Provided that no such investment shall be made of any money pending any adverse claim thereto, except with the consent of the claimant.

Decision as to Distribution or Investment.

22. Where any question (whether in respect of asserted joint capture, or in respect of flag shares, or in respect of any other matter) arises concerning the distribution of any money distributable as aforesaid, or concerning any investment thereof, actual or intended, the High Court of Admiralty shall have exclusive jurisdiction to hear and determine the same; and any person claiming an interest in such money, or the Lords of the Admiralty, may apply to the High Court of Admiralty for a judgment on that question; and the Court, after hearing the parties interested, shall decide thereon, and such decision shall be final, and shall be binding on all persons concerned.

Miscellaneous.

23. Nothing in this Act shall—

- (1.) authorize a ship's agent or his sub-agent to practise, or as a proctor, attorney, solicitor, or other legal practitioner in any court; or
- (2.) affect the right or power of the officers and crew of any of her Majesty's ships of war as salvors, seizors, captors, re-captors, or otherwise, or of any of such officers and crew, to take or cause or procure to be taken any step or proceeding, or do or cause or procure to be done anything that may be necessary or proper to be taken or done for any purpose in any court or elsewhere, in case of the absence or default of the ship's agent; or
- (3.) affect any right or power of control, or other

authority, that her Majesty has or may exercise in any prize cause or other proceeding.

24. Nothing in this Act shall invalidate an appointment of an agent made before the commencement of this Act, under The Navy Prize Agents Act, 1863; but every agent so appointed shall, from the commencement of this Act, be subject to this Act as if he were appointed under it.

25. Her Majesty in council may from time to time make such orders as seem meet for the better execution of this Act.

26. Every order in council under this Act shall be published in the *London Gazette*, and shall be laid before both houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and, if not, then within thirty days after the next meeting of Parliament.

27. This Act shall commence on such day, not later than the First day of *January* one thousand eight hundred and sixty-five, as her Majesty in council thinks fit to direct.

SCHEDULE.

Form of Appointment of Ship's Agent.

I, _____ (a) commanding officer of her Majesty's _____ (b) hereby appoint _____ (c) of _____ (d) to be the ship's agent for the purposes of The Naval Agency and Distribution Act, 1864.

Dated the _____ day of _____
Witness, _____ (Signed) A.B.
(Signed) C.D.

(a) Name of officer.

(b) Description and name of ship.

(c) Name of agent.

(d) Address of agent.

CAP. XXV.

An Act for regulating Naval Prize War.

[23rd June, 1864.]

1. *Short title.*
2. *Interpretation of terms.*
3. *High Court of Admiralty and other courts to be prize courts for purposes of Act.*
4. *Jurisdiction of High Court of Admiralty.*
5. *Appeal to Queen in council, in what cases.*
6. *Jurisdiction of Judicial Committee in prize appeals.*
7. *Custody of processes, papers, &c.*
8. *Limit of time for appeal.*
9. *Enforcement of orders of high court, &c.*
10. *Salaries of judges of vice-admiralty prize courts.*
11. *Retiring pension of judges, as in 22 & 23 Vict. c. 26.*
12. *Returns from vice admiralty prize courts.*
13. *General orders for prize courts.*
14. *Prohibition of officer of prize court acting as proctor, &c.*
15. *Prohibition of proctors being concerned for adverse parties in a cause.*
16. *Custody of prize ship.*
17. *Bringing in of ship's papers.*

18. *Issue of monition.*
19. *Examinations on standing interrogatories.*
20. *Adjudication by court.*
21. *Further proofs.*
22. *Custody, &c., of ships of war.*
23. *Entry of claim; security for costs.*
24. *Power to court to direct appraisement.*
25. *Power to court to direct delivery to claimant on bail.*
26. *Power to court to order sale.*
27. *Sale on condemnation.*
28. *How sales to be made.*
29. *Payment of proceeds to paymaster-general or official accountant.*
30. *One adjudication as to several small ships.*
31. *Application of foregoing provisions to prize goods.*
32. *Power to court to call on captors to proceed to adjudication.*
33. *Person intervening on appeal to enter claim.*
34. *Jurisdiction of prize court in case of capture in land expedition.*
35. *Jurisdiction of prize court in case of expedition with ally.*
36. *Restriction on petitions by asserted joint captors.*
37. *In case of offence by captors, prize to be reserved for crown.*
38. *Purchase by admiralty for public service of stores on board foreign ships.*
39. *Prizes taken by ships other than ships of war to be droits of admiralty.*
40. *Salvage to re captors of British ship or goods from enemy.*
41. *Permission to re-captured ship to proceed on voyage.*
42. *Prize bounty to officers and crew present at engagement with an enemy.*
43. *Ascertainment of amount of prize bounty by decree of prize court.*
44. *Payment of prize bounty awarded.*
45. *Power for regulating ransom by order in council.*
46. *Punishment of masters of merchant vessels under convoy disobeying orders or deserting convoy.*
47. *Prize ships and goods liable to duties and forfeiture.*
48. *Regulations of customs to be observed as to prize ships and goods.*
49. *Power for treasury to remit customs duties in certain cases.*
50. *Punishment of persons guilty of perjury.*
51. *Actions against persons executing Act not to be brought without notice, &c.*
52. *Jurisdiction of high court of admiralty on petitions of right in certain cases, as in 23 & 24 Vict. c. 34.*
53. *Power to make orders in council.*
54. *Order in council to be gazetted, &c.*
55. *Not to affect rights of Crown; effect of treaties, &c.*

‘WHEREAS it is expedient to enact permanently, with amendments, such provisions concerning naval prize,

and matters connected therewith, as have heretofore been usually passed at the beginning of a war.'

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Naval Prize Act, 1864.

2. In this Act—

The term "the lords of the admiralty" means the lord high admiral of the United Kingdom, or the commissioners for executing the office of lord high admiral:

The term "the high court of admiralty" means the high court of admiralty of *England*:

The term "any of her Majesty's ships of war" includes any of her Majesty's vessels of war, and any hired armed ship or vessel in her Majesty's service:

The term "officers and crew" includes flag officers, commanders, and other officers, engineers, seamen, marines, soldiers, and others on board any of her Majesty's ships of war:

The term "ship" includes vessel and boat, with the tackle, furniture, and apparel of the ship, vessel, or boat:

The term "ship papers" includes all books, passes, sea briefs, charter parties, bills of lading, cockets, letters, and other documents and writings delivered up or found on board a captured ship:

The term "goods" includes all such things as are by the course of admiralty and law of nations the subject of adjudication as prize (other than ships.)

I.—PRIZE COURTS.

3. The high court of admiralty, and every court of admiralty or of vice-admiralty, or other court exercising admiralty jurisdiction in her Majesty's dominions, for the time being authorized to take cognizance of and judicially proceed in matters of prize, shall be a prize court within the meaning of this Act.

Every such court, other than the high court of admiralty, is comprised in the term "vice-admiralty prize court," when hereafter used in this Act.

High Court of Admiralty.

4. The high court of admiralty shall have jurisdiction throughout her Majesty's dominions as a prize court.

The high court of admiralty as a prize court shall have power to enforce any order or decree of a vice-admiralty prize court, and any order or decree of the judicial committee of the privy council in a prize appeal.

Appeal; Judicial Committee.

5. An appeal shall lie to her Majesty in council from any order or decree of a prize court, as of right in case of a final decree, and in other cases with the leave of the court making the order or decree.

Every appeal shall be made in such manner and form and subject to such regulations (including regulations as to fees, costs, charges, and expenses) as may for the time being be directed by order in coun-

cil, and in the absence of any such order, or so far as any such order does not extend, then in such manner and form and subject to such regulations as are for the time being prescribed or in force respecting maritime causes of appeal.

6. The judicial committee of the privy council shall have jurisdiction to hear and report on any such appeal, and may therein exercise all such powers as for the time being appertain to them in respect of appeals from any court of admiralty jurisdiction, and all such powers as are under this Act vested in the high court of admiralty, and all such powers as were wont to be exercised by the commissioners of appeal in prize causes.

7. All processes and documents required for the purposes of any such appeal shall be transmitted to and shall remain in the custody of the registrar of her Majesty in prize appeals.

8. In every such appeal the usual inhibition shall be extracted from the registry of her Majesty in prize appeals within three months after the date of the order or decree appealed from, if the appeal be from the high court of admiralty, and within six months after that date if it be from a vice-admiralty prize court.

The judicial committee may, nevertheless, on sufficient cause shown, allow the inhibition to be extracted and the appeal to be prosecuted after the expiration of the respective periods aforesaid.

Vice-Admiralty Prize Courts.

9. Every vice-admiralty prize court shall enforce within its jurisdiction all orders and decrees of the judicial committee in prize appeals and of the high court of admiralty in prize causes.

10. Her Majesty in council may grant to the judge of any vice-admiralty prize court a salary not exceeding five hundred pounds a year, payable out of money provided by Parliament, subject to such regulations as seem meet.

A judge to whom a salary is so granted shall not be entitled to any further emolument, arising from fees or otherwise, in respect of prize business transacted in his court.

An account of all such fees shall be kept by the registrar of the court, and the amount thereof shall be carried to and form part of the consolidated fund of the United Kingdom.

11. In accordance, as far as circumstances admit, with the principles and regulations laid down in the Superannuation Act, 1859, her Majesty in council may grant to the judge of any vice-admiralty prize court an annual or other allowance, to take effect on the termination of his service, and to be payable out of money provided by Parliament.

12. The registrar of every vice-admiralty prize court shall, on the first day of *January* and first day of *July* in every year, make out a return (in such form as the lords of the admiralty from time to time direct) of all cases adjudged in the Court since the last half-yearly return, and shall with all convenient speed send the same to the registrar of the high court of admiralty, who shall keep the same in the registry of that court, and who shall, as soon as conveniently may be, send a copy of the returns of each half year

to the lords of the admiralty, who shall lay the same before both houses of Parliament.

General.

13. The judicial committee of the privy council, with the judge of the high court of admiralty, may from time to time frame general orders for regulating (subject to the provisions of this Act) the procedure and practice of prize courts, and the duties and conduct of the officers thereof, and of the practitioners therein, and for regulating the fees to be taken by the officers of the courts, and the costs, charges, and expenses to be allowed to the practitioners therein.

Any such general orders shall have full effect, if and when approved by her Majesty in council, but not sooner or otherwise.

Every order in council made under this section shall be laid before both houses of Parliament.

Every such order in council shall be kept exhibited in a conspicuous place in each court to which it relates.

14. It shall not be lawful for any registrar, marshal, or other officer of any prize court, or for the registrar of her Majesty in prize appeals, directly or indirectly to act or be in any manner concerned as advocate, proctor, solicitor, or agent, or otherwise, in any prize cause or appeal, on pain of dismissal or suspension from office, by order of the court or of the judicial committee (as the case may require.)

15. It shall not be lawful for any proctor or solicitor, or person practising as a proctor or solicitor, being employed by a party in a prize cause or appeal, to be employed or concerned, by himself or his partner, or by any other person, directly or indirectly, by or on behalf of any adverse party in that cause of appeal, on pain of exclusion or suspension from practice in prize matters, by order of the court or of the judicial committee (as the case may require.)

II.—PROCEDURE IN PRIZE CAUSES.

Proceedings by Captors.

16. Every ship taken as a prize, and brought into port within the jurisdiction of a prize court, shall forthwith, and without bulk broken, be delivered up to the marshal of the court.

If there is no such marshal, then the ship shall be in like manner delivered up to the principal officer of customs at the port.

The ship shall remain in the custody of the marshal, or of such officer, subject to the orders of the court.

17. The captors shall, with all practicable speed after the ship is brought into port, bring the ship papers into the registry of the court.

The officer in command, or one of the chief officers of the capturing ship, or some other person who was present at the capture, and saw the ship papers delivered up or found on board, shall make oath that they are brought in as they were taken without fraud, addition, subduction, or alteration, or else shall account on oath to the satisfaction of the court for the absence or altered condition of the ship papers or any of them.

Where no ship papers are delivered up or found on board the captured ship, the officer in command, or one of the chief officers of the capturing ship, or some

other person who was present at the capture, shall make oath to that effect.

18. As soon as the affidavit as to ship papers is filed, a monition shall issue, returnable within twenty days from the service thereof, citing all persons in general to show cause why the captured ship should not be condemned.

19. The captors shall, with all practicable speed after the captured ship is brought into port, bring three or four of the principal persons belonging to the captured ship before the judge of the court or some person authorized in this behalf, by whom they shall be examined on oath on the standing interrogatories.

The preparatory examinations on the standing interrogatories shall, if possible, be concluded within five days from the commencement thereof.

20. After the return of the monition, the court shall, on production of the preparatory examinations and ship papers, proceed with all convenient speed either to condemn or to release the captured ship.

21. Where, on production of the preparatory examinations and ship papers, it appears to the court doubtful whether the captured ship is good prize or not, the court may direct further proof to be adduced, either by affidavit or by examination of witnesses, with or without pleadings, or by production of further documents; and on such further proof being adduced the court shall with all convenient speed proceed to adjudication.

22. The foregoing provisions, as far as they relate to the custody of the ship, and to examination on the standing interrogatories, shall not apply to ships of war taken as prize.

Claim.

23. At any time before final decree made in the cause, any person claiming an interest in the ship may enter in the registry of the court a claim, verified on oath.

Within five days after entering the claim, the claimant shall give security for costs in the sum of sixty pounds; but the court shall have power to enlarge the time for giving security, or to direct security to be given in a larger sum, if the circumstances appear to require it.

Appraisement.

24. The court may, if it thinks fit, at any time direct that the captured ship be appraised.

Every appraisement shall be made by competent persons sworn to make the same according to the best of their skill and knowledge.

Delivery on Bail.

25. After appraisement, the court may, if it thinks fit, direct that the captured ship be delivered up to the claimant, on his giving security to the satisfaction of the court to pay to the captors the appraised value thereof in case of condemnation.

Sale.

26. The court may at any time, if it thinks fit, on account of the condition of the captured ship, or on the application of a claimant, order that the captured ship be appraised as aforesaid (if not already appraised), and be sold.

27. On or after condemnation the court may, if it

thinks fit, order that the ship be appraised as aforesaid (if not already appraised), and be sold.

28. Every sale shall be made by or under the superintendence of the marshal of the court or of the officer having the custody of the captured ship.

29. The proceeds of any sale, made either before or after condemnation, and after condemnation the appraised value of the captured ship, in case she has been delivered up to a claimant on bail, shall be paid under an order of the court either into the bank of *England* to the credit of her Majesty's paymaster general, or into the hands of an official accountant (belonging to the commissariat or some other department) appointed for this purpose by the commissioners of her Majesty's treasury or by the lords of the admiralty, subject in either case to such regulations as may from time to time be made, by order in council, as to the custody and disposal of money so paid.

Small armed Ships.

30. The captors may include in one adjudication any number, not exceeding six, of armed ships not exceeding one hundred tons each, taken within three months next before institution of proceedings.

Goods.

31. The foregoing provisions relating to ships shall extend and apply, *mutatis mutandis*, to goods taken as prize on board ship; and the court may direct such goods to be unladen, inventoried, and warehoused.

Monition to Captors to proceed.

32. If the captors fail to institute or to prosecute with effect proceedings for adjudication, a monition shall, on the application of a claimant, issue against the captors, returnable within six days from the service thereof, citing them to appear and proceed to adjudication; and on the return thereof the court shall either forthwith proceed to adjudication, or direct further proof to be adduced as aforesaid, and then proceed to adjudication.

Claim on Appeal.

33. Where any person, not an original party in the case, intervenes on appeal, he shall enter a claim, verified on oath, and shall give security for costs.

III.—SPECIAL CASES OF CAPTURE.

Land Expeditions.

34. Where, in an expedition of any of her Majesty's naval or naval and military forces against a fortress or possession on land, goods belonging to the state of the enemy or to a public trading company of the enemy exercising powers of government are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession, a prize court shall have jurisdiction as to the goods or ship so taken, and any goods taken on board the ship, as in case of prize.

Conjunct Capture with Ally.

35. Where any ship or goods is or are taken by any of her Majesty's naval or naval and military forces while acting in conjunction with any forces of any of her Majesty's allies, a prize court shall have jurisdiction as to the same as in case of prize, and shall

have power, after condemnation, to apportion the due share of the proceeds to her Majesty's ally, the proportionate amount and the disposition of which share shall be such as may from time to time be agreed between her Majesty and her Majesty's ally.

Joint Capture.

36. Before condemnation, a petition on behalf of asserted joint captors shall not (except by special leave of the court) be admitted, unless and until they give security to the satisfaction of the court, to contribute to the actual captors a just proportion of any costs, charges, or expenses or damages that may be incurred by or awarded against the actual captors on account of the capture and detention of the prize.

After condemnation, such a petition shall not (except by special leave of the court) be admitted unless and until the asserted joint captors pay to the actual captors a just proportion of the costs, charges, and expenses incurred by the actual captors in the case, and give such security as aforesaid, and show sufficient cause to the court why their petition was not presented before condemnation.

Provided, that nothing in the present section shall extend to the asserted interest of a flag officer claiming to share by virtue of his flag.

Offences against Law of Prize.

37. A prize court, on proof of any offence against the law of nations, or against this Act, or any Act relating to naval discipline, or against any order in council or royal proclamation or of any breach of her Majesty's instructions relating to prize, or of any act of disobedience to the orders of the lords of the admiralty, or to the command of a superior officer, committed by the captors in relation to any ship or goods taken as prize, or in relation to any person on board any such ship, may, on condemnation, reserve the prize to her Majesty's disposal, notwithstanding any grant that may have been made by her Majesty in favour of captors.

Pre-emption.

38. Where a ship of a foreign nation passing the seas laden with naval or victualling stores intended to be carried to a port of any enemy of her Majesty is taken and brought into a port of the United Kingdom, and the purchase for the service of her Majesty of the stores on board the ship appears to the lords of the admiralty expedient without the condemnation thereof in a prize court, in that case the lords of the admiralty may purchase, on the account or for the service of her Majesty, all or any of the stores on board the ship; and the commissioners of customs may permit the stores purchased to be entered and landed within any port.

Capture by Ship other than a Ship of War.

39. Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of her Majesty shall, on condemnation, belong to her Majesty in her office of admiralty.

IV.—PRIZE SALVAGE.

40. Where any ship or goods belonging to any of her Majesty's subjects, after been taken as prize by the enemy, is or are retaken from the enemy by any

of her Majesty's ships of war, the same shall be restored by decree of a prize court to the owner, on his paying as prize salvage one eighth part of the value of the prize to be decreed and ascertained by the court, or such sum not exceeding one eighth part of the estimated value of the prize as may be agreed on between the owner and the re-captors, and approved by order of the court: provided, that where the re-capture is made under circumstances of special difficulty or danger, the prize court may, if it thinks fit, award to the re-captors as prize salvage a larger part than one eighth part, but not exceeding in any case one fourth part, of the value of the prize.

Provided also, that where a ship after being so taken is set forth or used by any of her Majesty's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize.

41. Where a ship belonging to any of her Majesty's subjects, after been taken as a prize by the enemy, is retaken from the enemy by any of her Majesty's ships of war, she may, with the consent of the re-captors, prosecute her voyage, and it shall not be necessary for the re-captors to proceed to adjudication till her return to a port of the United Kingdom.

The master or owner, or his agent, may, with the consent of the re-captors, unload and dispose of the goods on board the ship before adjudication.

In case the ship does not, within six months, return to a port of the United Kingdom, the re-captors may nevertheless institute proceedings against the ship or goods in the high court of admiralty, and the court may thereupon award prize salvage as aforesaid to the re-captors, and may enforce payment thereof, either by warrant of arrest against the ship or goods, or by monition and attachment against the owner.

V.—PRIZE BOUNTY.

42. If, in relation to any war, her Majesty is pleased to declare, by proclamation or order in council, her intention to grant prize bounty to the officers and crews of her ships of war, then such of the officers and crew of any of her Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of her Majesty's enemies shall be entitled to have distributed them among as prize bounty a sum calculated at the rate of five pounds for each person on board the enemy's ship at the beginning of the engagement.

43. The number of the persons so on board the enemy's ship shall be proved in a prize court, either by the examinations on oath of the survivors of them, or of any three or more of the survivors, or if there is no survivor by the papers of the enemy's ship, or by the examinations on oath of three or more of the officers and crew of her Majesty's ship, or by such other evidence as may seem to the court sufficient in the circumstances.

The court shall make a decree declaring the title of the officers and crew of her Majesty's ship to the prize bounty, and stating the amount thereof.

The decree shall be subject to appeal as other decrees of the court.

44. On production of an official copy of the decree the commissioners of her Majesty's treasury shall, out

of money provided by Parliament, pay the amount of prize bounty decreed, in such manner as any order in council may from time to time direct.

VI.—MISCELLANEOUS PROVISIONS.

Ransom.

45. Her Majesty in council may from time to time, in relation to any war, make such orders as may seem expedient, according to circumstances, for prohibiting or allowing, wholly or in certain cases, or subject to any conditions or regulations or otherwise, as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of her Majesty's subjects, and taken as prize by any of her Majesty's enemies.

Any contract or agreement entered into, and any bill, bond, or other security given for ransom of any ship or goods, shall be under the exclusive jurisdiction of the high court of admiralty as a prize court (subject to appeal to the judicial committee of the privy council), and if entered into or given in contravention of any such order in council shall be deemed to have been entered into or given for an illegal consideration.

If any person ransoms or enters into any contract or agreement for ransoming any ship or goods, in contravention of any such order in council, he shall for every such offence be liable to be proceeded against in the high court of admiralty at the suit of her Majesty in her office of admiralty, and on conviction to be fined, in the discretion of the court, any sum not exceeding five hundred pounds.

Convoy.

46. If the master or other person having the command of any ship of any of her Majesty's subjects, under the convoy of any of her Majesty's ships of war, wilfully disobeys any lawful signal, instruction, or command of the commander or the convoy, or without leave deserts the convoy, he shall be liable to be proceeded against in the high court of admiralty at the suit of her Majesty in her office of admiralty, and upon conviction to be fined, in the discretion of the court, any sum not exceeding five hundred pounds, and to suffer imprisonment for such time, not exceeding one year, as the court may adjudge.

Customs Duties and Regulations.

47. All ships and goods taken as prize and brought into a port of the United Kingdom shall be liable to and be charged with the same rates and charges and duties of customs as under any Act relating to the customs may be chargeable on other ships and goods of the like description; and

All goods brought in as prize which would on the voluntary importation thereof be liable to forfeiture or subject to any restriction under the laws relating to the customs, shall be deemed to be so liable and subject, unless the commissioners of customs see fit to authorize the sale or delivery thereof for home use or exportation, unconditionally or subject to such conditions and regulations as they may direct.

48. Where any ship or goods taken as prize is or are brought into a port of the United Kingdom, the master or other person in charge or command of the

ship which has been taken, or in which the goods are brought shall, on arrival at such port, bring to at the proper place of discharge, and shall, when required by any officer of customs, deliver an account in writing under his hand concerning such ship and goods, giving such particulars relating thereto as may be in his power, and shall truly answer all questions concerning such ship or goods asked by any such officer, and in default shall forfeit a sum not exceeding one hundred pounds, such forfeiture to be enforced as forfeitures for offences against the laws relating to the customs are enforced, and every such ship shall be liable to such searches as other ships are liable to, and the officers of the customs may freely go on board such ship and bring to the Queen's warehouse any goods on board the same, subject, nevertheless, to such regulations in respect of ships of war belonging to her Majesty as shall from time to time be issued by the commissioners of her Majesty's treasury.

49. Goods taken as prize may be sold either for home consumption or for exportation; and if in the former case the proceeds thereof, after payment of duties of customs, are insufficient to satisfy the just and reasonable claims thereon, the Commissioners of Her Majesty's Treasury may remit the whole or such part of the said duties as they see fit.

Perjury.

50. If any person wilfully and corruptly swears, declares, or affirms falsely in any prize cause or appeal, or in any proceeding under this Act, or in respect of any matter required by this Act to be verified on oath, or suborns any other person to do so, he shall be deemed guilty of perjury, or of subornation of perjury (as the case may be), and shall be liable to be punished accordingly.

Limitation of Actions, &c.

51. Any action or proceeding shall not lie in any part of her Majesty's dominions against any person acting under the authority or in the execution or intended execution or in pursuance of this Act for any alleged irregularity or trespass, or other act or thing done or omitted by him under this Act, unless notice in writing (specifying the cause of the action or proceeding) is given by the intending plaintiff or prosecutor to the intended defendant one month at least before the commencement of the action or proceeding, nor unless the action or proceeding is commenced within six months next after the act or thing complained of is done or omitted, or, in case of a continuation of damage, within six months next after the doing of such damage has ceased.

In any such action the defendant may plead generally that the act or thing complained of was done or omitted by him when acting under the authority or in the execution or intended execution or in pursuance of this Act, and may give all special matter in evidence; and the plaintiff shall not succeed if tender of sufficient amends is made by the defendant before the commencement of the action; and in case no tender has been made, the defendant may, by leave of the Court in which the action is brought, at any time pay into Court such sum of money as he thinks fit, whereupon such proceeding and order shall be had and

made in and by the Court as may be had and made on the payment of money into Court in an ordinary action; and if the plaintiff does not succeed in the action, the defendant shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about the action as may be taxed and allowed by the proper officer, subject to review; and though a verdict is given for the plaintiff in the action he shall not have costs against the defendant, unless the judge before whom the trial is had certifies his approval of the action.

Any such action or proceeding against any person in her Majesty's naval service, or in the employment of the Lords of the Admiralty, shall not be brought or instituted elsewhere than in the United Kingdom.

Petitions of Right.

52. A petition of right, under The Petitions of Right Act, 1860, may, if the suppliant thinks fit, be intitled in the High Court of Admiralty, in case the subject matter of the petition or any material part thereof arises out of the exercise of any belligerent right on behalf of the Crown, or would be cognizable in a Prize Court within her Majesty's dominions if the same were a matter in dispute between private persons.

Any petition of right under the last-mentioned Act, whether intitled in the High Court of Admiralty or not, may be prosecuted in that court if the Lord Chancellor thinks fit so to direct.

The provisions of this Act relative to appeal, and to the framing and approval of general orders for regulating the procedure and practice of the High Court of Admiralty, shall extend to the case of any such petition of right intitled or directed to be prosecuted in that court; and, subject thereto, all the provisions of The Petitions of Right Act, 1860, shall apply, *mutatis mutandis*, in the case of any such petition of right; and for the purposes of the present section the terms "court" and "judge" in that Act shall respectively be understood to include and to mean the High Court of Admiralty and the judge thereof, and other terms shall have the respective meanings given to them in that Act.

Orders in Council.

53. Her Majesty in council may from time to time make such orders in council as seem meet for the better execution of this Act.

54. Every order in council under this Act shall be published in the *London Gazette*, and shall be laid before both houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and if not, then within thirty days after the next meeting of Parliament.

Savings.

55. Nothing in this Act shall—

- (1.) give to the officers and crew of any of her Majesty's ships of war any right or claim in or to any ship or goods taken as prize or the proceeds thereof, it being the intent of this Act that such officers and crews shall continue to take only such interest (if any) in the proceeds of prizes as may be from

- time to time granted to them by the Crown; or
- (2.) affect the operation of any existing treaty or convention with any foreign power; or
 - (3.) take away or abridge the power of the Crown to enter into any treaty or convention with any foreign power containing any stipulation that may seem meet concerning any matter to which this Act relates: or
 - (4.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, any right, power, or prerogative of her Majesty the Queen in right of her Crown, or in right of her office of Admiralty, or any right, or power of the Lord High Admiral of the United Kingdom, or of the Commissioners for executing the office of Lord High Admiral; or
 - (5.) take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a Prize Court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exercisable by a Prize Court.

Commencement.

56. This Act shall commence on the commencement of The Naval Agency and Distribution Act, 1864.

CAP. XXVI.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *Southampton, Brighton, Hexam, Oswaldtwistle, Bolton, Ashford, Oswestry, Fareham, West Cowes, and Wilton.*

[23rd June, 1864.]

CAP. XXVII.

An Act for regulating the Proving and Sale of Chain Cables and Anchors. [23rd June, 1864.]

- Sec. 1. *Power to corporations, &c. to provide proving establishments for testing chain cables, &c.*
2. *Power to the Board of Trade to grant licences for proving chain cables and anchors, and may suspend or revoke licences.*
 3. *Board of Trade to appoint inspectors from time to time.*
 4. *Licences to be renewed annually.*
 5. *Fees payable on licences.*
 6. *As to remuneration of inspector.*
 7. *Tester to test all cables and anchors in proper order, and impress the same with authorized proof mark.*
 8. *As to charges for testing and affixing proof mark.*
 9. *Power to tester to detain chain cable, &c.*

10. *Tester, on application, to give certificate of test.*
11. *After 1st July, 1865, it shall be unlawful for makers and dealers to sell unproved chain cables and anchors.*
12. *Persons committing certain offences deemed guilty of a misdemeanour.*
13. *Act not to relieve makers from responsibility.*
14. *Act not to affect Admiralty contracts.*
15. *Term of Act.*

'WHEREAS it is essential, for the better security of lives and property afloat in sea-going ships to make provision for the proper testing of chain cables and anchors: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:—

1. Any corporation, public body, or company may erect and maintain proving establishments, apparatus, and machinery suitable for the testing of chain cables or anchors, and may, notwithstanding the provisions of any previous Act limiting the amount of money to be raised by such corporation, or public body, or company, raise money for that purpose by way of loan, secured by mortgage of such establishments, apparatus, and machinery, and of the income to be derived therefrom, or of other property of such corporation, public body, or company: Provided always as follows:—

- (1.) Nothing in this Act shall relieve any corporation or public body from the necessity of obtaining for any borrowing by them under this Act the consent of any authority or person whose consent is by law requisite to any borrowing by them otherwise than under this Act.
- (2.) Where the consent of any authority or person is not by law requisite to any borrowing by any corporation or public body, otherwise than under the consent of this Act, the consent of the Commissioners of Her Majesty's Treasury to any borrowing by that corporation or public body under this Act is hereby made requisite.
- (3.) Nothing in this Act shall empower any company to borrow money under this Act otherwise than in such manner and subject to such restrictions as are prescribed in relation to any borrowing by them for purposes other than the purposes of this Act, and if none are prescribed, then in such manner and under such restrictions as may be prescribed by resolution of the company adopted by three-fifths at least of the votes of the shareholders of the company present (personally or by proxy) at a general meeting of the company specially convened for the purpose.
- (4.) Any mortgage or charge created or to be created under any power existing at the passing of this Act on any property of any such corporation, public body, or company, other than such establishments, apparatus, and machinery as aforesaid, shall have priority over any mortgage created under the powers of this Act on the same property.
2. The Lords of the Committee of Privy Council

appointed for the consideration of matters relating to trade and foreign plantations, hereafter in this Act called the Board of Trade may from time to time grant to any corporation, public body, or company, person or persons erecting any proving establishment, apparatus, and machinery suitable for the testing of chain cables or anchors licence to test chain cables and anchors under this Act, and the Board may suspend or revoke any licence so granted if the Board shall see occasion; and the expression "tester" in this Act applies to every corporation, public body, or company, person or persons to whom such licence shall be granted, so long as such licence continues in force: Provided, that such a licence shall not be granted in any case unless and until the proving establishment, apparatus, and machinery erected have been inspected by an inspector appointed as by this Act provided, and have been certified by him as proper and efficient for their purposes.

3. The Board of Trade shall, as soon after the passing of this Act as the services of an inspector for the purposes of this Act appear to them to be required, and afterwards from time to time as vacancies occur, appoint a fit person to act as inspector of proving establishments, apparatus, and machinery under this Act, and may from time to time, at pleasure, remove from his office any person so appointed; and such inspector shall, in the execution of his duties, conform to any regulations from time to time made by the Board of Trade.

4. Any licence granted as aforesaid shall be renewable annually, and the same shall not in any case be renewed in any year unless and until the proving establishment, apparatus, and machinery in respect whereof such licence was granted have been inspected by the inspector within that year, and have been certified by him as proper and efficient for their purposes.

5. On the original grant of every such licence, and on every annual renewal of every such licence, there shall be paid such fee not exceeding fifty pounds as the Board of Trade from time to time appoint; all such fees to be paid to the Board of Trade, and to be by them paid into the receipt of her Majesty's exchequer, and to be carried to and form part of the consolidated fund of the United Kingdom.

6. The inspector shall receive such salary and allowances as may from time to time be directed by the Board of Trade, with the consent of the Commissioners of her Majesty's Treasury, out of money to be provided by Parliament for the purpose.

7. Every tester shall, with all reasonable despatch, subject every chain cable or anchor that shall be brought to the proving establishment of such tester for the purpose of being proved, and (unless the parties interested may otherwise agree) in the order in which such chain cables and anchors respectively shall be so brought, to the same tensile strain as that to which chain cables and anchors respectively of similar size, weight, or description are or shall be subjected before being received for the use of her Majesty's naval service, and shall stamp every five fathoms in length of every such chain cable, and also every such anchor, with a stamp or die to be provided for that purpose by the tester, and approved by the Board of Trade, denoting that such chain cable or anchor has been

"proved," and which shall bear the mark of the tester.

8. Every tester may make such charges for the testing and stamping with proof mark any chain cable or anchor as such tester may think fit, not exceeding the scale of charges authorized by the Board of Trade; and such tester shall affix upon some conspicuous part of the proving establishment a table of the charges so authorized to be taken by such tester; and such table shall be painted upon a board or boards in distinct black letters on a white ground or in white letters upon a black ground, or may be printed in legible characters on paper affixed to such board or boards; and it shall not be lawful for such tester to make any alteration in such table or in any of the charges therein specified until such alteration shall have been approved by the Board of Trade, and the tester shall have caused notice in writing of the intended alteration to be written or printed on paper, and such paper shall have been, for a period of not less than three months, affixed to such table, so that the same shall be clearly legible by all persons who may consult such table.

9. Any tester may detain any chain cable or anchor which shall have been so tested until such charge shall be paid; and if such charge shall not be paid within three months after the testing of such chain cable or anchor, the tester may cause such chain cable or anchor to be sold by auction, and shall out of the purchase money deduct the expenses of such sale, and all other expenses incurred by such tester with respect to such chain cable or anchor, including all lawful charges on the same, and shall pay the surplus thereof (if any), on demand, to the owner of such chain cable or anchor, or to the captain or master of the vessel, or other person on whose application the chain cable or anchor has been tested.

10. When any tester shall have tested and stamped any chain cable or anchor, such tester shall, if requested by the person on whose application the same was tested, within one month after such testing, make out and deliver, free of charge, to such person a certificate of such testing.

11. From and after the first day of *July* one thousand eight hundred and sixty-five it shall not be lawful for any maker of or dealer in chain cables or anchors to sell or contract to sell for the use of any vessel, any chain cable, whatever or any anchor exceeding in weight one hundred and sixty-eight pounds, unless such chain cable or anchor shall have been previously tested and duly stamped in accordance with the provisions of this Act; and if any person acts in contravention of this provision he shall for every such offence, upon a summary conviction for the same before a justice of the peace, or in *Scotland* before any sheriff, justice, or magistrate, be liable to a penalty not exceeding fifty pounds.

12. If any person shall stamp or assist in stamping any chain cable or anchor with the stamp of any tester, or with a stamp or mark purporting to be the stamp of any tester, without the authority of the tester whose stamp shall have been so used and counterfeited, or with any other stamp or mark, for the purpose or with the intention of passing such chain cable or anchor, or of allowing or assisting in the

same being passed as a chain cable or anchor duly tested and stamped under the powers of this Act; or if any person, knowing any such chain cable or anchor to have been so wrongfully marked or stamped as aforesaid, shall sell the same, or shall deliver the same to any person to be taken or used as part of the equipment of any vessel, or if any person shall write out and deliver to any person any certificate or document purporting to be a certificate under this Act, that any chain cable or anchor has been tested and stamped under the provisions of this Act, knowing that the chain cable or anchor referred to in such certificate or document had not been so tested or stamped, every person so offending shall be guilty of a misdemeanor, or in *Scotland* of an offence, and for every such misdemeanor or offence shall be liable, in the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

13. No maker of, or dealer in, chain cables or anchors, shipowner, or other person, shall by reason of this Act, or of anything done thereunder, be relieved from any responsibility in respect of any chain cable or anchor made, sold, or used by him to which, but for this Act, he would have been subject.

14. Nothing in this Act shall affect any contracts which may be made by the lords commissioners of the admiralty for the supply of any chain cables or anchors to any of her Majesty's dockyards or for the use of any of her Majesty's ships.

15. This Act shall continue in force to the first day of July one thousand eight hundred and seventy-two, and no longer.

CAP. XXVIII.

An Act to amend "The Common Law Procedure (*Ireland*) Act. 1853," in relation to Jurors and Juries in the county of *Cork*.

[23rd June, 1864.]

1. *Short title.*
2. *Power to judge of assize in county of Cork to direct the same panel for the criminal and civil sides, and to direct two sets of jurors to be summoned, one to attend at the beginning of each assizes, and the other to attend the residue thereof.*
Summonses to be made out either for the first or second set.
3. *A printed panel to be prepared and kept in the office of the returning officer, and a parchment copy to be annexed to abstract of Nisi Prius.*
4. *In case of view, judge to appoint trial during the attendance of viewers.*
5. *Proceedings not to be vitiated by juror acting before or after the time for which attendance was required.*
6. *Not to alter the powers of Courts to make orders for returning juries as heretofore.*
3 & 4 Wm. 4, c. 91.
7. *Special jurors may be summoned for specified days.*
8. *Sheriff to be reimbursed expenses of giving special notice to jurors.*

'WHEREAS it is expedient to amend "The Common Law Procedure Amendment Act (*Ireland*), 1853," as hereinafter mentioned, and to make provision as hereinafter mentioned, in relation to jurors and juries in the county of *Cork*.' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. In citing this Act in any precept, instrument, document, pleading, proceeding, or Act of Parliament, it shall be sufficient designation to use the expression "The Common Law Procedure Amendment Act (*Ireland*), 1864, as to county of *Cork* juries."

2. In the county of *Cork*, if the judges or commissioners of assize, or one of them, shall think fit so to direct, the sheriff, or the minister or ministers to whom the summoning of jurors to serve at the assizes shall belong, shall summon and impanel such number of jurors as such judges or commissioners, or one of them, shall think fit to direct, to serve indiscriminately on the criminal and civil side; and if such judges or commissioners, or one of them, shall so direct, such sheriff or other minister or ministers shall divide such jurors equally into two sets; the first of which sets shall attend and serve for so many days, at the beginning of the assizes, as such judges or commissioners, or one of them, shall, within a reasonable time before the commencement of such assizes, think fit to direct, and shall continue further to serve until discharged by the judges or commissioners of assize, or one of them; and the other of which sets shall attend and serve from the expiration of the said days so appointed for the attendance and service of the said first set, or from a time to be directed by such judges or commissioners, or one of them, for the residue of such assizes: Provided always, that such sheriff or other minister or ministers shall, in the summons to the jurors in each of such sets, specify whether the juror named therein is in the first or second set, and at what time the attendance of such juror will be required; and during the attendance and service of the first of such sets, the jury on the civil and criminal side respectively may be drawn from the name of the persons in that set, and during the attendance and service of the second of such sets from the names of the persons in such second set.

3. A printed copy of the said panel, containing the names (arranged alphabetically, or in such other convenient order as the judges or commissioners of assize, or one of them, shall think fit to direct), together with the additions and places of abode of the jurors in each of such sets, shall seven days before the commencement of the assizes, be made by such sheriff or other minister or ministers, and kept in the office of the returning officer of such sheriff or other minister or ministers in *Dublin*, for inspection; and a printed copy of such panel on parchment shall be delivered by such sheriff or other minister or ministers to any party requiring the same, on payment of a fee of one shilling; and such copy of such panel shall be annexed to the abstract of *Nisi Prius*.

4. In any case wherein an order for a view shall have been obtained, it shall be lawful for the judge before whom such case is to be tried, and he is hereby

required, on the application of the party obtaining such order, to appoint such case to be tried during the attendance and service of that set of jurors in which the viewers, or the major part of them, shall be included: Provided always, that it, nevertheless, shall be lawful for such judge, instead of appointing such case to be so tried, to order and direct, if it shall appear to him more convenient for the administration of justice, that the viewers, or such competent number of: hem as such judge shall determine, not being (unless the party obtaining such order shall so consent fewer in number than those in the set in which such viewers shall be most numerous, shall attend at the trial of the cause in which they shall have been named as viewers, at whatsoever period of the assize the same shall be tried; and thereupon it shall be the duty of such viewers accordingly to attend, and to be ready to serve at such trial.

5. No verdict or finding on any inquiry of damages or on any other inquiry had or delivered by any jury shall be annulled, vitiated, or affected by reason that any juror who shall be named in any one set of such panel as aforesaid shall have been sworn or shall have acted on such jury either before or after the time at which his attendance shall have been required by the summons served upon him, or after he shall have been discharged from attendance by the judges or commissioners of assize or any of them; but nothing herein contained shall prejudice or affect any right of any party to challenge any juror.

6. Nothing in this Act shall be construed to prevent the Court of Oyer and Terminer or of gaol delivery at such assizes from having and exercising the same power and authority as any such Court may now have and exercise in issuing any writ or precept, or in making any award or order, orally or otherwise, for the return of a jury for the trial of any issue before such Court, or for amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to every such writ, precept, award, or order, and the proceedings thereon, shall be made in the manner heretofore used and accustomed in any such Court; save that the jurors shall be returned from the body of the county, and not from any particular venue within the county, and shall be qualified according to the Act passed in the session of Parliament held in the third and fourth years of his late Majesty King William the Fourth, intituled *An Act for consolidating and amending the Laws relative to Jurors and Juries in Ireland*; neither shall anything in this Act extend or be construed to extend to deprive any alien indicted or impeached of any felony or misdemeanor of the right of being tried by a jury *de medietate linguæ*, or to repeal or affect the provisions of said last-mentioned Act in reference to the trial of aliens; nor shall anything in this Act repeal or affect any of the other provisions of the said last mentioned Act now in force, save so far as the same may be inconsistent with the provisions of this Act.

7. The foregoing provisions shall not apply to any special jury panel or to any special jurors; but in reference to special jurors, and to the panel or panels of them for the said county, as well as the general panel of special jurors made in pursuance of "The Common

Law Procedure Act (*Ireland*), 1853," as any panel made according to the old practice existing when the said Act was passed, the sheriff or other minister or ministers to whom the summoning of special jurors in said county shall belong, shall summon such special jurors to attend at the assizes on such day or days as the judges or commissioners of assize, or one of them, shall, within a reasonable time before the commencement of the assizes, think fit to direct; and the special jurors shall be summoned by such sheriff or such other minister or ministers to attend on such day or days accordingly; and the special jurors so summoned shall attend at such assizes at the time and times specified in such summonses for their attendance thereat, and shall continue to attend and serve at such assizes until the end thereof, or until they shall have been discharged by the judges or commissioners of assize, or one of them: provided always, that if no such directions shall be given by the judges or commissioners of assize, or one of them, the special jurors shall be summoned to attend the assizes, and shall be bound to attend thereat in the same manner as if this enactment had not been made.

8. If the assizes shall close, or be about to close, before the period for the attendance of the second set of jurors shall have arrived, it shall be lawful for the judges or commissioners of assize, or one of them, to direct that notice shall be given by the sheriff to the jurors named in the second set that their attendance will not be required; and thereupon the sheriff, by letters addressed to the jurors through the post office, and by publication of notices in the usual places for posting notices in the said county, or in such manner as such judges or commissioners, or one of them, shall direct, shall give notice to the jurors in such second set that their attendance will not be required at the assizes for which they shall have been so summoned; and an account of all expenses properly incurred by such sheriff in the giving of such notices shall be furnished by such sheriff to the secretary of the grand jury ten clear days before the then next ensuing assizes; and it shall be lawful for the grand jury at such next ensuing assizes, and they are hereby required, to present such sums to be paid to such sheriff, his executors or administrators, as shall be necessary to pay and satisfy the expenses properly incurred by such sheriff in giving such notices to such jurors, to be raised and levied off the county at large, without any previous application at any presentment sessions.

CAP. XXIX.

An Act to amend the Act Third and Fourth *Victoria*, Chapter Fifty-four, for making further Provision for the Confinement and Maintenance of Insane Prisoners. [23rd June, 1864.]

CAP. XXX.

An Act to provide for the Alteration of the Circuits of the Court of Justiciary in *Scotland*, and for holding addition 1 Circuit Courts. [23rd June, 1864.]

CAP. XXXI.

An Act to settle an Annuity on *Mary Louisa Countess of Elgin and Kincardine*, in consideration of the distinguished Services performed by the late *James Earl of Elgin and Kincardine*.

[30th June, 1864.]

CAP. XXXII.

An Act to enable certain Banking Copartnerships which shall discontinue the Issue of their own Bank Notes to sue and be sued by their public Officer.

[30th June, 1864.]

CAP. XXXIII.

An Act to facilitate the Commutation and Sale of certain Vicarage Teinds in *Scotland*.

[30th June, 1864.]

CAP. XXXIV.

An Act for amending the Law relating to Seats in the House of Commons of Persons holding certain Public Offices.

[30th June, 1864.]

21 & 22 Vict., c. 106, s. 4.

- Sec. 1. *Provision in case of person accepting office of under secretary when four under secretaries are sitting in the House of Commons.*
2. *Provision in case of more secretaries or under secretaries of state being chosen at a general election than are capable of sitting.*
3. *Provision in case of other offices.*
4. *Provision as to members elected previously to passing of this Act.*

‘WHEREAS by the Act of the session of the twenty first and twenty-second years of the reign of her present Majesty, chapter one hundred and six, it is provided that after the commencement of that Act any four of her Majesty’s principal secretaries of state for the time being, and any four of the under secretaries for the time being to her Majesty’s principal secretaries of state, may sit and vote as members of the House of Commons, but no more than four such principal secretaries and not more than four such under secretaries shall sit as members of the House of Commons at the same time: and whereas it is expedient to explain and amend the said Act: and whereas similar provisions are or may be contained in other Acts now in force or to be hereafter passed with respect to persons holding other offices, and it is expedient that the same rules shall be established for all such cases:’ be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. If at any time when four of the under secretaries for the time being to her Majesty’s principal secretaries of state are members of the House of Commons, any other person, being a member of that house, accepts the office of under secretary of state to any of the said principal secretaries, the election of such person shall be and the same is hereby declared to be void, and a writ shall be issued for a new election.

A member whose election is so declared to be void

(and also any person who, not being a member, holds the office of principal secretaries of state, or under secretary to one of her Majesty’s principal secretaries of state,) shall be incapable of being elected or sitting as a member of the House of Commons during such time as he holds such office, and four other principal secretaries or under secretaries respectively, as the case may be, are members of the House of Commons, but not for any further or longer period.

2. If at any general election there are returned as members to serve in Parliament a greater number of persons holding the office of principal secretary of state or the office of under secretary of state than are permitted by Act of Parliament to sit and vote in the House of Commons, the election of such persons shall not be invalidated by reason of such excess; but no one of such persons shall be capable of sitting or voting in the House of Commons until the number of persons returned as members and holding the same office as himself is reduced by death, resignation, or otherwise to the number permitted by law to sit in the House of Commons.

If any person sits or votes in the House of Commons in contravention of this section he shall be liable to a penalty not exceeding five hundred pounds for each day during which he so sits or votes.

3. In all cases in which by any Act now in force, or to be hereafter passed, any limit is or shall be imposed upon the number of persons holding any other office who may at the same time sit or vote as members of the House of Commons, the rules established by this Act with reference to persons holding the office of under secretary of state shall be applied in the same manner as if such other office had been expressly mentioned in this Act, unless special provision shall be made to the contrary.

4. No election of any member of the House of Commons elected previously to the passing of this Act shall be deemed to have become void by reason only of any excess which may have occurred previously to the passing of this Act, in the number of members of the said house holding the same office for the time being beyond the number limited by law.

CAP. XXXV.

An Act for more effectually regulating the Sale of Beer in *Ireland*.

[30th June, 1864.]

Sec. 1. *Short title.*

2. *Commencement of Act.*

3. *Excise officers in Ireland not to grant licences or renewal of licences without producing certificate of justices.*

4. *Persons applying for certificate to give notice to police officers.*

5. *Police officers may object to the issue of certificate.*

6. *Prohibitions, &c., now in force in Ireland with respect to houses, which houses may be kept open, to extend to persons licensed, &c. Rights, &c., of justices to extend to this Act.*

7. *Penalty for selling beer for consumption on premises without a licence.*

8. *Penalty for tipping on premises not licensed for consumption on such premises.*

9. *Justices may require production of licences upon the hearing of any complaint.*
10. *Power to Justices to mitigate penalty annexed by this Act to offences.*
11. *Wholesale dealers in beer who shall keep open their premises for the sale of beer between 7 o'clock in the evening and 7 o'clock in the morning to be subject to police supervision.*
12. *Proceedings for the recovery of penalties, &c.*
13. *Power to appeal to quarter sessions as to the granting or refusing certificate. Where grant of a certificate shall be reversed, licence to be annulled.*
14. *Parties herein named not required to produce certificate before obtaining grant, &c. of licence.*
15. *Definition of "retail."*

‘WHEREAS it is expedient to amend the law with respect to certain houses in *Ireland* (commonly called “beer-houses”) licensed for the sale of beer to be drunk or consumed elsewhere than on the premises where sold: Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited for all purposes as “The Beer houses (*Ireland*) Act, 1864.”

2. This Act shall come into operation on the first day of *July*, one thousand eight hundred and sixty-four.

3. From and after the commencement of this Act, save as hereinafter mentioned, it shall not be lawful for any officer of excise in *Ireland* to grant a licence or transfer of a licence for the sale of beer by retail, to be drunk or consumed elsewhere than on the premises where sold, to any person applying for such licence or transfer of a licence, or to grant a renewal of any such licence as aforesaid to any person applying for such renewal, without such person producing a certificate signed by two or more justices of the peace presiding at the petty sessions of the district in which such person resides, or if in the *Dublin* metropolitan police district by a divisional justice of the district in which such person resides, to the good character of such person, and the suitability of the premises for the purpose of such sale, and where the application shall be for the transfer of an existing licence or the renewal of a licence for the same house, as shall have been licensed in the year last immediately preceding, and which licence shall have not been withdrawn or annulled, without a similar certificate to the good character of the person applying for such renewal, or of the person to whom such transfer is proposed to be made, and to the peaceable and orderly manner in which such house had been conducted in the past year.

4. Every person who shall apply for such certificate as aforesaid shall give twenty-one days notice in writing to the sub-inspector of the district in which he resides, or in his absence to the head-constable, or if in the *Dublin* metropolitan police district to the

superintendent of police of the division in which such person resides, stating the intention of such person to make such application, and setting forth his place of residence, and the situation and place of the house where such person purposes to carry on the business of a retailer of beer; and in every case where any such person had been at any time previously licensed for the sale of wine, spirits, beer, ale, cider, or other exciseable liquors to be consumed on the premises or elsewhere, such notice shall set forth the last place of business whereat such wine, spirits, beer, ale, cider, or other exciseable liquors had been sold, together with the date at which such person had given up or otherwise discontinued the sale thereof.

5. The sub-inspector of the district, or in his absence the head-constable, or if in the *Dublin* metropolitan police district, the superintendent of the police of the division, shall be and he is hereby authorized to object before the justices at petty sessions, or the divisional justices, as the case may be, to the issue of such certificate, and the justices shall in such case proceed to consider, examine on oath into, and adjudicate upon the truth, sufficiency, and validity of such objection; and if such justices shall be satisfied of the truth and sufficiency of any such objection, they may refuse to grant such certificate.

6. From and after the commencement of this Act all the prohibitions, penalties, and forfeitures now in force in *Ireland* with respect to the hours during which licensed houses may be lawfully kept open for the sale of wine, spirits, ale, beer, or cider, by retail, to be drunk or consumed on the premises, shall extend to and be applicable to persons licensed to sell beer by retail not to be drunk or consumed upon the premises where sold: And in like manner all and singular the rights, powers, and authorities given to any justice of the peace, police officer, or constable, in and by the second section of an Act passed in the eighth and ninth years of the reign of her Majesty, chapter sixty-four, and in and by the twelfth section of an Act passed in the seventeenth and eighteenth years of her said Majesty, chapter eighty-nine, and the several fines, forfeitures, pains, and penalties contained in the said sections in relation to the offences therein respectively set forth, shall extend and be applicable to such licensed persons, and the houses and premises in which the sale of beer is so carried on as fully and effectually to all intents and purposes as if the said provisions of the said sections of the said Acts had been herein repeated and specially enacted with reference to persons licensed to sell beer by retail to be drunk and consumed elsewhere than on the premises where sold, and to the sale of beer by such persons for consumption on their premises, save that the mode of recovering and applying any penalty shall be as hereinafter enacted.

7. Every person not being duly licensed in that behalf who shall sell beer for consumption upon his premises shall be liable for the first offence to a fine not exceeding two pounds nor less than five shillings, or to be imprisoned, with or without hard labour, for any term not exceeding one month nor less than one week, and for the second and every subsequent offence to a fine not exceeding five pounds nor less than twenty shillings, or to be imprisoned, with or without

hard labour, for any term not exceeding three months nor less than one month.

8. If any person shall be found drinking or tipping, or having the appearance of having been recently drinking or tipping, on any premises in respect of which a licence shall then exist authorizing the sale of beer but not for consumption on such premises, such person may be summoned before the justices of peace at petty sessions or divisional justices of the police district of *Dublin* metropolis, as the case may be, or may be lawfully apprehended and brought, so soon as conveniently may be, before a justice of the peace, to be dealt with according to law; and upon conviction of his having been so drinking or tipping shall be liable for the first offence to a fine not exceeding five shillings, and for the second and every subsequent offence to a fine not exceeding ten shillings nor less than five shillings.

9. In case any complaint shall be laid against any person licensed to sell beer by retail not to be drunk or consumed upon the premises where sold for any offence against the tenour of his licence, or for any offence against this Act or any other Act affecting or having reference to his licence, it shall be lawful for the justice or justices before whom such complaint shall be brought to require such person to produce his licence before such justice or justices for examination; and if such person shall wilfully neglect or refuse so to do, he shall forfeit and pay for such offence such sum, not exceeding five pounds, as the said justice or justices shall think proper.

10. It shall be lawful for the justice or justices before whom the case shall be heard to mitigate the penalty annexed by this Act to any offence, so as such mitigation shall not in any case reduce such penalty to less than one-fourth thereof, and the cause of such mitigation shall be set forth upon such conviction.

11. Any person licensed to sell beer by wholesale, to be consumed off the premises where sold, who shall keep his house or premises open for the sale of beer between the hours of seven o'clock in the evening and seven o'clock in the morning, shall, during the said hours, be subject to the same supervision by justices of the peace, police officers, and constables as persons licensed to sell beer by retail to be consumed off the premises where sold are by this Act subjected to; and all and singular the rights, powers, and authorities given to any such justice, officer, or constable in and by the second section of the Act passed in the eighth and ninth years of her Majesty's reign, chapter sixty-four, and the twelfth section of the Act passed in the seventeenth and eighteenth years of her Majesty's reign, chapter eighty-nine, and the several fines, forfeitures, pains, and penalties contained in the said sections in relation to the offences therein respectively set forth, shall extend and be applicable to such wholesale dealers in beer, and the houses and premises in which they shall carry on, or purport to carry on, the sale of beer during the hours aforesaid, as fully and effectually, and to all intents and purposes, as if the said provisions of the said sections of the said Act had been herein repeated and specially enacted with reference to persons licensed to sell beer by wholesale, to be consumed off the premises where sold,

who shall keep open their houses or premises for the sale of beer during the hours aforesaid, save that the mode of recovering and applying any penalty shall be as is hereinbefore provided in respect to other penalties imposed by this Act.

12. All proceedings for the recovery of penalties incurred under this Act and the appearance of any witness, and the hearing and determination of all complaints under this Act, shall be subject in all respects to the provisions of the Petty Sessions (*Ireland*) Act, 1851, as the same is amended by "The Petty Sessions Clerk (*Ireland*) Act, 1858," when the case shall be heard in any petty sessions district, and to the provisions of the Acts relating to the divisional police offices, when the same shall be heard in the police district of *Dublin* metropolis, so far as the said provisions shall be consistent with this Act; and when any fine or penalty is imposed under the provisions of this Act, such fines and penalties shall be paid over to such purposes and applied in such manner as is provided by the "Fines Act (*Ireland*), 1851," or any Act amending the same; and all such proceedings as aforesaid may be taken by and in the name of any superintendent or inspector of police within the police district of *Dublin* metropolis, or by any sub-inspector, head or other constable in any other part of *Ireland*, without any orders of the Commissioners of Inland Revenue for that purpose.

13. After the hearing and determination by any justice or justices of the peace of any application for a certificate either party to the proceedings before the said justice or justices may, if dissatisfied with the decision or judgment given thereon, appeal therefrom to the justices assembled at the general or quarter sessions of the peace to be holden for the county, city, town, or place in which such decision or judgment shall have been given, or if within the police district of *Dublin* metropolis, then to the Recorder of the city of *Dublin* at his next sessions; and every appeal from an order granting or refusing a certificate shall be subject to the provisions contained in an Act passed in the eighteenth and nineteenth years of the reign of her Majesty, chapter sixty-two, and in an Act passed in the twenty third and twenty-fourth years of the reign of her Majesty, chapter thirty-five, and the recognizance to be entered into shall be in the form in the schedule annexed to the said Act passed in the eighteenth and nineteenth years of the reign of her Majesty, chapter sixty-two, or as near thereto as the circumstances of the case may admit; and in every case where the decision of a justice granting a certificate under the provisions of this Act shall be reversed on appeal, the justices of the peace at the general or quarter sessions, or the recorder of the city of *Dublin*, as the case may be, shall forthwith annul any licence which shall have been granted on the faith of such certificate.

14. Notwithstanding anything in this Act contained, the persons hereinafter mentioned shall not be required to produce a certificate under this Act before obtaining the grant, renewal, or transfer of a licence for the sale of beer by retail to be drunk or consumed elsewhere than on the premises where sold; that is to say,)

1. Any person duly licensed to brew beer for sale,

and who has paid on such licence a duty in respect of not less than one hundred barrels of beer;

2. Any person not being a brewer of beer who is duly licensed to sell beer only in casks containing not less than four and a half gallons, imperial measure, or in not less than two dozen reputed quart bottles, at one time, to be consumed elsewhere than on his premises;

3. Any person duly licensed to trade in, vend, and sell coffee, tea, cocoa nuts, chocolate, or pepper.

15. For the purposes of this Act any person who shall sell beer in any less quantity than four gallons and a half, imperial standard measure, or in any less quantity than two dozen reputed quart bottles, at one time, shall be deemed to sell by retail.

CAP. XXXVI.

An Act to amend the Law relative to the payment of the share of Prize and other Money belonging to deceased Officers and Soldiers of her Majesty's Land Forces. [30th June, 1864.]

2 & 3 W. 4, c. 53.

Sec. 1. *Short title.*

2. *Interpretation of "prize money."*

3. *Sec. 25 of recited Act repealed, and new provision herein named substituted.*

4. *Indemnity to Commissioners.*

5. *Indemnity for past payments.*

'WHEREAS by section twenty-five of the Act of the session of the second and third years of King William the Fourth (chapter fifty-three), for "consolidating and amending the laws relating to the payment of army prize money," it is enacted that it shall be lawful for the Commissioners of the Royal Hospital at Chelsea to authorize their treasurer or deputy treasurer to pay to any person or persons who shall prove him, her, or themselves to the satisfaction of such Commissioners, or of the said treasurer or deputy treasurer, to be the next of kin or legal representative, or otherwise entitled to any share of prize money, belonging to any deceased officer, soldier, or other person, any such share not exceeding fifty pounds although such person shall not have regularly taken out letters of administration to or have procured the probate of any will of the party originally entitled thereto, to enable him legally to demand such share of prize money:

'And whereas it is expedient to enlarge and better define the powers of the said Commissioners with respect to the payment of small sums and other prize money belonging to deceased officers and soldiers, and to indemnify the said Commissioners in respect of the exercise of such powers: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as The Army Prize (Shares of Deceased) Act, 1864.

2. In this Act the term "prize money" includes bounty money, grant, or other allowance of money in the nature of prize or grant, in the hands of the Com-

missioners of the Royal Hospital at Chelsea, or of their treasurer, deputy treasurer, or secretary for distribution.

3. Section twenty-five of the recited Act is hereby repealed, and in lieu thereof the following provision shall take effect as part of the recited Act; namely—

The Commissioners of the Royal Hospital at Chelsea may in any case, if they think fit, authorize their treasurer or secretary to pay the share of prize money, not exceeding fifty pounds, belonging to any deceased officer, soldier, or other person, to or among any person or persons showing himself, herself, or themselves to the satisfaction of the said Commissioners, to be entitled thereto or to shares thereof (as the case may be), without probate of the will or letters of administration to the estate of any deceased person being obtained or taken out.

4. Every payment made in pursuance of this Act shall be good and valid as against all persons; and the said Commissioners and their treasurer and secretary for the time being are by virtue of this Act absolutely discharged from all liability in respect of any money paid in pursuance of this Act.

5. Any payment made before the passing of this Act, that would have been valid if made after the passing of this Act, shall be deemed good and valid as against all persons; and the said Commissioners, and every their treasurer, deputy treasurer, and secretary for the time being are by virtue of this Act absolutely discharged from all liability in respect of any money so paid.

CAP. XXXVII.

An Act to amend and extend the Act for the Regulation of Chimney Sweepers. [30th June, 1864.]

3 & 4 Vic. c. 85.

Sec. 1. *Short titles.*

2. *Commencement of Act.*

3. *Interpretation of terms.*

4. *This Act to be construed with principal Act.*

5. *Application of penalties.*

6. *Restriction on employment of children under ten.*

7. *Chimney sweepers entering houses to sweep chimneys, &c. not to bring with him persons under sixteen.*

8. *Penalties for before named offences.*

9. *Power to justices to impose imprisonment.*

10. *Burden of proof of age to lie on chimney sweeper.*

11. *Abolition of minimum penalty.*

'WHEREAS by the Act of the session of the third and fourth years of her Majesty Queen Victoria (chapter eighty-five), "for the regulation of chimney sweepers and chimneys," provision was made to prevent any person compelling or knowingly allowing a child or young person under the age of twenty one years to ascend or descend a chimney or enter a flue for the purpose of sweeping, cleaning, or coring the same, or for extinguishing fire therein: And whereas it is expedient to amend in some particulars and to extend the said Act (hereafter in this Act called the Principal Act):'

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

General.

1. This Act may be cited as "The Chimney Sweeper's Regulation Act, 1864," the principal Act may be cited as "The Chimney Sweepers and Chimneys Regulation Act, 1840;" and the principal Act and this Act may be cited together as "The Chimney Sweepers and Chimneys Regulation Acts, 1840 and 1864."

2. This Act shall commence and take effect on the first day of *November*, one thousand eight hundred and sixty-four.

3.—In this Act—

The term "sheriff" includes steward:

The term "chimney sweeper" means a person using the trade or business of a chimney sweeper.

4. This Act shall be construed together with the principal Act as one Act, and for this purpose the expression "this Act" when used in the principal Act shall be taken to include the present Act.

5. Any pecuniary penalty recovered under this Act shall be applied as directed in the present Act.

Protection of children and young persons.

6. It shall not be lawful for a chimney sweeper to employ a child under the age of ten years to do or assist in doing any work or thing in or about the trade or business of such chimney sweeper elsewhere than within the house or place of business of such chimney sweeper, or the yard or buildings (if any) connected therewith.

7. It shall not be lawful for a chimney sweeper, on any occasion, of his entering a house or building for the purpose of sweeping, cleaning, or coring a chimney or flue therein or belonging thereto, or for extinguishing fire in any such chimney or flue, to cause or knowingly allow a person under the age of sixteen years in his employment or under his control to enter before, with, or after him into any part of such house or building, or to be therein for any part of the time during which such chimney sweeper himself continues therein for any such purpose as aforesaid.

8. If any chimney sweeper acts in contravention of either of the foregoing enactments, he shall for every such offence be liable to a penalty not exceeding ten pounds.

9. Where under section two of the principal Act a chimney sweeper is convicted of the offence of compelling or knowingly allowing a person under the age of twenty-one years to ascend or descend a chimney or enter a flue for any purpose in that section mentioned, the justices or sheriff before whom he is convicted may, in lieu of the imposition of any such pecuniary penalty as is authorized by that section, adjudge the offender to be imprisoned in the common gaol or house of correction for any term not exceeding six months, with or without hard labour.

10. In any prosecution of a chimney sweeper for any offence against the principal Act or against this Act, where the age of any young person or child

comes in question, the proof of the age of such young person or child shall lie on the defendant.

11. Section two of the principal Act shall be read as if the words "or less than five pounds" were omitted therefrom.

CAP. XXXVIII.

An Act to facilitate the Redemption of Chief Rents in Ireland. [30th June, 1864.]

1. *Explanation of certain terms.*
2. *Owner of land and owner of rent may agree for redemption, &c., of such rent.*
3. *Application of price of redemption, whether paid in money or in land.*
4. *In cases of limited interests, contract of redemption to have sanction of judge of Landed Estates Court.*
5. *Judge of Landed Estates Court to examine and certify title.*
6. *Deeds effecting contracts for redemption to be chargeable with ad valorem stamp duty as upon a conveyance on sale.*
7. *Apportioning rent reserved, where part only redeemed.*
8. *Reservation or exceptions may go with the rent.*
9. *If payment to trustees be necessary, trustees to be appointed by a judge of Landed Estates Court.*
10. *Application of purchase money.*
11. *Judges may make general orders for all proceedings in their Courts.*
12. *Extent of Act.*

' WHEREAS it is expedient to enable persons holding lands or tenements subject to any rent to redeem the said rent: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:—

1. Any lands or tenements held in fee farm, or for lives renewable for ever, or for any term whereof more than two hundred years shall be unexpired, shall, if subject to any rent during the continuance of such estate, be deemed land within the provisions of this Act; and any person entitled in possession to such lands or tenements, or to the rents and profits thereof, under any will or settlement for any term of years determinable on the dropping of a life or lives, or for any greater estate (not being a term of years less than the term for which such lands or tenements may be held), shall be deemed the owner of such lands and tenements; and any person entitled under any will or settlement to an immediate estate in the said rent, or in the reversion to which the same may be incident, for any term of years determinable on the dropping of a life or lives, or for any greater estate, shall be deemed the owner of such rent; and every estate in land or rent, other than an unincumbered estate in fee, shall be deemed a limited estate within the provisions of this Act; and the words "lands or tenements" in this Act shall extend to any divided or undivided shares thereof respectively; and the word

"rent" shall extend to any part or parts thereof; and the words "owner or person" shall extend to two or more persons seized of or entitled to divided or undivided shares of or estates in the said lands and rents respectively, and shall also include any corporate bodies, aggregate or sole.

2. The owner of any land or tenement subject to any rent may agree with the owner of such rent for the redemption and extinguishment thereof on the following terms; that is to say, the price to be paid for such redemption shall be either a sum of money in gross, or a part of the lands or tenements which were subject to the said rent, or any lands or tenements to which the owner shall be entitled in fee simple or fee farm, or which shall be subject to the same limitations as the lands or tenements to be discharged from rent by such agreement.

3. In case the owner of such rent shall have only a limited estate therein, if the price agreed to be paid for the redemption thereof shall be a sum of money in gross it shall be paid to the trustees appointed by the deed or instrument whereby the estate or interest of such owner of rent shall be limited, or to the trustees to be appointed when necessary by the Landed Estates Court as hereinafter mentioned, for application in the manner hereinafter mentioned, and if the price shall be land it shall be conveyed to and held by such trustees in lieu of the said rent, subject to the same trusts, limitations, and charges as the rent had previously been subject to.

4. If the owner of the rent have only a limited estate therein, the contract for redemption shall not be concluded without the sanction of one of the judges of the Landed Estates Court, after giving notice to such persons as he shall think proper; and in case such contract shall be sanctioned such deed or deeds shall be executed by the parties as the said judge shall direct.

5. The judge of the Landed Estates Court shall investigate such title, and if it shall be sufficient he may cause a certificate of his approbation thereof to be annexed to the contract for redemption; and such certificate shall have the effect of giving to the person taking the land or rent under such contract the same title thereto as if the same had been conveyed to him by one of the judges after the sale thereof in the Landed Estates Court.

6. Every deed executed by the direction of the judge, and every certificate annexed to the contract for redemption as aforesaid, which respectively shall have the force or operation of a conveyance of any rechargement under this Act, shall be chargeable with *ad valorem* stamp duty as upon a conveyance on sale; that is to say, where the consideration for such redemption shall be a sum of money in gross the said *ad valorem* stamp duty shall be chargeable in respect of such sum of money as the purchase or consideration money; and where the consideration for such redemption shall be lands or tenements, then the said deed or certificate shall be chargeable with the *ad valorem* stamp duty which would be chargeable on a conveyance of such lands or tenements on the sale thereof in consideration of the rent contracted to be redeemed.

7. Where it is intended to redeem under this Act

a part only of any rent, it shall be lawful for one of the judges of the Landed Estates Court to apportion the rent reserved by the lease or grant as between the part thereof to be redeemed and the land as to which the same is to be extinguished and the remaining part or parts of the said rent and land; and the judge shall direct notice of any such intended apportionment as aforesaid to be given to such persons and in such manner as he shall think fit, and shall hear such parties as shall apply in relation thereto; and after such apportionment, and after the said part of the said rent shall have been so redeemed, the owner of the remaining part of the said rent so apportioned shall have the like remedies for the recovery thereof against the lands out of which the same shall be payable, and the owners and occupiers thereof respectively, as were subsisting for the entire rent before such apportionment; and all the covenants, conditions, and agreements of every lease or grant, except as to the amount of rent to be paid, shall, as regards the part or parts not redeemed, remain in force, in the same manner as they would have done if such redemption had not taken place: Provided always, that the enactment in this section shall be deemed to apply to the redemption of any parts of the same original rent to be redeemed at different times; provided also, that where any such part of the said rent so intended to be redeemed shall have been theretofore apportioned or fixed and determined as between the owners of such lands and tenements liable to payment of the whole rent, and such part or parts shall have been theretofore apportioned as between such owners themselves, such apportionment shall be adopted and acted upon to all intents and purposes as if the same was made under the provisions of this section.

8. Any reservation or exceptions, or any returns, services, or duties, secured by or contained in the instrument by which such rent may have been created or reserved, may (with the sanction and approval of a judge of the Landed Estates Court, but not otherwise) be granted or released together with the rent, if the parties interested therein shall agree thereto, and shall express such agreement in the contract by which such rent shall be redeemed or extinguished.

9. When it shall be necessary to pay the purchase money of any rent to trustees for application under this Act, if such trustees shall not already exist, or have been created by deed or will or other instrument, trustees shall be appointed by a judge of the Landed Estates Court, and all such trustees shall apply the same on the same uses and trusts, and hold the same subject to the same charges and limitations, as the rent which had been redeemed; and until a legal application of such purchase money can be made, the trustees shall invest the same in the public funds, and shall pay the annual dividends thereof to such persons as would be entitled to the said rent if it had not been redeemed or extinguished.

10. All monies to be received on any sale effected under the authority of this Act may be applied under the direction of a judge of the Landed Estates Court to some one or more of the following purposes—namely, the purchase or redemption of quit or crown rent, or the discharge or redemption of any debt or incumbrance affecting the rent in respect of which

such purchase money shall have been paid, or affecting any other hereditaments subject to the same uses or trusts, or the purchase of other hereditaments to be settled in the same manner as the rent in respect of which the money was paid, or the payment to any person becoming absolutely entitled.

11. The judges of the Landed Estates Court may from time to time make general orders for regulating all proceedings in their Courts under this Act, and the costs of such proceedings; and such rules, so long as they shall be in force, shall have the same effect as if they were comprised in this Act.

12. This Act shall only extend to *Ireland*.

CAP. XXXIX.

An Act to amend the Union Assessment Committee Act (1862). [14th July, 1864.]

CAP. XL.

An Act for authorizing the Relinquishment in favour of the King of the *Hellenes* of certain money payable in respect of the *Greek* Loan. [14th July, 1864.]

CAP. XLI.

An Act for confirming a Scheme of the Charity Commissioners for the Charity called "The Free Grammar School" in the city of *Coventry*. [14th July, 1864.]

CAP. XLII.

An Act to provide for Superannuation Allowances to Officers of Unions and Parishes. [14th July, 1864.]

CAP. XLIII.

An Act to grant additional Facilities for the Purchase of small Government Annuities, and for assuring Payments of Money on Death. [14th July, 1864.]

16 & 17 Vic. c. 45.

- Sec. 1. *Deferred annuities may be granted if sum required be paid in smaller instalments.*
2. *Such annuities may be granted to extent of £50.*
3. *Portion of sec. 10 of recited Act repealed.*
4. *Limit on age of persons insured.*
5. *Limit of sum insured.*
6. *Power to construct fresh tables for annuities and insurances.*
7. *This Act not to come in force until tables can be legally acted on.*
8. *Provision in case of default by purchasers after five years payments.*
9. *Purchasers liable to provisions of existing Savings Banks Acts.*
10. *Jurisdiction of county court. Jurisdiction of courts in Scotland and Ireland.*
11. *Assignment of contracts.*
12. *Commissioners not to be affected by notice of trusts.*
13. *Commissioners for Reduction of National Debt to regulate instalments.*
14. *Power to Post-Master General, with consent*

of treasury, to authorize his officers to receive monies.

15. *Power to Commissioners to give authority to trustees of savings banks.*

16. *Power to Postmaster-General, with consent of treasury, to make regulations for carrying out provisions of this Act.*

17. *Accounts of Postmaster-General and Commissioners to be submitted to Commissioners for auditing Public Accounts.*

'WHEREAS under the Act sixteenth and seventeenth *Victoria*, chapter forty-five, deferred annuities of small amounts can only be granted upon the condition that the full amount required to purchase such annuities shall be paid in one sum, or by annual payments during a course of years fixed at the time of purchase: And whereas under the said Act contracts for payment of a sum of money on death cannot be entered into except upon the condition that the party contracting for such payment on death shall at the same time purchase a deferred annuity depending upon his or her own life: And whereas it is expedient to amend the said Act: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Deferred annuities, authorized to be granted by the second section of the said Act, may be granted upon the condition, to be fixed at the time of purchase, that the sum required under the said Act to purchase such annuity shall be payable in smaller instalments and at shorter periods than are now fixed by the said Act.

2. Annuities authorized to be granted under the second section of the said Act may be granted in amounts exceeding the limit of thirty pounds fixed by the said Act, but no such annuity shall be granted to any one person to an amount exceeding fifty pounds *per annum*.

3. So much of the tenth section of the said Act as requires that a deferred annuity shall be purchased by any person contracting with the Commissioners for the Reduction of the National Debt for payment of a sum of money on death shall be and the same is hereby repealed.

4. No contract for a payment on death shall be entered into by or on behalf of any person under the age of sixteen or over the age of sixty years.

5. No contract for payment to be made on the death of any one person under this and the said Act shall be for a greater amount in the whole than one hundred pounds, or of a less amount than twenty pounds.

6. 'Whereas by the sixteenth section of the said Act it is enacted, that the Commissioners of her Majesty's Treasury may from time to time direct the Commissioners for the Reduction of the National Debt to use and adopt such tables as shall from time to time be authorized and approved of by the said Commissioners of the Treasury for the grant of annuities and for payment of sums of money to be secured at death under the provisions of the said Act: And whereas it is expedient that the fund to be formed by

the receipt of sums on account of all such contracts effected under the said Act and this Act shall be adequate to meet all claims accruing and to accrue thereon, so as to render certain the fulfilment of all engagements to persons contracting for such annuities or payment on death, or for any compositions or sums agreed to be granted upon the lapse of any contract, without entailing any charge in respect thereof, or in respect of costs and expenses on the consolidated fund of the United Kingdom: Be it enacted, therefore, that the said Commissioners of her Majesty's Treasury shall cause tables to be constructed in accordance with the principles above recited, upon which annuities or payment on death shall be contracted for under the said Act and this Act, and the said tables shall be framed, first, for such contracts as shall provide for the consideration money in one sum; second, for such contracts as shall provide for the like payments in annual sums; and third, for such contracts as shall provide for the like payments by more frequent instalments; and such tables, when the Commissioners of her Majesty's Treasury have approved of the same, shall, together with a statement of the rules observed in constructing them, be laid before both Houses of Parliament for thirty days before they shall be acted upon; and if any address shall be presented to her Majesty from either House of Parliament praying that such tables may be revoked and cancelled, such tables shall be revoked and cancelled accordingly; and thereupon the Commissioners of her Majesty's Treasury shall order other tables to be framed for their approval in lieu of the tables so revoked and cancelled. The tables for payment on death shall be calculated, so far as the interest of money is concerned, at the rate of three *per centum per annum*.

7. Until the tables made in pursuance of this Act can be legally acted on, this Act shall not come into force so far as to enable any grant to be made of an insurance on the life of any person or any grant to be made of any annuity the consideration money for which is paid by instalments more frequent than annual instalments.

8. In case any person who shall contract under the provisions of the said Act and of this Act for a payment to be made at death, after having paid the several premiums for a period of not less than five years, shall desire to surrender his policy, or shall make default in the payments stipulated to be made according to the contract, the commissioners for the Reduction of the National Debt, at the option of the party beneficially interested in the contract, shall pay to such person such sum of money, not being less than one-third of the premiums paid by him, as shall be fixed by the regulations authorized to be framed under the provisions of this Act, or shall grant to him a paid-up policy of assurance or such an immediate or deferred life annuity, under the tables in force under the authority of the said Act or this Act, as shall be equivalent in value to the sum which under the provisions of this Act would be paid to him in money; but it shall also be lawful for the said Commissioners, if they think fit, to enter into contracts for payments to be made at death, on the condition that no portion of the premiums paid are to be returnable; and no premium

shall be returned in pursuance of this section in respect of any contract so made.

9. For the purposes of this Act and of the said Act, every person purchasing an annuity, or having purchased the same under the provisions of the said Act, or contracting for the payment of a sum of money on his or her death, shall be considered as a depositor in a savings bank; and all the provisions of the Acts now in force relating to savings banks, in as far as the same can or may be applicable, shall apply to the parties having purchased or purchasing such annuities, or contracting for the payment of money on death, and to the rules and regulations to be made for carrying the same into effect: Provided always, that nothing in this Act or the said Act contained shall be held to exempt any person or persons entering into a contract for a payment on death, or any person or persons becoming beneficially interested therein, from probate or any stamp duty payable by law.

10. If payment of any sum of money due on a contract made under this Act for payment of money on death shall be refused by the Commissioners for the Reduction of the National Debt, the party beneficially interested therein may, if he think fit, instead of proceeding to arbitration in manner provided by the said Savings Banks Acts, take proceedings against the said Commissioners for the Reduction of the National Debt in the county court of the district in which such contract was entered into, or with the consent of the said Commissioners in any other county court in the jurisdiction of which such party may be resident, for the recovery of the amount; and any county court in which proceedings under this section may be taken shall have jurisdiction in the matter, and the decision thereupon shall be final and binding on all parties to all intents and purposes, and without any appeal; and for the purposes of this Act the contract shall be deemed to have been entered into at the place where the party insured resided at the time at which the contract bears date. For the purpose of arbitration under the said Acts relating to savings banks, the said Commissioners shall when necessary be deemed to be in the place of the trustees of savings banks. In *Scotland* the sheriff court, and in *Ireland* the Civil bills Court of the Chairman of Quarter Sessions, shall have the same jurisdiction as is given by this section to the county court.

11. Any person who shall contract under the provisions of this Act and of the said Act for a payment to be made at death may, after having duly paid for five years or upwards the premiums thereon, assign his right and interest therein, upon payment of such fee and on such conditions as shall be fixed by regulations made under the authority of this Act. The assignee of such contract shall take, both at law and in equity, all such right and interest therein, including the right to sue, as was possessed by the assignor, but no other or greater right or interest.

12. The Commissioners shall not, except in so far as is provided by the said Act, receive or be affected by notice, however given, of any trust affecting any annuity, or any contract for payment on death, made in pursuance of this and the said Act.

13. The Commissioners for the Reduction of the National Debt, with the consent of the Commissioners

of her Majesty's Treasury, may make regulations for fixing the amounts of the several instalments and premiums, and the periods at which such instalments and premiums shall be paid, in respect of the purchase money payable upon all contracts which shall be made under the authority of this and the said Act, but so as not to affect any contract previously made; and no sum in respect of instalments or premiums payable at any one time shall be of less amount than two shillings.

14. The Postmaster-General, with the consent of the Commissioners of her Majesty's Treasury, may, if he shall think fit, authorize and direct such of his officers as he may select to receive such moneys as may become payable upon contracts entered into under this and the said Act for investment with the Commissioners for the Reduction of the National Debt, and to pay on behalf of the said Commissioners all such monies as may become due and payable under such contracts.

15. The Commissioners for the Reduction of the National Debt may, in like manner, with the consent of the said Commissioners of her Majesty's Treasury, if they shall think fit, authorize the trustees of savings banks established under the Act of the twenty-sixth and twenty-seventh *Victoria*, chapter eighty-seven, with consent of such trustees, to receive such monies as may become payable upon contracts entered into under this Act for remittance to the Commissioners for the Reduction of the National Debt, and to pay on behalf of the said Commissioners all such monies as may become due and payable under such contracts, and may make to the said trustees a reasonable allowance for their expenses, in respect of such transactions, out of the monies so received and paid over by the said trustees to the said Commissioners.

16. The Postmaster-General, with the consent of the Commissioners of her Majesty's Treasury, may make all regulations for carrying out the provisions of this Act, in so far as his department is concerned; and the Commissioners for the Reduction of the National Debt, with the consent of the said Commissioners of her Majesty's Treasury, may make regulations for carrying out the provisions of this Act so far as the trustees of savings bank are concerned, and also for the execution of contracts on behalf of the said Commissioners, by any officer or officers appointed by the said Commissioners for that purpose, or appointed by the Postmaster-General, with the consent of the said Commissioners; and all regulations made by the said Postmaster-General and the said Commissioners for the reduction of the National Debt respectively shall be binding to the same extent as if such regulations formed part of this Act; and copies of all regulations issued under the authority of this Act shall be laid before both Houses of Parliament.

17. The annual accounts of the Postmaster-General and of the Commissioners for the Reduction of the National Debt to the thirty-first day of *December* in each year, in respect to all monies received or invested under the authority of this Act, shall annually, prior to the thirty-first day of *March* in each year, be submitted by the said Postmaster-General and by the said Commissioners for examination and audit to the Commissioners for auditing Public Accounts.

CAP. XLIV.

An Act to amend the Act relating to Divorce and Matrimonial Causes in *England*, twentieth and and twenty-first *Victoria*, chapter eighty-five.
[14th July, 1864.]

CAP. XLV.

An Act to further amend The Settled Estates Act of 1856.
[14th July, 1864.]

19 & 20 *Vic. c. 120.*

- Sec. 1. *Conditions that lease shall be settled by the Court not to be inserted in orders under sec. 10 of the recited Act.*
2. *Conditions already inserted may be struck out by Court.*
3. *Removal of doubts as to construction of sec. 1 of recited Act.*
4. *Act to be construed with recited Act.*
5. *Extent of Act.*

‘WHEREAS by the tenth section of the Act passed in the Parliament holden in the 19th and 20th years of her Majesty's reign, intituled *An Act to facilitate Leases and Sales of Settled Estates*, it was enacted, that when the Court of Chancery should deem it expedient that any general powers of leasing any settled estates, conformably to the said Act, should be vested in trustees, it might, by order, vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and that in every such case the Court, if it should think fit, might impose any conditions as to consents or otherwise on the exercise of such power: And whereas, in order to protect the interests of persons interested in the settled estates affected by such powers, the practice of the said Court has been to require that leases granted in pursuance of a power vested in any trustees or other persons, under the provisions of the said tenth section of the said Act should be settled by the said court or by a judge thereof, or otherwise should be made conformable with a model lease deposited in the chambers of the judge: And whereas the introduction of such a condition has been found to occasion delay and expense, and so to create great difficulties in carrying into execution the objects of the Act, and such conditions may in general be safely omitted, and it is therefore expedient that the said Act should be amended as hereinafter mentioned:’ Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In orders to be hereafter made under the said tenth section for vesting any powers of leasing in any trustees or other persons, no condition shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the said court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient.

2. In all cases of orders already made in pursuance

of the said tenth section, in which any such condition as aforesaid has been inserted, it shall be lawful for any person interested to apply to the court to alter and amend such order, by striking out such condition, and the court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the court to act under this clause in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why in the case in question such a condition is necessary or expedient.

3. 'And whereas doubts are entertained whether in the construction of the first section of the said Act the court is bound by the state of facts existing at the period of the settlement taking effect, or by the state of facts at the time of an application to the court under the said Act, and it is desirable that such doubts should be removed: ' Be it enacted, that the said court, in determining what are settled estates within the said Act, shall be governed by the state of facts and by the trusts or limitations of the settlement at the time of the said settlement taking effect.

4. This Act shall be construed and dealt with as part of the said former Act as amended by the Act of the twenty-first and twenty-second years of her Majesty's reign, chapter seventy-seven, and all proceedings under this Act shall be subject to the same rules and orders, and shall be conducted in the same manner as proceedings under the said former Acts.

5. This Act shall extend to *Ireland*, but not to *Scotland*.

GAP. XLVI.

An Act to provide for the Investment and Appropriation of all Monies received by the Commissioners for the Reduction of the National Debt on account of Deferred Life Annuities and Payments to be made on Death. [14th July, 1864.]

Sec. 1. *Investment of monies received by commissioners for reduction of national debt on account of deferred annuities and payments on death.*

2. *Annual account of all monies received and of disposal thereof to be laid before Parliament.*

3. *Commissioners for reduction of national debt to transmit to treasury every five years a statement of financial result of engagements and liabilities. Provision in case of deficiency or surplus.*

4. *Treasury to issue one of consolidated fund sums necessary to make good deficiency.*

' WHEREAS it is expedient to provide for the investment and appropriation of all monies received by the commissioners for the reduction of the national debt under any Acts in force in that respect on account of deferred life annuities and payments on death, and to secure due payment thereof to the parties respectively entitled thereto: ' be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal,

and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. All monies received by the commissioners for the reduction of the national debt on account of contracts for deferred life annuities, and for payments on death, entered into under the authority of any Act or Acts of Parliament subsequently to the passing of this Act, shall be invested in such and the like securities as the said commissioners are authorized by law to purchase on account of savings banks, and such securities shall be held by the said commissioners applicable to meet the claims on account of such deferred annuities and payments on death; and the said commissioners shall, in respect of all such monies, have such and the like powers as are now vested by law in the said commissioners in respect of monies received by them from the trustees of saving-banks for investment; and the commissioners of her Majesty's treasury may from time to time, if they shall think it advantageous to the public service, convert any capital stocks of annuities held by the said commissioners for the reduction of the national debt on account of such investments into an equivalent amount of annuities for a term of years, chargeable upon and payable out of the consolidated fund; and whenever such conversion shall take place the capital stocks of annuities so converted shall be cancelled, and copies of the authorities under which such conversion shall have been made shall be laid before both houses of Parliament.

2. An account of all monies received and of the disposal thereof, and of all contracts for the grant of such deferred life annuities, and for payments on death, made between the first day of *January* and the thirty-first day of *December* in every year shall be laid before both houses of Parliament not later than the thirty first day of *March* next following; and such accounts shall show—

The amount of receipts during the year on contracts;

The number and amount of payments made on account of contracts during the year;

The amount of expenses during the year;

The number and amount of new contracts entered into;

The total number and amount of all current contracts at the end of the year;

The whole amount of capital, distinguishing the manner in which invested, how much in cash, how much in securities, specifying their nature;

The average rate of interest received upon each class of investments;

The table of mortality and the rate of interest used in calculating the premiums.

3. The commissioners for the reduction of the national debt shall prepare and shall transmit to the commissioners of her Majesty's treasury, at the end of every five years, a statement of the result of a valuation of the engagements made and liabilities incurred during the preceding five years, and of the assets applicable to meet the same; and if it shall appear that the amount of the liabilities is greater than that of the said assets, the commissioners of her Majesty's treasury shall charge the deficiency upon the consolidated fund; and if it shall appear that the value of

the assets is more than sufficient to discharge the liabilities, the said commissioners of the treasury shall direct that there be cancelled out of the securities held by the commissioners for the reduction of the national debt an amount not exceeding four fifths of such surplus.

4. The commissioners of her Majesty's treasury shall from time to time, upon being satisfied that the assets are not sufficient to meet the liabilities, and upon a certificate to that effect under the hands of the comptroller general or assistant comptroller acting under the commissioners for the reduction of the national debt, direct such sums to be issued out of the consolidated fund of the United Kingdom, or out of the growing produce thereof, as may be necessary to meet the said liabilities: provided always, that no such sums shall be issued as, taken together, shall exceed the amount charged upon the consolidated fund under the authority of this Act.

CAP. XLVII.

An Act to amend the Penal Servitude Acts.

[25th July, 1864.]

16 & 17 Vict., c. 99; 20 & 21 Vict., c. 3.

Sec. 1. *Short titles.*

2. *Length of sentences of penal servitude.*

3. *Punishment of offences in convict prisons.*

4. *Forfeiture of licence.*

5. *Offences by holders of licence.*

6. *Apprehension of holder of licence without warrant.*

7. *Summary punishment of offences.*

8. *Where holder of licence is summarily convicted, convicting magistrate to forward certificate to secretary of state or Lord Lieutenant of Ireland.*

9. *Effect of forfeiture or revocation of licence.*

10. *Licences may be granted in form differing from that in Schedule (A.)*

' WHEREAS two Acts were passed, the one chapter ninety-nine in the session of the sixteenth and seventeenth years of the reign of her present Majesty, and the other chapter three in the session of the twentieth and twenty-first years of the same reign, having for their object the substitution of other punishments in lieu of transportation: and whereas it is expedient to amend the said Acts: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall be construed as one with the above-mentioned Acts, and the said Acts, together with this Act, may be cited for all purposes as the Penal Servitude Acts, 1853, 1857, and 1864, and each of the said Acts may be cited as the Penal Servitude Act of the year in which it was passed.

Sentences of Penal Servitude.

2. No person shall be sentenced to penal servitude in respect to any offence committed after the passing of this Act for a period of less than five years, and where under any Act now in force a period of less than five years is the utmost sentence of penal servi-

tude that can be awarded, a period of five years shall, in respect to any offence committed after the passing of this Act, in such Act be substituted for the less period; and where under any Act now in force a period of either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that Act shall, in respect to any offence committed after the passing of this Act, be a period of five years; and where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, or, in *Scotland*, of any crime, (whether such previous conviction shall have taken place upon an indictment or under the provisions of the Act passed in the eighteenth and nineteenth of *Victoria*, chapter one hundred and twenty-six,) the least sentence of penal servitude that can be awarded in such case shall be a period of seven years.

Convict Prisons.

3. One of her Majesty's principal secretaries of state in *Great Britain*, and the lord lieutenant or other chief governor in *Ireland*, may, by warrant under his hand and seal, empower any two or more justices of the peace, to be named in such warrant, acting for any county in which a prison for the reception of convicts under sentence of penal servitude is situate, to order, from time to time, the infliction of corporal punishment on any convict confined in such prison, for an offence committed by such convict in such prison, and against the discipline thereof; and any two or more justices of the peace thus empowered shall have the same power of adjudicating on such offences, and of ordering the infliction of such punishment, to be exercised under the same conditions as one of the directors of convict prisons would have, and no greater.

Licences.

4. A licence granted under the said Penal Servitude Acts, or any of them, may be in the form set forth in Schedule (A.) to this Act annexed, and may be written, printed, or lithographed. If any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted, either by the verdict of a jury, or upon his own confession, of any offence for which he is indicted, his licence shall be forthwith forfeited by virtue of such conviction, or if any holder of a licence granted under the said Penal Servitude Acts, or any of them, who shall be at large in the United Kingdom, shall, unless prevented by illness or other unavoidable cause, fail to report himself personally, if in *Great Britain* to the chief police station of the borough or police division, and if in *Ireland* to the constabulary station of the locality, to which he may go within three days after his arrival therein, and being a male subsequently once in each month, at such time and place, in such manner, and to such person as the chief officer of the constabulary force to which such station belongs shall appoint, or shall change his residence from one police district to another without having previously notified the same to the police or constabulary station to which he last reported himself, he shall be deemed guilty of a misdemeanor, and may be summarily convicted thereof, and his licence shall be forthwith forfeited by virtue

of such conviction, but he shall not be liable to any other punishment by virtue of such conviction.

5. If any holder of a licence granted in the form set forth in the said Schedule (A.),—

1. Fails to produce his licence when required to do so by any judge, justice of the peace, sheriff, sheriff substitute, police or other magistrate before whom he may be brought charged with any offence, or by any constable or officer of the police in whose custody he may be, and also fails to make any reasonable excuse why he does not produce the same; or
2. Breaks any of the other conditions of his licence by an Act that is not of itself punishable either upon indictment or upon summary conviction;

He shall be deemed guilty of an offence punishable summarily by imprisonment for any period not exceeding three months, with or without hard labour.

6. Any constable or police officer may, without warrant, take into custody any holder of such a licence whom he may reasonably suspect of having committed any offence, or having broken any of the conditions of his licence, and may detain him in custody until he can be taken before a justice of the peace or other competent magistrate, and dealt with according to law.

7. In *England* and *Ireland* any offence under this Act punishable summarily may be prosecuted summarily before two or more justices; as to *England*, in manner directed by an Act passed in the session holden in the eleventh and twelfth years of the reign of her Majesty Queen *Victoria*, chapter forty-three, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and Orders*, or any Act amending the same; and as to *Ireland*, in manner directed by the Act passed in the session holden in the fourteenth and fifteenth years of the reign of her Majesty Queen *Victoria*, chapter ninety-three, intituled *An Act to consolidate and amend the Acts regulating the Proceedings of Petty Sessions, and the Duties of Justices of the Peace out of Quarter Sessions in Ireland*, or any Act amending the same.

In *Scotland* any offence under this Act punishable summarily may be prosecuted upon summary conviction at the instance of the procurator fiscal before any sheriff or sheriff substitute, or before any two justices of the countv, or before the magistrates or any police magistrate of the burgh in which the offence is committed.

8. Where any holder of a licence granted in the form set forth in the said Schedule (A.) is convicted of an offence punishable summarily under this or any other Act, the justices, sheriff, sheriff substitute, or other magistrate convicting the prisoner shall without delay forward by post a certificate in the form given in Schedule (B.) to this Act annexed, if in *England* or *Scotland* to one of her Majesty's principal secretaries of state, if in *Ireland* to the lord lieutenant or other chief governor of *Ireland*, and thereupon the licence of the said holder may be revoked in manner provided by the said Penal Servitude Acts.

9. Where any licence granted in the form set forth

in the said Schedule (A.) is forfeited by a conviction of any indictable offence, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall, for the purpose of his undergoing such last-mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.

10. Provided always, that it shall be lawful for her Majesty, or for the lord lieutenant or other chief governor in *Ireland*, whenever they shall respectively think fit, to grant from time to time to convicts under sentence of penal servitude, licences in any other form different from that set forth in Schedule (A.), which they may respectively consider it expedient to adopt, and containing other and different conditions; and such last-mentioned licences shall be revocable at pleasure by the authority by which they are granted; but no holder of such last-mentioned licence shall be deemed guilty of an offence punishable upon summary conviction merely by reason of the breach of the conditions of the said last-mentioned licences, or any of them.

SCHEDULES.

SCHEDULE (A.)

Order of Licence to a Convict made under the Statute.

Whitehall,
day of 18 .

HER MAJESTY is graciously pleased to grant to
who was convicted of at the
for the on the and was then and
there sentenced to be kept in penal servitude for the
term of and is now confined in the
her royal licence to be at large from the day of his
liberation under this order during the remaining por-
tion of his said term of penal servitude, unless the
said shall before the expiration of the said
term be convicted of some indictable offence within
the United Kingdom, in which case such licence will
be immediately forfeited by law, or unless it shall
please her Majesty sooner to revoke or alter such li-
cence.

This licence is given subject to the conditions endorsed upon the same, upon the breach of any of which it will be liable to be revoked, whether such breach is followed by a conviction or not.

And her Majesty hereby orders that the said
be set at liberty within thirty days from the
date of this order.

Given under my hand and seal.

Conditions.

1. The holder shall preserve his licence and produce it when called upon to do so by a magistrate or police officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life, without visible means of obtaining an honest livelihood.

If his licence is forfeited or revoked in consequence of a conviction for any offence, he will be liable to undergo a term of penal servitude equal to the portion of his term of years which remained unexpired when his licence was granted, viz., the term of years.

*SCHEDULE (B.)**Form of Certificate of Conviction of Holder of Licence.*

I do hereby certify that *A.B.*, the holder of a licence under the Penal Servitude Acts, was on the _____ day of _____ in the year _____ duly convicted by _____ of the offence of _____ and sentenced to _____

C.D.

Clerk to the said justices.

CAP. XLVIII.

An Act for the Extension of the Factory Acts.

[25th July, 1864.]

Sec. 1. *Short title.*

2. *Application of Act.*

3. *Definition of "Factory Acts."*

4. *Factory to be well cleansed and ventilated.*

5. *Special rules for regulation of workmen in factories.*

6. *The Factory Acts, as set out in sect. 3, incorporated with this Act, and to apply to manufactures, &c., in first schedule.*

7. *Recovery and application of penalties.*

'WHEREAS it is expedient to provide for the effectual cleansing and ventilation of the factories in which are carried on the manufactures and employments specified in the first schedule hereto, and for the regulation of the labour of the children, young persons, and women employed therein: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited for all purposes as the "Factory Acts Extension Act, 1864."

2. This Act shall apply only to the several manufactures and employments mentioned in the said first schedule.

3. The Factory Acts shall mean such provisions as are now in force of the Acts following; that is to say, An Act passed in the fourth year of the reign of his late Majesty, chapter one hundred and three, intituled *An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom:*

An Act passed in the seventh year of the reign of her present Majesty, chapter fifteen, intituled *An Act to amend the Laws relating to Labour in Factories:*

An Act passed in the fourteenth year of the reign of her present Majesty, chapter fifty-four, intituled *An Act to amend the Acts relating to Labour in Factories:*

An Act passed in the seventeenth year of the reign of her present Majesty, chapter one hundred and four, intituled *An Act further to regulate the Employment of Children in Factories:*

An Act passed in the twentieth year of the reign of her present Majesty, chapter thirty-eight, intituled *An Act for the further Amendment of the Laws relating to Labour in Factories.*

Sanitary Measures.

4. Every factory to which this Act applies shall be kept in a cleanly state, and be ventilated in such a manner as to render harmless so far as is practicable any gases, dust, or other impurities generated in the process of manufacture that may be injurious to health.

If any occupier of any factory fails to keep the same in conformity with this section, he shall be deemed to be guilty of an offence against this Act, and to be subject in respect of such offence to a penalty not exceeding ten pounds nor less than three pounds.

The Court having jurisdiction under this Act may, in addition to or in instead of inflicting any penalty in respect of an offence under this section, make an order directing that within a certain time to be named in such order certain means are to be adopted by the occupier for the purpose of bringing his factory into conformity with this section; the court may upon application enlarge any time appointed for the adoption of the means directed by the order, but any non-compliance with the order of the court shall, after the expiration of the time as originally limited or enlarged by subsequent order, be deemed to be a continuing offence, and to be punishable by a penalty not exceeding one pound for every day that such non-compliance continues.

Special Rules.

5. In order to prevent the requirements of this Act as to cleanliness and ventilation in a factory being infringed to the detriment of the occupier by the wilful misconduct or wilful negligence of the workmen employed therein, it shall be lawful for the occupier of any factory to make special rules for compelling the observance amongst his workmen of the conditions necessary to insure the required degree of cleanliness and ventilation, and to annex to any breach of such rules a penalty not exceeding one pound.

The special rules made in pursuance of this section shall not be of any validity until they have been approved by one of her Majesty's principal secretaries of state.

Printed copies of the special rules in force in any factory shall be hung up in a legible condition in two or more conspicuous places in the factory, and a printed copy shall be supplied to any person employed in the factory who may apply for a copy.

A printed copy of the special rules for the time

being in force in any factory certified under the hand of the inspector for the time being having jurisdiction over such factory shall be evidence of such rules, and of their having been approved of by the said Secretary of State, and it shall be the duty of the above mentioned inspector to certify copies of special rules when required.

Application of Factory Acts.

6. The Factory Acts shall be incorporated with this Act, and shall apply to the several manufactures and employments mentioned in the said first schedule, with the qualifications and subject to the additions hereinafter mentioned:

- (1.) The term "factory" as used in this Act and in the Acts incorporated herewith shall mean in respect of the manufactures and employments to which this Act applies the premises in that behalf specified in the second schedule annexed to this Act, but all all other terms in this Act shall have the same meaning as is assigned to them in the Factory Acts:
- (2.) During the first six calendar months next ensuing the passing of this Act children of not less than eleven years of age may be employed for the same time, and subject to the same conditions, for and subject to which young persons exceeding thirteen years of age may be employed in pursuance of the said Factory Acts:
- (3.) During the first thirty calendar months next ensuing the passing of this Act children of not less than twelve years of age may be employed for the same time, and subject to the same conditions, for and subject to which young persons exceeding thirteen years of age may be employed in pursuance of the Factory Acts:
- (4.) In the manufacture of lucifer matches no child, young person, or woman shall be allowed to take his or her meals in any part of the factory where any manufacturing process (except that of cutting the wood) is usually carried on; and any child, young person, or woman who is allowed to take his or her meals in any part of the factory in contravention of the said provision shall be deemed to be employed contrary to the provisions of the Factory Acts:
- (5.) In the employment of fustian cutting no child shall be allowed to commence work until the attainment of the age of eleven years; and any child who is allowed to commence work in the employment of fustian cutting before the said age of eleven years shall be deemed to be employed contrary to the said Factory Acts:
- (6.) During the first eighteen calendar months next ensuing the passing of this Act so much of the said Factory Acts as provide that during any time allowed for meals no child, young person, or woman shall be employed or allowed to remain in any room in which any manufacturing process is carried on,

and that all the young persons employed in a factory shall have the time for meals at the same period of the day, shall not apply to the employment of paper staining, or to the manufacture of earthenware, subject to this proviso, that in the case of the manufacture of earthenware, at no time after the passing of this Act, shall any child, young person, or woman be allowed to take his or her meals, or to remain during any time allowed for meals, in the dipping houses, dippers drying rooms, or china scouring rooms:

- (7.) Whereas by the said Act of the session of the seventh and eighth years of the reign of her present Majesty, chapter fifteen, section eighteen, it is provided, amongst other things that all the inside walls, ceilings, or tops of rooms, whether plastered or not, and all the passages and staircases of every factory which shall not have been painted with oil once at least within seven years, shall be limewashed once at least within every successive period of fourteen months: to date from the period when last white-washed: Be it enacted, that, in the case of the manufacture of earthenware, the above recited provision shall not apply to those parts of the factory which are solely used for the storage of earthenware, and in which no work is carried on except such as is by the custom of the trade incidental to such storage or necessary for keeping the earthenware in a fit state for sale.

7. All penalties under this Act, including penalties for breach of a special rule, shall be recoverable and applied in manner in which penalties are recoverable and applicable under the said Factory Acts, and the term "Court" as used in this Act shall include any justices, sheriff, or other magistrate having jurisdiction in respect of such penalties.

SCHEDULES to which the foregoing Act refers.

FIRST SCHEDULE.

Manufactures and employments to which Act applies.

The manufacture of earthenware, except bricks and tiles, not being ornamental tiles.
 The manufacture of lucifer matches.
 The manufacture of percussion caps.
 The manufacture of cartridges.
 The employment of paper staining.
 The employment of fustian cutting.

SECOND SCHEDULE.

Definition of the word "factory."

In the manufacture of earthenware, except as aforesaid:

Any place in which persons work for hire in making or assisting in making, finishing or assisting in finishing, earthenware of any description.

In the manufacture of lucifer matches:

Any place in which persons work for hire in making lucifer matches, or in mixing the chemical materials for making them, or in any

process incidental to making lucifer matches, except the cutting of the wood.

In the manufacture of percussion caps:

Any place in which persons work for hire in making percussion caps, or in mixing or storing the chemical materials for making them, or in any process incidental to making percussion caps.

In the manufacture of cartridges:

Any place in which persons work for hire in making cartridges, or in any process incidental to making cartridges, except the manufacture of the paper or other material that is used in making the cases of the cartridges.

In the employment of paper staining:

Any place in which persons work for hire in printing a pattern in colours upon sheets of paper either by blocks applied by hand, or by rollers worked by steam, water or other mechanical power.

In the employment of fustian cutting:

Any place in which persons work for hire in fustian cutting.

For the purposes of this Act an apprentice shall be deemed to be a person working for hire.

No building or premises used solely for the purpose of a dwelling-house shall be deemed to be a factory or part of a factory within the meaning of this Act.

CAP. XLIX.

An Act to indemnify such persons in the United Kingdom as have omitted to qualify themselves for offices and employments, and to extend the time limited for those purposes respectively.

[25th July, 1864.]

CAP. L.

An Act to amend an Act of the Twenty-fifth Year of the Reign of Her present Majesty, to provide for the Registration and Transfer of *India* Stocks at the Bank of *Ireland*, and for the mutual Transfer of such Stocks from and to the Banks of *England* and *Ireland* respectively. [25th July, 1864.]

25 Vict., c. 7.

1. *Assignments and transfers of India Stock in the Bank of Ireland valid, although not accepted in writing.*

'WHEREAS by an Act passed in the session holden in the twenty-fifth year of the reign of her present Majesty, chapter seven, provision was made for the registration and transfer of *India* stocks at the Bank of *Ireland*, and for the mutual transfer of such stocks from and to the Banks of *England* and *Ireland* respectively: And whereas it was therein provided that all assignments or transfers at the Bank of *Ireland* of any part of the several stocks, and the proportional dividend attached thereto, should be signed by the parties making such assignments or transfers, or by his, her, or their attorney or attornies lawfully authorized, and that the person or persons to whom any such assignment or transfer should be made, or in case of absence his, her, or their attorney or attornies lawfully authorized, should respectively underwrite

his, her, or their acceptance thereof, and that no other method of assigning or transferring any such stock and the dividend attached thereto or any interest therein at the Bank of *Ireland* should be good and available in law: And whereas it is expedient that it should be optional with any person or persons to signify in writing his, her, or their acceptance of any such stock transferred at the Bank of *Ireland*.' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. That no such assignment or transfer as aforesaid at the Bank of *Ireland* of the before-mentioned *India* stocks or any parts thereof, or of the dividend attached thereto, or any interest therein, shall be deemed invalid or ineffectual by reason that the acceptance of such assignment or transfer may not have been signified in writing by the party or parties to whom the assignment or transfer shall have been made.

CAP. LL.

An Act to vest the Site of the *India* Office in her Majesty for the Service of the Government of *India*. [25th July, 1864.]

CAP. LII.

An Act to amend the Law relating to the Valuation of Rateable Property in *Ireland*. [25th July, 1864.]

1. *Power to boards of guardians to appeal from revised valuation of any tenement in their union.*
2. *Notice of such appeal to be given to the occupier of the tenement.*
3. *Occupiers joined as respondents, and may obtain costs. Guardians not entitled to costs.*
4. *Guardians not to enter into recognizance. Appeal not to affect a pending rate.*

'WHEREAS it is expedient to amend the law relating to the valuation of rateable property in *Ireland* in the manner hereinafter mentioned:' Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. From the revised valuation of any tenement in any poor law union in *Ireland*, made by the commissioner of valuation at any annual revision, in pursuance of the laws in force for the valuation of rateable property in *Ireland*, the board of guardians of the union in which such tenement shall be situate shall, with the sanction of the poor law commissioners and not otherwise, have the same power of appeal to the commissioner of valuation, and to the quarter sessions, as the owner or occupier of such tenement now has, and such appeal shall be subject to the same conditions and provisions, and exercised in the same manner, as is provided for in respect to appeals of the said owners or occupiers, save so far as the same are hereinafter altered or amended.

2. When the board of guardians of any union shall, with the sanction aforesaid, be the party appealing from the revised valuation of any tenement as aforesaid, the clerk of the said board shall send by post, or cause to be delivered to the occupier or occupiers of the tenement in respect of the valuation of which the appeal is made, a notice similar in all respects to that now by law required to be sent or delivered to the board of guardians by the owner or occupier of any tenement who may appeal from the revised valuation thereof, and such notice shall be signed by such clerk, and a copy thereof shall be sent by such clerk to the commissioner of valuation at the office in *Dublin* of the general valuation of *Ireland*.

3. In any appeal to the quarter sessions, sanctioned as aforesaid, of any board of guardians in respect to such revised valuation, the occupier or occupiers of the tenement in respect of the valuation of which such appeal is made shall be joined as respondents in such appeal, together with the commissioner of valuation; and in case the board of guardians shall fail on the hearing of such appeal, the court of quarter sessions may, if they shall so think fit, award to the respondents or any of them such costs as they may deem reasonable, not exceeding in the whole the sum of ten pounds, for their costs of such appeal, and the sum so awarded shall be forthwith paid to the said respondents by such board of guardians; and in no case shall the board of guardians be entitled as against the respondents to the costs of such appeal.

4. It shall not be necessary for any board of guardians appealing to quarter sessions against the revised valuation of any tenement to enter into any recognizance conditioned for the due prosecution of such appeal or for any other purpose; and no appeal by any board of guardians shall affect any rate that may be struck before or pending such appeal.

CAP. LIII.

An Act to make Provision for Uniformity of Process in Summary Criminal Prosecutions and Prosecutions for Penalties in the Inferior Courts of *Scotland*.
[25th July, 1864.]

CAP. LIV.

An Act for the union of the Diocesan Courts and Registries in *Ireland*; for the Regulation of the Mode of Procedure therein, and also in the Provincial Courts of *Armagh* and *Dublin*; and for appeals therefrom.
[25th July, 1864.]

1. *Short title.*
2. *Extent of Act.*
3. *Commencement of Act.*
4. *Interpretation of terms.*
5. *Rules and orders to be prepared by the Archbishops of Armagh and Dublin, with the concurrence of the Lord Lieutenant in council.*
6. *Power of altering and regulating fees.*
7. *Rules, &c., to be laid before Parliament.*
8. *Establishment of united courts and registries.*
9. *Certain dioceses to be united for ecclesiastical jurisdiction.*

10. *As to official signature of Archbishops and Bishops.*
11. *Transference of certain dioceses to province of Dublin.*
12. *Union of certain consistorial and diocesan courts and registries as herein named.*
13. *As to discharge of duties of rights and powers of vicars general of dioceses herein named.*
14. *As to the appointment of registrars of united dioceses.*
15. *Existing registrars shall continue to perform their duties.*
16. *Surviving registrars to perform duties of united registries.*
17. *Upon death, &c., of all the joint registrars only one registrar for each united diocese to be appointed.*
18. *Deputy registrars not to exercise duties after death, &c., of principal.*
19. *Existing patents of vicars general of Dromore, &c., annulled, except as to existing rights.*
20. *Fees to vicars general in spirituals.*

MODE OF PROCEDURE IN THE PROVINCIAL AND UNITED COURTS.

21. *Suits, &c. to be commenced by filing a petition or statement of accusation in the registry.*
22. *Defendants to have the same rights as in superior courts.*
23. *Affidavit by petition that no collusion exists, and that the allegations in the petitions are true.*

SERVICE OF PETITION OR NOTICES.

24. *Petitions, &c. may be sent to the registry in a registered letter.*
25. *Any petition or notice may be served by sending the same in a registered letter.*
26. *Proceedings in default of appearance.*

PAYMENT OF COSTS.

27. *Security for costs.*
28. *Costs to be in the discretion of the court.*
29. *Frivolous complaints or defences.*
30. *As to computation of time.*

OATHS AND SUBSCRIPTIONS.

31. *Acts not required to be done in court.*
32. *Oaths, &c. before Bishop may be witnessed by Archdeacon, &c.*

PROCEEDINGS BY CONSENT.

33. *Determination of question raised by consent.*
34. *Suits, &c. may be heard and determined by the Archbishop of Armagh in the province of Dublin.*
35. *As to the grant of faculties.*
36. *Ecclesiastical instruments to be filed.*
37. *Witness to give evidence viva voce.*
38. *Notes of evidence to be taken by vicar-general, &c.*
39. *Notes upon any question of law to be signed by vicar-general.*
40. *Shorthand writer to report evidence and summing up of the court.*
41. *False evidence to be deemed perjury.*

42. *Attendance of witnesses.*
43. *Evidence may be taken before a commissioner appointed by a provincial or united court.*
44. *Judgments to be in writing.*
45. *Judgment or sentence to be filed in registry.*
46. *When judgments need not be delivered in open court.*
47. *Copies of judgments to be sent to the parties upon the record.*
48. *Printed copies of the judgment of the provincial courts and final courts of appeal to be sent to the Archbishops, &c.*
49. *Citation or notice to extend over Great Britain, Ireland, &c.*
50. *Process of the diocesan court to be under seal.*
51. *Mode of enforcing orders, decrees, and judgments.*
52. *Who may appear as counsel.*
53. *Proctors may practise as heretofore, and attorneys, &c. to have same rights as proctors.*
54. *Qualification of a provincial vicar-general.*
55. *Appointment of a deputy provincial vicar-general.*
56. *Qualifications of diocesan vicars general.*
57. *Appointment of deputy diocesan vicars-general.*
58. *Tenure of office.*
59. *Oath of office.*
60. *Oath to be taken by deputy vicar-general.*
61. *Removal of vicar-general when he ceases to be a member of the Church.*
62. *Registrars to perform their duties in person.*
63. *Appointment of deputy in the case of illness or absence.*
64. *Judges, &c. not to receive gratuities.*
65. *Remedies against officers for misconduct.*
66. *Act not to affect powers of Archbishops.*
67. *Visitations not interfered with.*
68. *Reservation of powers of vicars general to appoint surrogates.*
69. *As to suits pending when this Act comes into operation.*
70. *Power to vicar-general whose power is determined to deliver written judgments.*
71. *Power to courts to enforce decrees, &c.*
72. *Authority of Archbishops and Bishops to include every place in exempt jurisdictions, as in 5 G. 4, c. 91.*
73. *Transmission of records to the united registries.*
74. *Penalty on stealing or defacing records.*
75. *Application of Fees, &c.*
Such fees may be recovered before chairman of county quarter sessions.
76. *Accounts of courts and registries to be audited.*
77. *Annual report of business transacted, &c., by the court, to be laid before Lord Lieutenant.*
78. *Appeals from the united courts to the provincial courts.*
79. *Provincial court may affirm, &c. order appealed against.*
80. *How appeals from a united court shall be made.*

81. *No appeal from the judgment of a provincial court from interlocutory decrees not having the force of a definite sentence.*

‘WHEREAS it is expedient to make provision for the union of the Consistorial or Diocesan Courts and Registries in *Ireland*; to alter and amend the procedure and practice of the Provincial and Diocesan Courts and Registries, in order that the same may be rendered simple and expeditious; to reduce and regulate the expenses and costs now charged and payable in such Courts and Registries: to re-arrange, reduce, or abolish the fees upon letters of orders, consecration of churches, institutions to benefices, and other ecclesiastical instruments and acts; and to make provision for the better preservation of the ecclesiastical records and other instruments deposited in the provincial and diocesan registries:’ Be it therefore enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

PRELIMINARY.

1. This Act may be cited as “The Ecclesiastical Courts and Registries Act (*Ireland*), 1864.”
2. This Act shall only extend to that part of the United Kingdom called *Ireland*.
3. This Act shall come into operation on such day, not sooner than the second day of *November* one thousand eight hundred and sixty-four, as the Lord Lieutenant of *Ireland* shall by order in council appoint, provided that such order be made one month at least previously to the day so to be appointed.
4. For the purposes of this Act the following words and expressions shall, if not inconsistent with the context, be thus interpreted:
 - “Archbishop of *Armagh*” shall mean the Lord Archbishop of *Armagh* for the time being;
 - “Archbishop of *Dublin*” shall mean the Lord Archbishop of *Dublin* for the time being;
 - “Bishop” shall include an Archbishop within his own diocese;
 - “Lord Chancellor shall mean the Lord High Chancellor or Lord Commissioners for the Custody of the Great Seal of *Ireland* for the time being;
 - “Lord Lieutenant in Council” shall mean the Lord Lieutenant or other Chief Governor or Governors of *Ireland* for the time being, by and with the advice of her Majesty’s Privy Council in *Ireland*;
 - “Jurisdiction” shall include “power and authority;”
 - “Rules and orders” shall mean such rules and orders as shall from time to time be prepared by the Archbishop of *Armagh* and the Archbishop of *Dublin*, and directed by the Lord Lieutenant in Council to take effect as rules and orders under the provisions of this Act;
 - “Said Archbishops” shall mean the Lord Archbishop of *Armagh* for the time being and the Lord Archbishop of *Dublin* for the time being;

- "Superior Courts" shall mean Her Majesty's Superior Courts of Law and Equity in *Dublin*:
 "The Church" shall denote the United Church of *England* and *Ireland*:
 "The Commissioners" shall mean and include the Commissioners of Inland Revenue:
 "The Court" shall mean the Provincial Court or the United Court as regulated under this Act, as the case may be:
 "United Court" shall mean the Consistorial or Diocesan Court formed by the union of the several Courts which by the enactments of this Act shall be united to each other, and shall include the Diocesan Court of *Meath*:
 "United Diocese" shall mean the several Dioceses under the episcopal jurisdiction of one Archbishop or Bishop, and shall include the Diocese of *Meath*:
 "United Registry" shall mean the Consistorial or Diocesan Registry formed by the union of the several registries which by the enactments of this Act shall be united to each other, and shall include the Registry of the Diocese of *Meath*:
 "Vicar-General" shall mean and include Official Principal, Commissary General, and Chancellor.

PART II.

RULES AND ORDERS.

5. It shall be lawful for the Archbishop of *Armagh* and the Archbishop of *Dublin* to prepare from time to time rules and orders for—

- (1.) Altering and regulating the times, forms, and mode of procedure and practice before the Provincial and United Courts; and
- (2.) Altering, establishing, and regulating the fees to be payable by suitors of the Provincial and United Courts to the officers thereof in respect of the business to be conducted before such Courts:
- (3.) Regulating the government and conduct of registrars of the provincial registries, and the registrars of the united registries, apparitors, clerks, agents, and other officers or persons, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of their offices or of this Act, and of rules and orders made in pursuance thereof:
- (4.) The custody and preservation of records, books, instruments, or other documents in the provincial and united registries:
- (5.) Making such alterations in the form and number of ecclesiastical instruments now issued under any archiepiscopal or episcopal or consistorial seal, or out of any provincial or united court, as they may deem expedient, and such instruments so altered shall be as effectual in law for this purpose as the forms for which they are substituted:
- (6.) Abolishing, altering, or regulating fees on instruments prepared in the provincial registries or united registries, or filed therein:

- (7.) Altering and regulating on a uniform scale the fees on marriage licences, such fees not to exceed in any case the sum of forty shillings, except in the case of special licences:
- (8.) Abolishing, altering, or regulating visitation fees, and other fees, charges, and costs to be charged and paid either in the provincial and united courts or in the provincial and united registries in respect of the business done or transacted therein respectively:
- (9.) Establishing and regulating the fees, expenses, and costs which shall, under this Act, be charged and payable in the provincial and united registries for the performance of the duties belonging to the offices of the Provincial Vicars-General of the United Courts, Surrogates, Registrars of the Provincial Registries, and Registrars of the United Registries, apparitors, or other officers:
- (10.) Establishing and regulating the salaries or allowances or fees to be allowed to all or any of the Vicars-General of the Provincial and United Courts, Surrogates, apparitors, Registrars of Provisional Registries, or Registrars of the United Registries:
- (11.) Establishing and regulating the fees and allowances to proctors, attornies, and solicitors in respect of the business transacted by them either in the Provincial and United Courts or in the Provincial and United Registries: Or for
- (12.) Otherwise bringing into operation and carrying into effect the provisions of this Act:

And such rules and orders so prepared shall be submitted to the Lord Lieutenant in Council; and it shall thereupon be lawful for the Lord Lieutenant in Council to direct that all or any part of such rules and orders shall take effect as rules and orders of the Provincial and United Courts and of the Provincial and United Registries respectively; and all such rules and orders may from time to time, upon the recommendation of the said Archbishops, be rescinded, altered, varied or added to by the Lord Lieutenant in Council.

6 The power of altering or regulating any fees or other emoluments that may, at the time of the passing of this Act, be vested in any Ecclesiastical Court or Registry, or in any Archbishop, Bishop, Vicar-General of a Provincial Court, Vicar-General of a Diocesan Court, or other person or body corporate, shall only be exercised after the passing of this Act by order of the Lord Lieutenant in Council, upon the recommendation of the said Archbishops.

7. All rules and orders which may be made under this Act shall be laid before both Houses of Parliament by the Registrar of the Provincial Court of *Armagh*, or by the Registrar of the Provincial Court of *Dublin*, as shall be directed by the rules and orders, within one month after the making thereof, if Parliament be then sitting, or if Parliament be not then sitting, within one month from the commencement of the then next session of Parliament.

PART III.

THE UNITED COURTS AND REGISTRIES.

8. There shall be in *Ireland*, exclusive of the two Provincial Courts, twelve United Diocesan Courts and twelve United Diocesan Registries.

9. The several Dioceses the Courts and Registries of which shall have been united under this Act shall be deemed and taken to be one diocese for all purposes of citation and of ecclesiastical power, and shall have a seal for each United Court and Registry.

10. For official signature to all documents and other instruments it shall be sufficient if the Archbishop of *Armagh* and Bishop of *Clogher* shall designate himself Archbishop of *Armagh*; and if the Archbishop of *Dublin* and Bishop of *Glendalagh* and of *Kildare* shall designate himself Archbishop of *Dublin*; and if the Bishop of *Down* and *Connor* and *Dromore* shall designate himself Bishop of *Down*; and if the Bishop of *Derry* and *Raphoe* shall designate himself Bishop of *Derry*; and if the Bishop of *Kilmore*, *Elphin*, and *Ardagh* shall designate himself Bishop of *Kilmore*; and if the Bishop of *Tuam*, *Killala*, and *Achonry* shall designate himself Bishop of *Tuam*; and if the Bishop of *Killaloe*, *Kilfenora*, *Clonfert*, and *Kilmacduagh* shall designate himself Bishop of *Killaloe*; and if the Bishop of *Limerick*, *Ardfert* and *Aghadoe* shall designate himself Bishop of *Limerick*; and if the Bishop of *Ossory*, *Ferns*, *Leighlin*, shall designate himself Bishop of *Ossory*; and if the Bishop of *Cashel*, *Emly*, *Waterford*, and *Lismore* shall designate himself Bishop of *Cashel*; and if the Bishop of *Cork*, *Cloyne*, and *Ross* shall designate himself Bishop of *Cork*.

11. The Diocese of *Clonfert* and the Diocese of *Kilmacduagh* shall be within the Province of *Dublin* and under the Archiepiscopal jurisdiction of the Archbishop of *Dublin* as metropolitan.

12. The Consistorial and Diocesan Court and Registry of the Diocese of *Clogher* shall be united to the Consistorial and Diocesan Court and Registry of the Diocese of *Armagh*:

The Consistorial and Diocesan Court and Registry of the Diocese of *Raphoe* shall be united to the Diocesan Court and Registry of the Diocese of *Derry*:

The Consistorial and Diocesan Court and Registry of the Diocese of *Dromore* shall be united to the Consistorial and Diocesan Court and Registry of the Dioceses of *Down* and *Connor*:

The Consistorial and Diocesan Courts and Registries of the Dioceses of *Elphin* and *Ardagh* shall be united to the Consistorial and Diocesan Court and Registry of the Diocese of *Kilmore*:

The Consistorial and Diocesan Courts and Registries of the Diocese of *Killala* and *Achonry* shall be united to the Consistorial and Diocesan Court and Registry of the Diocese of *Tuam*:

The Consistorial and Diocesan Courts and Registries of the Dioceses of *Clonfert*, *Kilmacduagh*, and *Kilfenora* shall be united to the Consistorial and Diocesan Court and Registry of the Diocese of *Killaloe*:

The Consistorial and Diocesan Court and Registry of the Diocese of *Kildare* shall be united to the

Consistorial and Diocesan Court and Registry of the Dioceses of *Dublin* and *Glendalagh*:

The Consistorial and Diocesan Courts and Registries of the Dioceses of *Ferns* and *Leighlin* shall be united to the Consistorial and Diocesan Court and Registry of the Diocese of *Ossory*:

The Consistorial and Diocesan Courts and Registries of *Cashel* and *Emly* shall be united to the Consistorial and Diocesan Court and Registry of the Dioceses of *Waterford* and *Lismore*:

The Consistorial and Diocesan Court and Registry of the Diocese of *Cloyne* shall be united to the Consistorial and Diocesan Court and Registry of the Diocese of *Cork* and *Ross*:

And the consistorial and diocesan court and registry of the dioceses of *Ardfert* and *Aghadoe* shall be united to the consistorial and diocesan court and registry of the diocese of *Limerick*.

13. The vicar general of the diocese of *Armagh* shall discharge the duties and possess the rights and powers of the vicar general of the diocese of *Clogher*:

The vicar general of the diocese of *Derry* shall discharge the duties and possess the rights and powers of the vicar general of the diocese of *Raphoe*:

The vicar general of the diocese of *Down* and *Connor* shall, subject to the provisions hereinafter contained, discharge the duties and possess the rights and powers of the vicar general of the diocese of *Dromore*:

The vicars general of the diocese of *Kilmore* shall, subject to the provisions hereinafter contained, discharge the duties and possess the rights and powers of the vicars general of the dioceses of *Elphin* and of *Ardagh*:

The vicar general of the diocese of *Tuam* shall discharge the duties and possess the rights and powers of the vicar general of the diocese of *Killala* and *Achonry*:

The vicar general of the diocese of *Killaloe* shall, subject to the provisions hereinafter contained, discharge the duties and possess the rights and powers of the vicars general of the dioceses of *Clonfert*, *Kilmacduagh*, and *Kilfenora*:

The official principal, commissary general, and chancellor of the diocese of *Dublin* and *Glendalagh* shall, subject to the provisions hereinafter contained, discharge the duties and possess the rights and powers of the vicar general in spirituals, official principal, commissary general, and chancellor of the diocese of *Kildare*:

The vicar general of the diocese of *Ossory* shall discharge the duties and possess the rights and powers of the vicar general of the dioceses of *Ferns* and *Leighlin*:

The vicar general of the diocese of *Waterford* and *Lismore* shall, subject to the provisions hereinafter contained, discharge the duties and possess the rights and powers of the vicar general of the dioceses of *Cashel* and *Emly*:

The vicar general of the diocese of *Cork* and *Ross* shall discharge the duties and possess the rights and powers of the vicar general of the diocese of *Cloyne*:

The vicar general of the diocese of *Limerick* shall discharge the duties and possess the rights and powers of the vicar general of the dioceses of *Ardfert* and *Aghadoe*.

14. The registrar of the diocese of *Clogher* and the registrars of the diocese of *Armagh* shall be the joint registrars of the united dioceses of *Armagh* and *Clogher*:

The registrar of the diocese of *Raphoe* and the registrar of the diocese of *Derry* shall be the joint registrars of the united dioceses of *Derry* and *Raphoe*:

The registrar of the diocese of *Dromore* and the registrar of the dioceses of *Down* and *Connor* shall be the joint registrars of the united dioceses of *Down*, *Connor*, and *Dromore*:

The registrars of the dioceses of *Elphin* and *Ardagh* and the registrar of the diocese of *Kilmore* shall be the joint registrars of the united dioceses of *Kilmore*, *Elphin*, and *Ardagh*:

The registrar of the dioceses of *Killala* and *Achonry* and the registrar of the diocese of *Tuam* shall be the joint registrars for the united dioceses of *Tuam*, *Killala*, and *Achonry*:

The registrar of the diocese of *Clonfert*, *Kilmacduagh*, and *Kilfenora* and the registrar of the diocese of *Killaloe* shall be the joint registrars for the united dioceses of *Killaloe*, *Clonfert*, *Kilmacduagh*, and *Kilfenora*:

The registrar of the diocese of *Kildare* and the registrar of the diocese of *Dublin* and *Glendalagh* shall be the joint registrars of the united dioceses of *Dublin*, *Glendalagh*, and *Kildare*:

The registrars of the dioceses of *Ferns* and *Leighlin* and the registrar of the diocese of *Ossory* shall be the joint registrars of the united dioceses of *Ossory*, *Ferns*, and *Leighlin*:

The registrars of the dioceses of *Cashel* and *Emly* and the registrars of the dioceses of *Waterford* and *Lismore* shall be the joint registrars for the united dioceses of *Cashel*, *Waterford*, *Lismore*, and *Emly*:

The registrar of the diocese of *Cloyne* and the registrar of the dioceses of *Cork* and *Ross* shall be the joint registrars of the united diocese of *Cork*, *Cloyne*, and *Ross*:

The registrar of the dioceses of *Ardfert*, and *Aghadoe* and the registrar of the diocese of *Limerick* shall be the joint registrars of the united dioceses of *Limerick*, *Ardfert*, and *Aghadoe*:

15. Each of such joint registrars of a united registry shall continue to discharge his duties as registrar in the diocese of which he is registrar at the time of the passing of this Act, and to receive, subject to the rules and orders, the fees or official emoluments arising therefrom.

16. Upon the death, resignation, or removal of one or more of such joint registrars, the surviving registrar or registrars shall, subject to the rules and orders, perform all the duties and receive the fees and official emoluments belonging to the office of registrar or joint registrar of the united dioceses to which he shall have been appointed under this Act.

Upon the death, resignation, or removal of all the joint registrars of any united registry who may be in

office when this Act comes into operation there shall be only one registrar appointed for any united registry who shall hold his office during good behaviour; and until the death, resignation, or removal of all the joint registrars of any united registry no appointment of registrar or joint registrar of any united registry shall be made.

18. Subject to the rules and orders, nothing herein contained shall give any deputy registrar a right to exercise the duties of a registrar or deputy registrar after the decease, resignation, or removal of his principal from the office of joint registrar.

19. When this Act comes into operation, the patents, commissions, and appointments of the vicars general of the dioceses of *Dromore*, *Elphin*, *Ardagh*, *Kildare*, *Cashel* and *Emly*, *Clonfert*, and *Kilmacduagh*, shall, except as to their respective existing rights and duties as vicars general in spirituals, be of no force and effect: Provided that,

Upon the death, resignation or removal of the now vicar general of *Dromore* the rights and duties of the vicar general of *Dromore* in spirituals shall belong to and be discharged by the vicar general of the diocese of *Down* and *Connor* for the time being:

Upon the death, resignation, or removal of the now vicar general of *Elphin* and of the now vicar general of *Ardagh* the rights and duties of the vicars general of *Elphin* and of *Ardagh* in spirituals shall belong to and be discharged by the vicar general of the diocese of *Kilmore* for the time being:

Upon the death, resignation, or removal of the now vicars general of *Clonfert*, *Kilmacduagh*, and *Kilfenora*, the rights and duties of such vicars general of *Clonfert*, *Kilmacduagh*, and *Kilfenora* in spirituals shall belong to and be discharged by the vicar general of the diocese of *Killaloe* for the time being:

Upon the death, resignation, or removal of the now vicar general of *Kildare* the rights and duties of the vicar general of *Kildare* in spirituals shall belong to and be discharged by the official principal of the dioceses of *Dublin* and *Glendalagh* for the time being:

Upon the death, resignation, or removal of the now vicar general of the dioceses of *Cashel* and *Emly* the rights and duties of the vicar general of *Cashel* and *Emly* in spirituals shall belong to and be discharged by the vicar general of the dioceses of *Waterford* and *Lismore* for the time being.

20. Every registrar shall, in such manner as may be directed by the rules and orders, keep separate an account of all fees for diocesan business transacted by him after this Act comes into operation, and he shall on the twenty-fifth day of *March* and on the twenty-ninth day of *September* in every year, in such manner as may be directed by the rules and orders, account for and pay to any vicar general whose patent, commission, or appointment is or may be partly annulled by this Act the fees for business transacted belonging to the office of vicar general in spirituals received in respect of the diocese to which each such vicar general severally belongs; and the registrars of the united

registries shall respectively pay to the vicars general appointed under this Act their respective shares of such fees as are payable to them as the official principal's chancellors and commissary generals of such dioceses.

PART IV.

PROCEDURE AND PRACTICE; PROCEEDINGS IN DEFAULT OF APPEARANCE; PAYMENT OF COSTS; COMPUTATION OF TIME; OATHS AND SUBSCRIPTIONS; PROCEEDINGS BY CONSENT; GRANT OF FACULTIES; AND FILING OF INSTRUMENTS.

21. Suits or other proceedings shall be commenced i. the provincial or united courts by filing in the registry a petition or statement of accusation, signed by counsel, and addressed to the provincial or united court, as the case may be, and by serving the defendant with a copy thereof, and the subsequent proceedings shall be conducted subject to the rules and orders.

22. Every defendant under this Act shall have, except the right to have disputed questions of fact tried by a jury, the same rights and privileges as defendants have in the superior courts.

23. In any suit or other proceeding originated in a provincial or united court, other than for the grant of faculty, the petitioner or prosecutor shall, before presenting his petition or statement of accusation to the court, make an affidavit, and annex the same to his petition or statement of accusation, that there exists no collusion between himself and the defendant with respect to the subject matters contained in his petition or statement of accusation, and that he believes that the allegations contained in his petition or statement of accusation are true: The court may, if it think fit, order the petitioner or prosecutor to attend, and may examine him or permit him to be examined or cross-examined on the hearing of any such petition or statement of accusation.

24. Petitions, deeds, documents, instruments, notices, and other communications directed to be filed in or sent to any provincial or united registry under this Act may be forwarded by post in a registered letter to such registry.

25. A summons, or the copy of any petition or statement of accusation, or any notice, may be served either on the person instituting any suit or other proceeding, or upon the defendant to such suit or other proceeding, by leaving the same or sending it by post in a registered letter addressed to him at his usual place of abode.

26. If a party be duly summoned to appear in any suit or other proceeding, and shall not appear pursuant to the rules and orders, the court having jurisdiction over such suit or other proceeding may, notwithstanding such default, proceed to hear and determine the same.

27. The vicar-general of any provincial or united court may, if he deem fit, upon the application of a defendant to any suit or other proceeding, supported by affidavit, order the petitioner or party prosecuting to give security for the costs of the defendant, and until such security for costs be given the suit or other proceeding shall be stayed.

28. Upon appeals from the provincial court to the

Queen in council the costs shall be in the discretion of the judicial committee. In matrimonial suits, in suits relating to dilapidations, and in all other suits or proceedings, whether by consent or otherwise, the costs shall be in the discretion of the court that pronounces the final judgment.

29. If it appear that any petitioner or party prosecuting has made any groundless or frivolous claim or complaint, or that any defendant has set up any groundless or frivolous defence, the court or the judicial committee, as the case may be, may order such petitioner, party prosecuting, or defendant to pay, as between attorney and client, the whole or any part of the costs of resisting such groundless or frivolous claim or complaint, or setting up such groundless or frivolous defence, and such costs shall be taxed as may be directed by the rules and orders.

30. When any particular number of days is prescribed by this Act, or by the rules and orders, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a *Sunday, Christmas Day, Good Friday, Monday and Tuesday in Easter Week*, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also.

31. Any act of episcopal jurisdiction not required to be done in any provincial or united court, at which the presence of a surrogate, registrar, or other officer is now required, may, at the discretion of the bishop, be done in the presence of any priest in holy orders of the united Church of *England and Ireland*, or of any attorney or solicitor who shall witness the same, and transmit it to the registrar.

32. All oaths and subscriptions now required to be made before a bishop, and to which the attestation of a surrogate, registrar, notary public, or other officer is necessary, may, at the discretion of the bishop, be witnessed by any archdeacon or beneficed clergyman.

33. For the determination of questions raised by consent, the parties in any suit or other proceeding in a provincial or a united court may, after a petition has been filed in any united registry, or at any subsequent stage of the proceedings before judgment, state any questions arising in such suit or other proceeding in a special case, provided it be signed by a barrister-at-law, and the parties, after signing and filing the same as of record in such registry, may require thereon the judgment of the united court in which the suit or other proceeding shall have been instituted, without any further proceeding, and the judgment of such court shall be filed in the united registry as of record. If either of the parties be dissatisfied with such judgment, he may appeal therefrom to the Provincial Court.

34. If all the parties to any suit or proceeding in a cause or matter ecclesiastical be desirous to have such a suit or proceeding argued before the Archbishop of *Armagh* or his Vicar-General in *Dublin*, the Archbishop of *Armagh* may direct the same to be argued accordingly, and the Archbishop of *Armagh* or his Vicar-General shall have and exercise the same rights and powers in respect of such suit or proceeding as he

would have had or might have exercised in the province of *Armagh*.

35. It shall not be necessary to hold a Court for the hearing of any cause arising out of a petition for the granting of a faculty, unless within fourteen days after the return of the necessary citation a decree on such petition, or notice of opposition to the granting of such faculty to be made at such Court, shall be filed in the registry by some person entitled to appear in such cause, and failing such notice the faculty may be issued as if such Court had been held and no appearance made.

36. Every instrument prepared in the ecclesiastical registry which shall be executed by the bishop shall be executed in duplicate, one copy whereof shall be given to the party entitled to receive the same, and the other copy shall be returned by the bishop to the registrar of the registry, to be by him filed as of record; provided that where there be no party entitled to receive such copy, and it be only requisite to file such instrument in the registry, such instrument shall not be executed in duplicate.

PART V.

EVIDENCE.

37. In all suits or other proceedings before a Provincial or United Court the evidence shall be given, save as herein-after provided, *viva voce* in open Court, and upon oath.

38. Notes of such evidence shall be taken down in writing by the vicar-general of the province or of the united court, as the case may be, or by the registrar, or by such other person and in such manner as such vicar-general or as the rules and orders shall direct.

39. A note of any judgment that may be given by the Court as to any question of law arising before the hearing of any suit or other proceeding, or as to the admissibility of any evidence, shall be made and signed by the vicar-general who presides at such hearing or judgment.

40. The Court in any suit or other proceeding may, if requested by any of the litigant parties, in open court, at the commencement of the trial, appoint a shorthand writer, or, if needed, more than one, or a reporter, or, if needed, more than one, who shall be sworn faithfully to report the evidence at such trial in such manner as shall be directed by the rules and orders, and the payment of such shorthand writer or reporter shall be paid by the parties making the application; and such reporter shall be disposed of in such manner as shall be directed by the rules and orders.

41. If in the Provincial Court of *Armagh* or of *Dublin*, or in any united court, or in any provincial or united registry, any person, wilfully give false evidence upon oath, he shall be deemed guilty of perjury.

42. Any provincial or united court may require and enforce the attendance of any witness before itself in any suit or other proceeding, and also the production of any deeds, evidences, books, or writings, by any order, to be issued in such and the same form, or as nearly as may be, as that in which a writ of subpoena ad testificandum or of subpoena duces tecum is now issued and enforced in the superior courts; and every person disobeying such order shall be considered as

in contempt of the Court, and may be punished accordingly.

43. In any suit or proceeding in a provincial or united court, if the Court be satisfied, by affidavit or otherwise, that from illness, age, or infirmity any person whose testimony is required cannot attend and give evidence in person at the trial, it may, if it appear to be necessary for the ends of justice, issue a commission for the examination of such witnesses on oath, upon interrogatories or otherwise, or, if the witness be within the jurisdiction of the Court, order the examination of such witness upon oath, upon interrogatories or otherwise, before any officer or person to be named in such order for the purpose, and all the powers given to the superior courts by any Act now in force for enabling such courts to issue commissions and give orders for the examination of witnesses in actions depending in such courts, and to enforce such examination, and all the provisions of any Acts for enforcing or otherwise applicable to such examination, and to the witnesses examined, shall, subject to the rules and orders, extend and be applicable to every provincial and united court, and to the examination of witnesses under the commission and orders of such court, and to the witnesses examined, as if such court was one of the superior courts, and the matter before it was an action pending in such court.

PART VI.

JUDGMENTS.

44. Every judgment pronounced by the vicars-general of the provincial and united courts shall be in writing.

45. When the Court shall have signed its judgment or sentence the same shall be filed as of record in the registry of the province or diocese.

46. The judgment, with the reasons thereof, of any provincial or united court in any suit or other proceeding, except in cases of crime and immorality, need not be delivered in open court, but shall in every case be filed in the registry.

47. Copy of every such judgment shall in every case be transmitted by the registrar in the mode prescribed by the rules and orders to each of the parties upon the record within three days after the filing of such judgment in the registry.

48. The registrar shall, within twenty one days after the filing in the registry of any judgment of a provincial court, and of any judgment or opinion pronounced thereon by the final Court of Appeal in respect of matters concerning the doctrine, worship, discipline, or government of the church, cause printed copies of such judgment or opinion to be transmitted to each of the archbishops and bishops of the church holding sees in *England* and *Ireland*, to the Lord Chancellor of *Great Britain*, to the Lord Chancellor of *Ireland*, and to such other persons as shall be directed by the rules and orders.

PART VII.

ENFORCEMENT OF THE PROCESS OF THE PROVINCIAL AND UNITED COURTS.

49. Any citation or notice issuing out of any provincial or united court may be personally served upon the party to be effected thereby in any part of *Great*

Brithin and Ireland, and the Isles of Man, Guernsey, Jersey, Sark, and Alderney.

50. Summonses and other process issuing out of the provincial or united court shall be sealed or stamped with the seal of the court, and signed by the vicar-general of the province or united court; and if any person forge such seal or signature, summons or other process, or serve or enforce any such summons or process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the court, knowing the same to be false, or wilfully act under any false colour or pretence of the process of the court, he shall be guilty of felony, and shall upon conviction be liable to imprisonment for any term not exceeding three years, with or without hard labour.

51. Any provincial or united court may enforce its orders, decrees, and judgments in such manner as may be directed by the rules and orders: and in the case of any order, decree, or judgment being pronounced against any person holding any preferment, the same may be enforced by means of a sequestration of such preferment, subject to the regulations to be made by the rules and orders.

PART VIII.

PRACTITIONERS.

52. A party to any suit or other proceeding in a provincial or united court, or, if retained on behalf of either party, serjeant-at-law and barrister-at-law, may appear and practise in the provincial and united courts, with all the rights and privileges that they possess in the superior courts.

53. Proctors may practise as heretofore in the provincial and united courts, and attornies and solicitors shall have the same rights and privileges as proctors in such courts, and the laws and statutes concerning proctors, attornies, and solicitors, shall extend to proctors, attornies, and solicitors practising under this Act.

PART IX.

PROVINCIAL AND DIOCESAN VICARS-GENERAL, REGISTRARS, AND OTHER OFFICERS.

54. No person shall be qualified for the office of vicar-general of the provincial courts of *Armagh* or *Dublin* unless he be one of her Majesty's serjeants or one of her Majesty's counsel, or a practising barrister of fifteen years standing at the *Irish bar*.

55. In case of the illness or incapacity to act of any vicar-general of the provinces of *Armagh* or *Dublin*, a statement of the circumstances whereof shall be by the registrar filed as of record in the registry belonging to the province of which he is vicar-general, the archbishop of such province may appoint under his archiepiscopal seal, which appointment shall be by the registrar filed as of record in the registry of such archbishop, one of her Majesty's serjeants or one of her Majesty's counsel, or a practising barrister of fifteen years standing at the *Irish bar*, to act as vicar-general for the province of *Armagh* or *Dublin*, as the case may be, during the illness or incapacity to act of the vicar-general; and every serjeant, counsel, or barrister so appointed shall, during his appointment have all the powers, privileges, and protections and perform

all the duties of the vicar-general for whom he is appointed to act; and such deputy vicar-general shall be paid by such vicar-general such sum of money or proportion of fees or salary, by way of salary or allowance, not exceeding two-thirds of the fees or salary received by such vicar-general for his own use, as shall be fixed by the archbishop of *Armagh* or the archbishop of *Dublin*, as the case may be, under his archiepiscopal seal.

56. After the passing of this Act no person shall be appointed to the office of the vicar-general for any united diocese unless he has previously been a practising barrister of six years standing at the *Irish bar*; but nothing herein contained shall disqualify any person holding the office of vicar-general before the passing of this Act from continuing to hold such office under this Act by reason of his not having been a practising barrister of six years standing.

57. In case of the illness or incapacity to act of any vicar-general of a united diocese, a statement of the circumstances whereof shall be filed as of record in the united registry belonging to the united diocese of which he is vicar-general, the bishop having power over such united diocese may appoint under his episcopal seal, which appointment shall be by the registrar of such united diocese filed as of record, a practising barrister of six years standing at the *Irish bar* to act as vicar-general for such united diocese during such illness or incapacity; and every barrister so appointed shall, during his appointment, have all the powers, privileges, and protections, and perform all the duties of the vicar-general for whom he is appointed to act; and such deputy vicar-general so appointed shall be paid by such vicar-general such sum of money or proportion of fees by way of salary or allowance, not exceeding two-thirds of the fees received by such vicar-general for his own use, as shall be fixed by the said bishop under his episcopal seal.

58. Every vicar-general shall hold his office during good behaviour.

59. Every vicar-general shall, before entering upon the duties of his office, take an oath before any archbishop or bishop of the United Church of *England* and *Ireland*, or any one of the judges of the superior courts, who is hereby authorised to administer it, which oath shall be in the following form; that is to say,

'I A. B. do solemnly swear, that I am a member of the United Church of *England* and *Ireland*, and that I will faithfully and to the best of my ability execute the office of vicar-general within the province of [or diocese of as the case may be] without fear, favour, affection, or malice.

'So help me GOD.'

60. Every barrister appointed to act as a deputy vicar-general of a province or united diocese shall, before entering upon the duties of his office, take an oath before any archbishop or bishop of the said united church, or any one of the judges of the superior courts, who is hereby authorised to administer it; that is to say,

'I A. B. do solemnly swear, that I am a member of the United Church of *England* and *Ireland*, and that I will faithfully and to the best of my ability execute the office of deputy vicar-general within the pro-

vince of [or diocese of as the case may be] without fear, favour, affection, or malice.

‘So help me GOD.’

61. If any provincial or diocesan vicar-general shall cease to be a member of the Church his office shall *ipso facto* become void, as in the case of a vacancy in the office caused by death, and a successor shall be appointed.

62. Every registrar of a provincial or united registry hereinafter to be appointed shall perform the duties of his office in person, and shall not appoint a deputy registrar to perform such duties; but nothing herein contained shall disqualify any person holding the office of registrar at the time of the passing of this Act from discharging, under the provisions of this Act, the duties of a registrar by deputy; provided that no such last-mentioned registrar shall after the passing of this Act appoint any deputy, unless it be with the written consent of the bishop of the diocese within which such registry is situated.

63. Provided that in the case of the illness or absence of any registrar of a united registry, a statement of the circumstances whereof shall be filed as of record in the registry of which he is registrar, the archbishop or bishop having power over such registry may appoint under his archiepiscopal or episcopal seal, which appointment shall be filed in such as of record, a qualified person to act as registrar during the illness or absence of such registrar; and every person so appointed during the time for which he shall be so appointed to act shall, subject to the rules and orders, have all the powers, privileges, and protections and perform all the duties of the registrar for whom he is appointed to act; and such deputy registrar shall be paid by such registrar such sum of money by way of allowance as shall be fixed under the archiepiscopal or episcopal seal of the archbishop or bishop having power over the registry of such registrar.

64. It shall not be lawful for any judge, officer, or other person appointed, employed, or retained under the provisions of this Act to receive any gratuity for his own use or profit.

65. If any registrar, officer, or other person belonging to any provincial court, united court, or united registry, acting under pretence of the jurisdiction of the court or of this Act, be charged with extortion or misconduct, or with not duly paying or accounting for money levied by him under this Act, the vicar-general of the province or of a united diocese may publicly inquire into such matter upon oath, and may summon and enforce the attendance of all necessary parties, in such manner as shall be directed by the rules and orders, and may make such order thereupon, subject to the written confirmation of the bishop endorsed upon such orders, as such vicar-general may deem proper for the repayment of the money so extorted, or for the due payment of money so levied as aforesaid, and for the payment of damages and costs: all such orders and proceedings shall be forthwith transmitted to the provincial registry and filed as of record, and every such officer and other person convicted of such extortion or misconduct shall be for ever incapable of being employed under this Act: the said archbishops may, if they think fit, before this Act comes into operation, make and issue rules and orders direct-

ing the registrars and deputy registrars or other officers of all or any of the provincial and diocesan registries to make such returns, and to do such other acts, as may in their opinion be required for bringing the provisions of this Act into operation; and any registrar, deputy registrar, or other officer disobeying such rules and orders may by the said archbishops be suspended from his office of registrar, deputy registrar, or other officer, as the case may be, until he shall have obeyed such rules and orders.

PART X.

RESERVATION OF EXISTING RIGHTS.

66. Nothing in this Act contained shall be deemed, construed, or taken to derogate from, diminish, prejudice, alter, or affect, otherwise than is expressly provided, any jurisdiction already vested in or belonging to any archbishop or bishop or vicar-general under or by virtue of any statute, canon, or usage.

67. This Act shall not interfere with the jurisdiction of any archbishop, bishop, archdeacon, or other ecclesiastical person as to holding visitations, or doing any act or exercising any jurisdiction which he may at present do or exercise at visitations.

68. Subject to the rules and orders, nothing in this Act contained shall affect the power of any provincial or diocesan vicar-general of a united diocese to appoint surrogates, as heretofore, or to affect the power of any person heretofore appointed.

69. All suits and proceedings in causes or matters ecclesiastical which at the time when this Act comes into operation shall be pending in any ecclesiastical court in *Ireland* which by this Act shall be united to any other ecclesiastical court shall be transferred to, dealt with, and decided by the Court to and with which such ecclesiastical court shall be united by this Act as if the same had originated therein; and all suits or other proceedings which at the time of this Act coming into operation shall be depending before the Queen in her High Court of Chancery shall be dealt with and decided as if this Act had not been passed.

70. If any cause or matter ecclesiastical which would under this Act be transferred to a united court shall have been heard before any vicar-general having jurisdiction in relation to such cause or matter, and be then standing for judgment, such vicar-general may, at any time within six weeks after this Act comes into operation, give or transmit to the registrar of the united court a written judgment thereon, and a decree or order, as the case may require, shall be drawn up by the registrar of the united court in pursuance of such judgment, and every such decree or order shall have the same force and effect as if it had been drawn up in pursuance of a judgment of the court of the diocese of which he had been the vicar-general on the day on which the same was delivered to the registrar, and shall be subject to appeal under this Act.

71. Any decree or order of any ecclesiastical court which shall have been made before this Act comes into operation in any cause or matter ecclesiastical may be enforced or otherwise dealt with by a united court in the same way as if it had been originally made therein.

PART XI.

MISCELLANEOUS CLAUSES.

72. For the purposes of this Act the province of an

archbishop or the diocese of an archbishop or bishop shall be taken to include every place or district, exempt or peculiar, subject to the authority of such archbishop or bishop for the purposes of an Act passed in the fifth year of his late Majesty King George the Fourth, intituled *An Act to consolidate and amend the Laws for enforcing the Residence of Spiritual Persons on their Benefices, to restrain Spiritual Persons from carrying on Trade or Merchandise, and for the Support and Maintenance of Stipendiary Curates, in Ireland.*

73. The registrar or deputy registrar or other officer of each registry which shall be united to registry shall transmit to the united registry, at such time and in such manner as may be directed by the rules and orders, all letters patent, records, deeds, processes, Acts, proceedings, compositions, lists, books, marriage notice books, documents, faculties, licences, consecrations, instruments relating to pews in churches or chapels, or to the building or dilapidations of ecclesiastical residences, sequestrations, or any other instrument or document now in such diocesan registry of which he is the registrar or deputy registrar.

74. If any person steal or wilfully deface, destroy, or injure any letters patent, records, deeds, processes, acts, proceedings, compositions, lists, books, marriage notice books, documents, faculties, licences, consecrations, instruments relating to pews, in churches or chapels, or to the building or dilapidations of ecclesiastical residences, sequestrations, or any other instrument or document filed or deposited in any united registry, he shall be guilty of felony, and shall upon conviction be liable to imprisonment for any term not exceeding three years, with or without hard labour.

75. All fees, official charges, and costs for business transacted in the provincial and united courts and united registries, and all fees and documents filed therein, and all fees payable for marriage licences and at visitations, and all fees which after this Act comes into operation shall become due and payable to every vicar-general of a provincial court, vicar-general of a united court, surrogate, registrar, and apparitor, shall, except otherwise directed by the rules and orders, be paid to the several registrars of the united registries, and may be by such registrars recovered before the Chairman of the County Quarter Sessions within whose circuit the office of the registry may be situated, or may be recovered by them as such fees are now recoverable.

76. The accounts of the receipts and disbursements of the provincial and united courts, and of the provincial and united registries, and all other receipts and disbursements under this Act, shall be audited in such manner as shall be directed by the rules and orders; and the said archbishops shall appoint an auditor of such accounts, and may remove such auditor, and fix the amount to be paid to him in respect of every such audit, which shall be defrayed out of the funds at the disposal of the Ecclesiastical Commissioners for Ireland.

77. The registrars of the provincial and united registries shall annually make and send a report to the Lord Lieutenant in council of the business transacted in the provincial and united courts and in the provincial and united registries, and also an abstract of the

receipts and disbursements of their respective courts and registries during such period.

PART XII.

APPEALS FROM THE UNITED COURTS TO THE PROVINCIAL COURTS.

78. In any suit or other proceeding before a united court there shall be no appeal, without the special leave of such court, from any interlocutory decree or order thereof not having the force of a definitive sentence, until a definitive sentence shall have been pronounced thereon; but when a definitive sentence has been pronounced, any party appealing therefrom may also appeal from such interlocutory decree or order.

79. The provincial court may affirm, modify, or amend the decree or order appealed against, or make such other order in the premises as it thinks just.

80. Every appeal from a united court to a provincial court shall be made by suing out letters of request from the bishop to the provincial court, having annexed thereto a transcript of the record in the cause, the proceeding thereon, the documentary evidence, any decision of the court upon any question of law, with the notes of the evidence, and no other evidence shall be received before the provincial court.

81. In any suit or other proceeding there shall be no appeal from a provincial court, without the special leave of such court, from any interlocutory decree or order thereof not having the force of a definitive sentence, until a definitive sentence shall have been pronounced therein; but when any definitive sentence has been pronounced either in a provincial or a diocesan court, any party appealing therefrom may also appeal from such interlocutory order or decree.

CAP. LV.

An Act for the better Regulation of Street Music within the Metropolitan Police District.

[25th July, 1864.]

CAP. LVI.

An Act for granting to her Majesty certain Stamp Duties; and to amend the Laws relating to the Inland Revenue.

[25th July, 1864.]

1. 19 G. 2, c. 37. *Re-assurances of sea risks may lawfully be made. On termination of risk and proof of prior assurance duly stamped, allowance to be made for stamp duty on policy of re assurance.*
2. *Bills of exchange payable on demand and endorsed abroad to be deemed foreign bills.*
3. *Stamp duties on letters of attorney for the receipt of dividends or interest of stocks, funds, &c.*
4. *Stamp duties on probates, letters of administration, and inventories to extend to British ships at sea.*
5. *Probates, &c., exempted from stamp duty where the effects do not exceed £100.*
6. *Stamp duties on certain licenses to be for the future excise duties.*
7. *A license may be granted to a hawkers upon the certificate required by law, and may be*

renewed on the production of a previous license.

8. *Brewers licenses to expire on the 30th of September in each year.*
9. *Sects. 54 to 65 of 7 & 8 Vict., c. 52, and so much of sec. 13 of 3 & 4 W. 4, c. 68, as relates to brewers in Ireland, repealed.*
10. *Extension to Ireland of certain provisions of Acts relating to brewers in Great Britain.*
11. *Couch frames not to be altered after entry, unless upon notice to supervisor.*
12. *Tobacco licenses taken out by keepers of inns in Scotland to expire on the same day as licenses taken out by them for the sale of exciseable liquors.*
13. *Tobacco licenses granted to persons who retail beer not to be consumed on premises to expire on 10th October in each year.*
14. *Auctioneers not to deal in or sell exciseable commodities except upon licensed premises.*
15. *Postage stamps may be received in payment of taxes in Scotland and Ireland.*
16. *Persons admitted barristers in England or in Ireland may be admitted in the other part of the United Kingdom on payment of the stamp duty of £10 only.*
17. *Parts of certain stamp duties to be paid direct to the treasurer of King's Inns, Ireland, instead of into the Exchequer as heretofore.*
18. *Provisions of former Acts to apply to this Act.*
19. *Taxes in Scotland may be paid by means of Post-office Orders.*

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. "Whereas an Act was passed in the nineteenth year of King George the Second, chapter thirty-seven, intituled '*An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandises or Effects laden thereon*;' and by section four of the same Act it is prohibited to make re-assurance except in the cases therein mentioned: and whereas it is expedient to remove such restriction:" be it enacted, that notwithstanding anything contained in the said Act, it shall be lawful to make re-assurance upon any ship or vessel, or upon any goods, merchandise, or other property on board any ship or vessel, or upon the freight of any ship or vessel, or upon any other interest in or relating to any ship or vessel which may lawfully be insured, and such re-assurances shall be deemed to be the assurance of interests which may lawfully be insured within the meaning of the Acts imposing stamp duties on policies of sea insurance: provided always, that if within three calendar months next after the termination of the risk on any policy or re-assurance application shall be made to the Commissioners of Inland Revenue, and it shall be proved to their satisfaction that any such re-assurance as aforesaid has been made on the same property or interest and risk which shall have been previously assured to the same or some greater amount by one or

more lawful and valid policy or policies existing at the time of making such re-assurance, and duly stamped for denoting the full and proper duties chargeable thereon, it shall be lawful for the said commissioners to make allowance for the stamp duty impressed on the policy of re-assurance in like manner as in the case of spoiled stamps on policies of insurance under the Act passed in the fifty-fourth year of the reign of King George the Third, chapter one hundred and thirty-three; and the several provisions of the said Act, so far as they are applicable or can be applied, shall be observed and put in force with respect to the allowance of the stamps on the said policies of re-assurance.

2. Any bill of exchange payable on demand, which shall be endorsed out of the United Kingdom, or purport to be so endorsed, wheresoever the same may have been drawn, shall, for the purpose of charging the stamp duty thereon, be deemed to be a foreign bill of exchange, but shall be chargeable with the same amount of stamp duty as an inland bill of exchange for the payment of money otherwise than on demand, according to the amount thereby made payable; and the provisions, regulations, and penalties contained in the fifth section of the Act passed in the seventeenth and eighteenth years of her Majesty's reign, chapter eighty-three, shall be deemed to apply to any such bill so endorsed or purporting to be endorsed as aforesaid as if the same were a bill drawn out of the United Kingdom.

3. In lieu of the stamp duties now payable for or upon any letter or power of attorney for the receipt of dividends or interest of any of the government or parliamentary stocks or funds, or of the stocks or funds of the Secretary of State in council of India, or of India promissory notes, or registered promissory notes the interest of which is payable by bills of exchange on the governments of India, Madras, and Bombay respectively, or of the stocks, funds, or shares of or in any joint stock company or other company or society whose stocks or funds are divided into shares and transferable, there shall be charged and paid for or upon such letter or power of attorney as aforesaid the following stamp duties; (that is to say):

Where such letter or power of attorney shall be for the receipt of one payment only, the duty of one shilling.

And where the same shall be for continuous receipt or for the receipt of more than one payment, the duty of five shillings.

4. 'And whereas certain *ad valorem* stamp duties are by several statutes in that behalf granted and imposed upon or in respect of the following instruments; (that is to say):

'Probate of a will and letters of administration, with or without a will annexed, to be granted in England or Ireland.

'Inventory to be exhibited and recorded in any commissary court in Scotland of the estate and effects of any person deceased."

Be it enacted, that the said stamp duties shall be charged and paid in respect of the value of any ship or any share of a ship belonging to any deceased person which shall be registered at any port in the United Kingdom, notwithstanding such ship at the time of the death of the testator or intestate may have been

at sea or elsewhere out of the United Kingdom; and for the purpose of charging the said duties, such ship shall be deemed to have been at the time aforesaid in the port at which she may be registered.

5. No stamp duty shall be chargeable on any such probate, letters of administration, or inventory as aforesaid in any case where the whole estate and effects of the deceased person dying after the passing of this Act (exclusive of what he shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially), shall be sworn not to exceed and shall not actually exceed in value the sum of one hundred pounds.

6. 'Whereas it is expedient that the duties now payable as stamp duties upon the licences hereinafter mentioned should for the future be and become payable as duties of excise;' be it enacted, that on and from and after the first day of *July* one thousand eight hundred and sixty-four the duties now payable by law upon or in respect of the licences to be taken out in the United Kingdom by persons carrying on the trades and businesses hereinafter mentioned, as described and defined by the several statutes relating to such licences and trades or businesses respectively, (that is to say):

Appraisers.

Pawnbrokers.

Dealers in gold and silver plate.

Owners, proprietors, makers, and compounders of and persons uttering, vending, or exposing to sale, or keeping ready for sale, any medicine liable to stamp duty.

Hawkers and pedlars.

House agents.

Sellers of playing cards (being makers thereof).

And sellers of playing cards (not being makers thereof).

Shall respectively be denominated and be deemed to be duties of excise, and the said licences respectively shall be granted by such officer or officers of the Excise, and shall be in such form as the Commissioners of Inland Revenue shall direct in that behalf; and all powers or directions granted to or to be observed by any officer of stamps, and now in force, contained in any Act relating to the said duties or licences, or to the said trades and businesses, or any of them, may be executed and enforced and shall be observed by any officer of excise; and all such duties and all fines, penalties, and forfeitures imposed by any Act or Acts of Parliament upon any person who shall carry on any of the said trades or businesses without being duly licensed, or who shall do or omit to do any act or thing in any manner contrary to the provisions of any Act of Parliament relating to the said licences, or to the said duties, or any of them, may be collected sued for, recovered, levied, mitigated, paid, and applied by the same means and methods, and in like manner, and under the same general or special powers, provisions, regulations, and directions as to appeal, and in all other respects as any other duties of excise, or any fines, penalties, or forfeitures, are directed to be collected, sued for, recovered, levied, mitigated, paid, and applied under any Act relating to the excise revenue, as well as by the means and methods and in the manner directed by the said Act or Acts relating

to the said duties or licences, or to the said trades or businesses, and in force at the time of the passing of this Act.

7. Any licence to a hawker, pedlar, and petty chapman in *Great Britain* may be granted by any authorised officer of excise upon the person applying for it producing the certificate described in the sixth section of the Act passed in the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter twenty one, or in any former Act: provided always, that it shall be lawful to grant to any person who shall have taken out a licence as a hawker, pedlar, and petty chapman a renewed licence upon the production and surrender of the licence last previously issued to him as such hawker, pedlar, and petty chapman, and without the production of any further or other certificate, so long as he shall continue to renew his licence immediately upon the expiration thereof.

8. All licences granted to brewers of beer for sale after the thirteenth day of *September* in the year one thousand eight hundred and sixty-four shall continue and be in force from the day of the date of such licences respectively until and upon the thirteenth day of *September* next after the granting thereof; on which last-mentioned day all such licences shall expire.

9. 'Whereas it is expedient that the laws relating to brewers of beer for sale should be made uniform throughout the United Kingdom;' be it enacted, that sections fifty-four to sixty-five inclusive (relating to brewers of beer in *Ireland*) of the Act passed in the seventh and eighth years of the reign of King *George* the Fourth, chapter fifty-two, and so much of section thirteen of the Act passed in the third and fourth years of the reign of King *William* the Fourth, chapter sixty-eight, as prohibits any brewer from receiving or holding a licence to sell beer, cider, or spirits by retail, to be drunk or consumed on the premises, shall be and the same are hereby repealed, except as to anything done or omitted to be done, or as to any penalty or forfeiture which shall respectively have been incurred, before the passing of this Act.

10. Sections two and three of the Act passed in the fifty-sixth year of the reign of King *George* the Third, chapter fifty-eight, (as amended and altered by section twenty of the Act passed in the twenty-fifth year of the reign of her present Majesty, chapter twenty-two), and sections one, two, and three of the Act passed in the first and second years of the reign of King *George* the Fourth, chapter twenty-two, and also sections fifteen and sixteen of the Act passed in the first year of the reign of King *William* the Fourth, chapter fifty-one, shall extend to and be in force in *Ireland*, and shall apply to brewers of beer in *Ireland*, and to all acts, matters, and things done or to be done in *Ireland*, in like manner as at the time of the passing of this Act the said sections of the several Acts aforesaid do apply to the like acts, matters, and things done or to be done in *Great Britain*.

11. 'And whereas by an Act passed in the seventh and eighth years of the reign of King *George* the Fourth, chapter fifty-two, couch frames to be used by maltsters in the making of malt are required to be made and constructed in the manner and form thereby prescribed, and it is fit and proper, in order to prevent fraud or error in the gauging of the corn or grain, that

no alteration should be made in such couch frames without previous notice to the officers of excise;’ be it enacted, that if any alteration shall be made in the dimensions, size, or capacity of any couch frame in the malthouse of any malster after entry thereof made by him with the officer of excise without four days notice in writing having been previously given by such maltster of the intended alteration to the supervisor of excise of the district in which such malthouse is situated, the maltster shall forfeit the sum of one hundred pounds, together with all corn or grain found in the said couch frame.

12. ‘And whereas licences for the sale of beer, spirits, and wine in inns and public-houses licensed under the authority of justices of the peace in *Scotland* expire on the fifteenth day of *May* in each year, and it would be convenient to the keepers of such inns and public-houses if the licences to deal in and sell tobacco and snuff therein expired on the said day instead of on the tenth day of *October* in each year as now provided by law:’ be it enacted, that all licences to deal in or sell tobacco or snuff, which shall be granted after the passing of this Act to the keepers of such inns or public-houses as aforesaid, shall expire on the fifteenth day of *May* next, after the granting of the same; and every such last-mentioned licence as aforesaid which shall be in force at the time of the passing of this Act, and which but for this Act would expire on the tenth day of *October* next, shall continue in force until the fifteenth day of *May*, one thousand eight hundred and sixty-five, provided the holder of any such licence shall on or before the eleventh day of *October* next pay to the proper collector of excise in respect of the continuance of such licence the sum of three shillings, the payment of which sum shall be endorsed by such collector on the said licence; and for the purpose of ascertaining the proportionate amount of duty to be paid in respect of any licence to deal in or sell tobacco or snuff which shall be granted after the passing of this Act to any person intending to keep such inn or public-house as aforesaid, and who shall be entitled under the laws of excise to take out such licence as a beginner according to the quarter of the year in which such licence shall be taken out, the quarters of the year shall be deemed to expire on the days hereinafter mentioned; that is to say, the first quarter on the fifteenth day of *August*, the second quarter on the fifteenth day of *November*, the third quarter on the fifteenth day of *February*, and the last quarter on the fifteenth day of *May*.

18. ‘And whereas by the twenty-fifth section of an Act passed in the twenty-sixth and twenty-seventh years of her Majesty’s reign, chapter thirty-three, it is enacted that licences to be taken out for the sale of tobacco or snuff by innkeepers or persons licensed to sell beer to be consumed upon the premises after the fifth day of *July* one thousand eight hundred and sixty-three should expire on the tenth day of *October* next after the granting thereof, and it is expedient that such licences when granted to persons licensed to sell beer by retail not to be consumed on the premises, under an Act passed in the first year of the reign of King *William* the Fourth, chapter sixty-four, and other Acts for the amendment thereof, should also expire on the said last-mentioned day:’ be it enacted,

that all licences for the sale of tobacco or snuff, which after the passing of this Act shall be granted to persons licensed to sell beer as last aforesaid, shall expire on the tenth day of *October* next after the granting of the same.

14. ‘And whereas by the sixth section of the Act passed in the eighth year of her Majesty’s reign, chapter fifteen, it is enacted that any auctioneer, having in force a licence on which the duty under the provisions of that Act has been paid, may sell by auction any property, goods, or commodities mentioned in the said section without taking out any other licence in such respect: And whereas persons holding licences as auctioneers do under colour thereof carry on the business of dealers and traders in commodities for the dealing in and selling of which excise licences are by law required to be taken out, and it is expedient to alter and amend the law in this respect:’ Be it enacted, that no licence taken out by any person to exercise or carry on the trade or business of an auctioneer shall authorize such person to deal in or sell, either on his own account or for his own benefit, or on account of or for the benefit of any other person, any commodities for the dealing in or selling of which an excise licence is required, except upon premises in respect of which the owner of such commodities shall have taken out and shall have in force at the time of the sale thereof the proper excise licence for the sale of such commodities; provided that any such licensed auctioneer may sell by auction, by sample, in any town or place, any such commodities as aforesaid, if the owner thereof shall be duly licensed for the sale of such commodities in the same town or place; and provided also, that the Commissioners of Inland Revenue may in their discretion authorize any licensed auctioneer to sell any such commodities by auction where they shall be satisfied that the said commodities are the property of a private person, and are not sold for profit or by way of trade; and if any person shall sell by auction any such commodities contrary to or otherwise than as allowed by this section, he shall incur the penalties imposed upon persons dealing in or selling such commodities without the excise licences required by law.

15. It shall be lawful for the Lords Commissioners of her Majesty’s Treasury, if they shall see fit, and under such regulations, conditions, and limitations as they shall think proper, to authorize and direct the Commissioners of Inland Revenue and their officers to receive postage stamps as and for payment of the respective taxes of land tax and assessed taxes and income tax, or any of them, which may become due or payable in *Scotland* or *Ireland*; and, under such regulations as aforesaid, such postage stamps shall be delivered over to the Postmaster-General or his officers, and the amount or value thereof be paid out of the revenue of the post office to the inland revenue, and accounted for as monies arising from the said taxes.

16. ‘Whereas the stamp duty chargeable on the admission of any person to the degree of barrister at law in either of the Inns of Court in *England* is fifty pounds, and the stamp duty chargeable on the admission of any person to the like degree, in the Inns of Court in *Ireland* is also fifty pounds, but of the

latter sum ten pounds is payable to the treasurer of the society of *King's Inns*, to be applied as the society may direct: Be it enacted, that where any person duly admitted to the said degree in *Ireland*, and having paid the full stamp duty chargeable thereon, shall be admitted as aforesaid in *England*, his latter admission shall be chargeable with the stamp duty of ten pounds only for the use of her Majesty's revenue; and where any person duly admitted to the said degree in *England*, and having paid the full stamp duty chargeable thereon, shall be admitted as aforesaid in *Ireland*, his latter admission shall be chargeable with the stamp duty of ten pounds only for the use of the said society of *King's Inns*, to be paid over to the treasurer of the said society, and applied as directed or authorized by the statutes in that behalf.

17. 'Whereas by an Act passed in the fifth and sixth years of the reign of her present Majesty, chapter eighty-two, and the several Acts continuing and confirming the same, the receiver-general of stamp duties is required to pay parts of certain stamp duties in the said first-recited Act mentioned at the receipt of her Majesty Exchequer in *Ireland*, and the Commissioners of her Majesty's Treasury for the time being are directed to pay the same to the treasurer of the society of *King's Inns*: Be it enacted, that the said receiver general shall pay the same to the said treasurer instead of to the receipt of her Majesty's Exchequer in *Ireland* as directed by the said Acts to be applied as in the said Acts mentioned.

18. All the powers, provisions, clauses, regulations, forfeitures, pains, and penalties contained in or imposed by any Act or Acts relating to any duties of the same kind or description as the several rates or duties granted by this Act respectively, and in force at the time of the passing of this Act, and not hereby expressly repealed, shall respectively be in full force and effect with respect to the said rates and duties by this Act granted respectively, so far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last mentioned rates and duties, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express provisions of this Act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the rates and duties by this Act granted respectively.

19. When any person liable to the payment of any of the duties of land tax, assessed taxes, or income tax in *Scotland* shall have received the accustomed notice thereof, it shall be lawful for him, within twenty-one days after receiving such notice, to produce the same at any money order office of the general post office in *Scotland*, and pay to the postmaster there the sum payable according to such notice, and thereupon the said postmaster shall deliver to him a post office order payable at the general post office in *London* to the Receiver-General of Inland Revenue for the said sum, less the commission for such order, which order such person shall forthwith transmit to the collector at the office for receipt in a letter prepaid by being duly stamped with the proper postage

stamp or stamps, specifying the particulars of the payment in such form as shall be provided by the Commissioners of Inland Revenue for that purpose, and delivered to the said person along with the said order; and upon the receipt of the said order and letter, with the particulars and in the form aforesaid, the collector shall credit the person named in the said letter with the amount specified in the said order, and with the said commission, in like manner as if the same had been paid to the collector in cash.

CAP. LVII.

An Act to make Provision respecting the Acquisition of lands required by the Admiralty for the Public Service, and respecting the Use and Disposition thereof, and the execution of works thereon.

[25th July 1864.]

Sec. 1. *Short title.*

2. *Interpretation of terms.*

3. *Power to Admiralty to take lands by agreement.*

4. *Incorporation of Lands Clauses Acts, except provisions giving compulsory powers, &c.*

5. *Incorporation of Lands Clauses Acts with Special Acts.*

6. *Power to Admiralty to withdraw notice for purchase within limited time.*

7. *Incorporation of Railways Clauses Acts as to correction of errors, &c. in books of reference, &c.*

8. *Limit of time for compulsory purchases.*

9. *Lands to vest in Lords of Admiralty, &c. for the time being.*

10. *Power of management, &c. of lands.*

11. *Actions and suits by and against Admiralty as to lands.*

12. *As to recovery of possession of land in England from tenants. 1 & 2 Vict. c. 74. 19 & 20 Vict. c. 108.*

13. *As to recovery of possession of land in Ireland from tenants. 14 & 15 Vict. c. 57. 14 & 15 Vict. c. 92.*

14. *Exception from incorporation of provisions as to sale of superfluous lands.*

15. *Power to Admiralty to sell lands not required for public service.*

16. *Rights of pre-emption preserved.*

17. *Payment of purchase money.*

18. *Lands vested indefeasibly in purchaser.*

19. *Compensation by Admiralty for prior interests (if any) afterwards established.*

20. *Incorporation of Railways Clauses Acts as to certain works, roads, &c.*

21. *Exception from incorporation of requirements as to bonds.*

22. *Provision for purchase money, &c.*

23. *Service of notices, &c.*

24. *Application of pecuniary penalties, &c.*

25. *Protection to Admiralty against penalties, &c.*

26. *Extension of provisions as to actions and suits.*

27. *Nothing to affect rights of Admiralty.*

'WHEREAS it is expedient to make provision for the acquisition by the Admiralty, by agreement, of lands required for the public service:

'And whereas it is expedient to consolidate into one general Act sundry provisions usually introduced into special Acts from time to time empowering the Admiralty to purchase particular lands for the public service by agreement or compulsorily, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several special Acts as for insuring greater uniformity in the provisions themselves:

'And whereas it is expedient to make provisions respecting the use and management of lands held by the Admiralty for the public service, and respecting the disposition thereof, when no longer required for the public service, and also respecting the execution of works by the Admiralty in certain cases:'

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament, assembled, and by the authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Admiralty Lands and Works Act, 1864.

2. In this Act—

The term "The Admiralty" means the Lord High Admiral of the United Kingdom or the Commissioners for executing the office of Lord High Admiral:

The term "The Lands Clauses Acts" means with respect to lands in *England* The Lands Clauses Consolidation Act, 1845, and with respect to lands in *Scotland* The Lands Clauses Consolidation (*Scotland*) Act, 1845, together with in each case The Lands Clauses Consolidation Acts Amendment Act, 1860, and with respect to lands in *Ireland* The Railway Acts (*Ireland*), 1851, including Acts incorporated in or amending the same:

The term "lands" includes any estate, term, easement, right, or interest in, to, over, or affecting lands.

In the construction of the Lands Clauses Acts in connection with this Act the term "the promoters of the undertaking" therein used shall mean the Admiralty, and the term "lands" therein used shall have the meaning hereinbefore assigned to it.

I. ACQUISITION OF LANDS BY AGREEMENT.

3. Subject and according to the provisions of this Act, the Admiralty may from time to time by agreement purchase or take lands requisite for her Majesty's naval service, or for the use or requirements of any force or department in the employment or under the direction or control of the Admiralty, and for that purpose may enter into, execute, and do all necessary and proper contracts, assurances, and things.

4. For the purposes of any such purchase or taking the Lands Clauses Acts shall be incorporated with this Act (for which purpose this Act shall be deemed the Special Act), except as to so much of the Lands Clauses Acts as relates to the purchase or taking of lands otherwise than by agreement, and to access to the Special Act.

II.—ACQUISITION OF LANDS UNDER SPECIAL ACTS.

5. Where by any special Act of the present or any future session compulsory powers of purchasing or taking particular lands are given to the Admiralty, the Lands Clauses Acts shall, subject to the provisions of this Act, be incorporated with the Act giving those powers (which shall for this purpose be deemed the Special Act), except as to so much of the Lands Clauses Acts as relates to access to the Special Act.

6. If in any case, after notice has been given by the Admiralty for the compulsory purchase or taking of any lands under any such Special Act as aforesaid of the present or any future Session, it appears to the Admiralty, from a change of circumstances, or other reasons, unnecessary or inexpedient to complete the purchase or taking of such lands, or any part thereof, the Admiralty may within two months after giving the notice give to the parties entitled to receive the first notice a further notice to the effect that they thereby withdraw the first notice wholly or in part, and thereupon the lands comprised in the notice of withdrawal shall be discharged from the effect of the first notice wholly or to the extent of the notice of withdrawal (as the case may be); provided that nothing herein shall—

- (1) prejudice any claim of any owner of or person interested in such lands for compensation for such damage (if any) as he may have sustained in consequence of the giving of the first notice; or
- (2) give to any person receiving notice for the purchase or taking of lands any further or other right as against the Admiralty than he would have had if this enactment had not been made.

7. In every such special Act as aforesaid of the present or any future session there shall also be incorporated, where the lands authorized to be purchased or taken compulsorily are situate in *England* or *Ireland*, sections seven and ten of the Railways Clauses Consolidation Act, 1845, and where the lands are situate in *Scotland*, sections seven and ten of the Railways Clauses Consolidation (*Scotland*) Act, 1845, for which purpose such Act of the present or any future session shall be deemed the Special Act, and the Admiralty shall be deemed the company.

8. The powers of the Admiralty for the compulsory purchase of lands for the purposes of any such Special Act as aforesaid of the present or any future session shall not be exercised after the expiration of five years from the passing of that Act.

III.—VESTING, MANAGEMENT, &C. OF LANDS.

9. Lands purchased or taken by the Admiralty as aforesaid, by agreement or compulsorily, shall according to the nature and quality of such lands, and the estate, term, or interest acquired by the Admiralty therein, vest in the Admiralty for the time being and go to and be held by the Lord High Admiral for the time being, or the Commissioners for the time being for executing the office of Lord High Admiral, in succession, in trust for her Majesty, her heirs and successors, for the public service.

10. Subject to the provisions of this Act and of any such Special Act as aforesaid of the present or any future session, the Admiralty may use lands pur-

chased or taken by them under this Act, or under any such Act in such manner as may seem most beneficial for the public service, and shall have in relation thereto all such powers of management and leasing, and all such other powers, and all such rights, as would be had in relation thereto by any individual holding the same for such estate, term, or interest as the Admiralty have therein.

11. The Admiralty may bring or defend any action or suit relative to any lands contracted to be purchased or taken by them under this Act, or under any such special Act as aforesaid of the present or any future session; and may bring any action of ejectment or other action or suit for recovering possession of any lands purchased or taken by them under this Act, or under any such special Act as aforesaid of the present or any future session, and may distrain or sue for any arrears of rent due to them in respect thereof; and may bring any action or suit in respect of any trespass or encroachment committed thereon or damage done thereto, or any other action or suit in respect thereof, and may defend any action or suit in respect thereof; and in every such action or suit the Admiralty may be styled "The Lord High Admiral of the United Kingdom" or "The Commissioners for executing the Office of Lord High Admiral of the United Kingdom" (as the case may require), without more; and any such action or suit shall not be affected by any change in the Admiralty; and in any such action or suit the Admiralty shall be liable and entitled to pay or receive costs according to the ordinary rules observed in actions between subject and subject.

Recovery of possession.

12. Where any lease or agreement of or concerning lands in *England* purchased or taken by the Admiralty under this Act or under any such special Act as aforesaid of the present or any future session, is determined by expiration, notice, or forfeiture (except for non-payment of rent), the following provisions shall take effect:

(1.) Possession of such lands may be recovered by the Admiralty under the Act of the session of the first and second years of her Majesty (chapter seventy-four) "to facilitate the recovery of possession of tenements after due determination of the tenancy," as in cases therein provided for, although the term or interest of the tenant may have exceeded seven years, and the rent may have exceeded the rate of twenty pounds a year, and a fine may have been reserved or made payable:

(2.) The notice of intention to apply to justices to recover possession under that Act may require possession to be given up on or before the expiration of seven clear days from the service of the notice, and the form of notice may be varied accordingly:

(3.) The justices by that Act authorized to issue a warrant for giving possession may by such warrant authorize entry and delivery of possession either forthwith or on or before such day as the justices think fit:

(4.) Such possession as aforesaid may (at the option of the Admiralty) be recovered with

rent or mesne profits, or both, under the Act of the session of the nineteenth and twentieth years of her Majesty (chapter one hundred and eight) "to amend the Acts relating to the county courts," as in cases provided for in section fifty of that Act, and the provisions auxiliary thereto, although the value of the premises and the rent payable in respect thereof may have exceeded fifty pounds by the year; and it shall not be necessary to prove the yearly value and rent as thereby required.

13. Where any lease or agreement of or concerning lands in *Ireland* purchased or taken by the Admiralty under this Act or under any such Special Act as aforesaid of the present or any future session, is determined by expiration, notice, or forfeiture (except for nonpayment of rent), the following provisions shall take effect:

(1.) Possession of such lands may be recovered by the Admiralty, as provided by section seventy-two of the Act of the session of the fourteenth and fifteenth years of her Majesty (chapter fifty-seven), "to consolidate and amend the Laws relating to Civil Bills and the Courts of Quarter Sessions in *Ireland*, and to transfer to Assistant-Barristers certain Jurisdiction as to Insolvent Debtors," in the case of lands holden by a tenant at a rent not exceeding fifty pounds *per annum*, and the tenant's interest wherein is determined, notwithstanding the rent payable under such lease or agreement may exceed that amount:

(2.) Such possession as aforesaid may (at the option of the Admiralty) be recovered, as provided by section fifteen of the Summary Jurisdiction (*Ireland*) Act, 1851, for the recovery of possession of houses in certain towns and villages:

(3.) The last-mentioned mode of recovery shall apply wherever the lands may be situate, and at and for whatever rent and term the same may have been holden; and notwithstanding anything in the last-mentioned provision, the justices authorized to issue a warrant for giving possession may by such warrant authorize possession to be given forthwith, or on or before such day as the justices think fit; and the justices may, if they think fit, issue such warrant notwithstanding the tenant may be willing to give such undertaking as in that provision mentioned.

Sale.

14. Notwithstanding anything in this Act, such provisions of the Lands Clauses Acts as relate to the disposal of superfluous lands, and to the effect of the words "grant" and "dispose" respectively in any conveyance, shall not apply to lands purchased or taken by the Admiralty under this Act or under any such Special Act as aforesaid of the present or any future session.

15. Where any lands purchased or taken by the

Admiralty under this Act or under any such Special Act as aforesaid of the present or any future session appear to the Admiralty to be no longer required to be held by them for the public service, the Admiralty may, with the previous consent of the Lords Commissioners of the Treasury, sell the same, and may for that purpose enter into, execute, and do all necessary or proper contracts, assurances, and things.

16. Nothing in this Act shall take away any right of pre-emption to which any person is for the time being entitled under the Lands Clauses Acts in respect of any lands purchased or taken by the Admiralty under this Act, or under any such Special Act as aforesaid of the present or any future session.

17. The purchase money payable on any sale under this Act shall be paid to her Majesty's Paymaster General, whose receipt shall be an effectual discharge for the same.

18. On the payment of such purchase money and the execution and delivery to the purchaser by the Admiralty of the necessary or proper assurance of the lands sold, the purchaser shall, notwithstanding any defect in the title of the Admiralty thereto, stand seised or possessed thereof for such estate or interest as may be expressed or intended to be assured to him, freed and absolutely discharged (save as in the assurance may be expressed) from all prior estates, interests, rights and claims therein or thereto.

19. If, nevertheless, at any time after any such sale any such prior estate, interest, right, or claim as aforesaid is made out to the satisfaction of the Admiralty to be capable of being established at law or in equity or is so established, the Admiralty shall make compensation for the same.

For the purposes of the present section the provisions of the Lands Clauses Acts with respect to interests in lands which have by mistake been omitted to be purchased shall apply and take effect as if the lands had not been sold by the Admiralty, or as near thereto as circumstances admit, with this addition, namely,—that such compensation shall not in any case exceed the amount of the purchase money received by the Admiralty on the sale of the lands in respect whereof such estate, interest, right, or claim is made out or established, exclusive of the value of any buildings or improvements erected or made thereon by the Admiralty for the public service.

IV.—WORKS.

20. Where, by any such special Act as aforesaid of the present or any future session, powers for the execution of particular works are given to the Admiralty, there shall be incorporated with the Act giving those powers (which shall for this purpose be deemed the Special Act) the following provisions, namely:

Where the lands on which the works are authorized to be executed are situate in *England* or *Ireland*, sections eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-four of the Railways Clauses Consolidation Act, 1845, and the provisions of the same Act with respect to the temporary occupation of lands near the railway during the construction thereof:

Where the lands on which the works are authorized to be executed are situate in *Scotland*, sections

eighteen, nineteen, twenty, twenty-one, twenty-two, and twenty-four of The Railways Clauses Consolidation (*Scotland*) Act, 1845, and the provisions of the same Act with respect to the temporary occupation of lands near the railway during the construction thereof:

And for the purposes of the present section the works authorized to be executed shall be deemed the railway, and the Admiralty shall be deemed the company, within the meaning of the incorporated provisions.

V.—MISCELLANEOUS.

21. Notwithstanding anything in this Act, so much of any provision by this Act incorporated with any such Special Act as aforesaid of the present or any future session as requires a bond to be given in relation to any lands or works shall not be incorporated with such Act, but in any such case, in lieu of such bond, and with the same effect as if such bond were given, the Admiralty shall give an undertaking in writing to the like purport (as nearly as circumstances admit) as the condition of such bond.

22. All purchase, compensation, or other money under this Act, or under any such Special Act as aforesaid of the present or any future session, agreed to be paid by or recovered against the Admiralty, shall be paid by them out of money to be provided and appropriated for that purpose by Parliament.

23. Any notice, summons, writ, or other document required to be served on the Admiralty for the purposes of this Act, or of any such Special Act as aforesaid of the present or any future session, may be served by being delivered to the Secretary of the Admiralty, or by being sent to him by post in a registered letter, addressed to him at the Admiralty office, *Whitehall, London*, or by being left for him there; and any document so sent by post shall be considered as served on the day on which such letter would be delivered in the ordinary course of post.

Any notice, summons, writ, or other document required to be served on behalf of the Admiralty for the purposes aforesaid may be given under the hand of such officer or person as the Admiralty from time to time direct.

24. Notwithstanding anything in this Act, or in any Act relating to municipal corporations as to the metropolitan police, or in any other Act, any pecuniary penalty or other money recovered under this Act, or under any such Special Act as aforesaid of the present or any future session, or in relation to lands purchased or taken by the Admiralty under this Act or under any such Act, shall be paid and applied as the Admiralty direct.

25. The Admiralty shall not, by reason of anything done or omitted to be done in the execution or intended execution or in pursuance of this Act or of any such Special Act as aforesaid of the present or any future session, or in relation to any lands purchased or taken by them under this Act or under any such Act, be liable collectively or individually to any fine, penalty, or forfeiture, or to execution of any process against the person or property, anything in any Act incorporated with this Act or with any such Act notwithstanding.

26. The provisions of this Act respecting actions

and suits by and against the Admiralty relative to lands shall apply in relation to all lands for the time being purchased or taken or contracted to be purchased or taken by the Admiralty under any general or special Act in force at the passing of this Act.

27. Nothing in this Act shall take away or prejudicially affect any power, right, or authority that would or might have been vested in or exercised by the Admiralty if this Act had not been passed.

CAP. LVIII.

An Act for confirming a Provisional Order concerning Pilotage made by the Board of Trade under the Merchant Shipping Act Amendment Act, 1862, relating to *Hartlepool*. [25th July 1864.]

CAP. LIX.

An Act to continue the Deputy Commissioners in Lunacy in *Scotland*, and to make further Provision for the Salaries of the Deputy Commissioners, Secretary, and Clerk of the General Board of Lunacy in *Scotland*. [25th July 1864.]

CAP. LX.

An Act to enable Her Majesty to grant a lease for Nine Hundred and Ninety-nine Years of the Building known as the College of Physicians in *Pall Mall East*. [25th July 1864.]

CAP. LXI.

An Act for empowering the Commissioners of the Treasury to guarantee, and the Commissioners for the Reduction of the National Debt to advance, the sums authorised to be borrowed for the Embankment of the *Thames* and Improvement of the Metropolis; and for other purposes connected therewith. [25th July 1864.]

CAP. LXII.

An Act for amending the *Isle of Man* Harbours Act, 1863. [25th July 1864.]

CAP. LXIII.

An Act to suspend the making of Lists and the Ballots for the Militia of the United Kingdom.

[25th July 1864.]

Sec. 1. *Meetings relating to the militia of the United Kingdom, and ballots for such militia suspended.*

2. *Proceedings may be had during such suspension by order in council.*

3. *So long as lists are suspended, not necessary to transmit extracts, &c. as required by sec. 3 of 7 G. 4, c. 58.*

4. *Not to extend to prevent the holding of certain meetings relating to the militia.*

WHEREAS it is expedient to suspend for a further period the ballots for the militia of the United Kingdom: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. All general and subdivision meetings relating to

the militia of the United Kingdom, and all proceedings relating to procuring any returns or preparing or making out lists of such militia, or any part thereof, for the purpose of a ballot, or relating to balloting for any militiamen or supplying any vacancies in such militia by ballot, as are or may be directed or authorized by or under any Act of Parliament now in force, shall cease and remain suspended until the first day of *October* one thousand eight hundred and sixty-five.

2. Provided always, that it shall be lawful for her Majesty by any order in council to direct that any proceedings shall be had at any time before the expiration of such period as aforesaid, either for the giving of notices and making returns and preparing lists, and also for the proceeding to ballot and enrol men for the filling up vacancies in the militia, as her Majesty shall deem expedient; and upon the issuing of any such order all such proceedings shall be had for carrying into execution all the provisions of the Acts in force in the United Kingdom relating to the giving notices for and returns for lists, and for the balloting and enrolling of men to supply any vacancies in the militia, and holding general and subdivision meetings for such purpose, at such times respectively as shall be expressed in any such order in council, or by any directions given in pursuance thereof to lord lieutenants, or deputy lieutenants acting for lord lieutenants, of the several counties, shires, cities, and places in the United Kingdom; and all the provisions of the several Acts in force in the United Kingdom relating to the militia shall, upon any such order, and direction given in pursuance thereof, become and be in full force and be carried into execution at the periods specified in such order or direction as aforesaid, with all such penalties and forfeitures for any neglect thereof, as fully as if such periods had been fixed in the Acts relating to such militia.

3. So long as the making of lists and the ballots for the militia of *Great Britain* are suspended it shall not be necessary for the clerks of general meetings of the several counties therein to transmit to the clerks of the subdivision meetings, or to her Majesty's Principal Secretary of State for the War Department, the extracts and abstracts mentioned and referred to in section three of seventh *George* the Fourth, chapter fifty-eight.

4. Provided also, that nothing herein contained shall extend to prevent the holding before the expiration of such period as aforesaid of such general or other meetings relating to the militia of the United Kingdom as may be called in *Great Britain* under the authority of one of her Majesty's Principal Secretaries of State, or in *Ireland* under the authority of the Lord Lieutenant or other Chief Governor or Governors of *Ireland*, or of any meeting which may be called for the purpose of altering, enlarging, or providing any place for the reception of the arms, accoutrements, clothing, or other stores belonging to the militia.

CAP. LXIV.

An Act for further regulating the closing of Public Houses and Refreshment Houses within the Metropolitan Police District, the City of *London*, certain Corporate Boroughs, and other places.

[24th July 1865.]

CAP. LXV.

An Act for amending the law relating to the Removal of Clerks of the Peace. [25th July 1864.]

CAP. LXVI.

An Act to authorize the Inclosure of certain Lands in pursuance of a Special Report of the Inclosure Commissioners. [25th July 1864.]

CAP. LXVII.

An Act to amend the Law in certain Cases relating to Trespasses in Pursuit of Game.

[25th July 1864.]

Sec. 1. *Landlord, &c. having reserved the right to game to be legal occupier. Person entering on land in pursuit of game without consent, deemed a trespasser. Penalty for such trespass.*

2. *As to the word "game."*

3. *To extend to Ireland only.*

'WHEREAS it is expedient to amend the law in certain cases relative to the recovery of penalties for trespass on lands in Ireland in pursuit of game, and to prevent the necessity of occupiers of lands not interested in such game being made party prosecutors in proceedings for the recovery of such penalties: ' Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Where the landlord or lessor of any land has reserved to himself, by any deed or writing, the exclusive right to the game on such land, then such landlord or lessor, for the purpose of prosecuting all persons for trespassing in pursuit of game on such land without his consent, shall be deemed the legal occupier of the said land; and any person who shall enter or be upon the said land in search of or in pursuit of game without the consent of such landlord or lessor shall be deemed a trespasser, and shall, on conviction thereof before one or more justices of the peace sitting in petty sessions, forfeit and pay such sum not exceeding forty shillings, together with the costs, as the said justice or justices shall think fit; and such penalty and costs shall be recovered and levied in the same mode and with the same power of appeal as are provided for the recovering and levying of any penalties under the Petty Sessions Act of the fourteenth and fifteenth Victoria, chapter ninety-three, and the Petty Sessions Act of the twenty-first and twenty-second Victoria, chapter one hundred, and as if the provisions in the said Acts relating to the recovery of penalties were herein expressly repeated.

2. The word "game" shall for all the purposes of this Act be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, woodcocks, snipes, quails, landrails, wild ducks, wild-geon, and teal.

3. This Act shall extend and be construed to extend to Ireland only.

CAP. LXVIII.

An Act to amend the Local Government Act of 1858 so far as it applies to Oxford.

[25th July 1864.]

CAP. LXIX.

An Act to defray the Charge of the Pay, Clothing, and contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland; to grant Allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Assistant Surgeons, and Surgeons Mates of the Militia; and to authorize the Employment of the Non-commissioned Officers.

[25th July 1864.]

CAP. LXX.

An Act to substitute fixed instead of fluctuating Incomes for the Members of certain minor Corporations in certain of the Cathedral Churches in England.

[25th July 1864.]

CAP. LXXI.

An Act for amending and extending the Railways, Ireland, Act, 1851, and the Railways, Ireland, Act, 1860.

[25th July 1864.]

Sec. 1. *The company, if dissatisfied with award, in cases exceeding £500, may traverse.*

2. *Power to have special jury.*

3. *Notice to be given to the sheriff of special jury.*

4. *Either party to such traverse entitled to have the premises viewed by the jury.*

5. *Either party may appeal from ruling of judge.*

6. *The party objecting shall deliver to the judge a note in writing, stating objection, and grounds thereof.*

7. *Special case, when settled and signed by the judge to be filed.*

8. *Court may direct an issue or other inquiry.*

9. *As to judgment upon special case.*

10. *Costs of appeal to be paid by company where appellants.*

11. *As to compensation in respect of lands temporarily occupied.*

12. *Taxation of costs.*

13. *Construction of term "company."*

14. *If company do not take possession within a fortnight of final award, value of crop to be added.*

15. *Within five years after the opening of a railway the company may be called upon to make certain accommodation works, and, if so, the matter shall be referred to an arbitrator.*

16. *Arbitrator shall have all the powers of an arbitrator appointed under 14 & 15 Vict. c. 70, and 23 & 24 Vict. c. 97.*

17. *The company shall obey the award of the arbitrator, except in certain cases.*

18. *Acts to be read together.*

19. *Short title.*

'WHEREAS it is expedient that the "Railways Act, Ireland, 1851," and the "Railways Act, Ireland, 1860," should be amended, and the provisions thereof extended as hereinafter mentioned: ' Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assem-

bled, and by the authority of the same, as follows:—

1. In all cases where the amount of money which the arbitrator appointed under the provisions of the said Acts, or either of them, shall have awarded to be paid by the company to any person in respect of any estate or interest in lands shall exceed the sum of £500 it shall be lawful for the company, if dissatisfied with such award, upon giving to such person within ten days next after the date of such award notice in writing of their intention to appeal therefrom, to have a traverse entered by the company in the Crown-book in respect of such award, at the same time and in like manner in all respects as are provided by the aforesaid Acts with respect to traverses taken by persons dissatisfied with any award, and the like proceedings shall be taken with respect to a traverse so taken by the company, and the verdict of the jury upon such traverse shall have the like effect as in the case of a traverse taken by a person so dissatisfied: Provided always, that in all cases where a traverse shall be so taken by the company, if the verdict of the jury shall be for a sum less than that awarded by the arbitrator, the company shall nevertheless pay to the other party to such traverse such sum not exceeding twenty pounds for the costs of such traverse as the judge before whom the same is tried shall direct; and in case the verdict of the jury shall be for a sum equal to or exceeding the award of the arbitrator, then and in that case the company shall pay to the other party the costs of the traverse, such costs to be taxed and ascertained in the same manner as costs are by law ascertained on the trial of an issue from the Court of Queen's Bench.

2. In all cases of traverse taken upon an award of the arbitrator, the company or person appellant shall be entitled to have the same tried by a special jury upon giving notice in writing to the respondent in such traverse of their or his intention that the same shall be so tried ten days previous to the assizes or term respectively (as the case may be), and the respondent in such traverse shall be so entitled upon giving the like notice six days before the said assizes or term: Provided that any judge of any of the superior courts sitting in chamber or at Nisi Prius may at any time order that such traverse shall be tried by a special jury upon such terms as he may think fit.

3. Where notice has been given to try by special jury either party may, six days before the first day of the assizes or of the term, as the case may be, give notice to the sheriff that such action is to be tried by a special jury; and in case no such notice has been given, or the notice has not been given in sufficient time, no special jury need be summoned to attend, and such traverse shall be tried before a common jury unless otherwise ordered by the judge before whom the same shall be tried.

4. Either party to such traverse shall be entitled to have the premises viewed by the jury, and for that purpose it shall be sufficient to obtain an order of any judge as aforesaid directing a view to be had, and thereupon all such proceedings shall be had as are directed by the "Common Law Procedure Amendment Act, *Ireland*, Act, 1853," section 116, with respect to view juries.

5. In case either party shall be dissatisfied at the

trial of such traverse with the ruling of the judge upon any matter of law, he shall be entitled to appeal from such ruling in the manner herein contained.

6. The party so objecting shall deliver to the judge at the time of such trial a notice in writing, stating such objection and the grounds thereof, and shall and may prepare a case, stating the facts and matters appearing in evidence so far as may be necessary, and the ruling of the judge, and the objections to such ruling, and such case may be accompanied by an appendix containing copies of the material documents; and all proceedings shall be taken with respect to the settlement of such case, and within the same period, as are taken in *Ireland* with respect to bills of exceptions to the direction of a judge at Nisi Prius.

7. Such special case and the appendix thereto, when settled and signed by the said judge, shall be filed in such one of the superior courts as the said judge shall direct, and such court shall proceed to adjudicate on the same in like manner as upon a special case stated under the said Common Law Procedure Act, and the adjudication of such court shall be final.

8. It shall be lawful for such court, upon the hearing of such special case, to direct any issue to be tried, or any valuation or other inquiry to be made, or the said case to be amended in any way, or other Act to be done, which such court may deem proper, in order finally to adjudicate upon and determine the rights of the parties.

9. The judgment or order of the said court upon such special case shall be equivalent to a judgment of the said court in a personal action between the parties.

10. In all cases where the company shall take any proceedings by way of appeal as aforesaid the costs thereof shall be ordered to be paid by them; but in cases where the company shall be respondent in such appeal the costs of such proceedings shall follow the event, and be included in the ultimate judgment of the Court of Appeal.

11. The amount of the purchase money or other compensation payable by the company in respect of lands temporarily occupied by them during the construction of the works, in case the parties shall differ about the same, shall be determined in manner following: The person claiming such purchase money or compensation shall deliver to the arbitrator a short statement in writing, setting forth the nature and amount of such claim, and shall also and at the same time deliver to the company a copy of the same; and the like proceedings in all respects shall be had with respect to such claim as are by the aforesaid Acts or by this Act directed to be taken with respect to a claim for compensation for lands taken or injuriously affected by the execution of the works; and the arbitrator shall have full jurisdiction to entertain such claim, and determine the amount payable in respect thereof, although the lands so temporarily occupied may not be contained in the maps and plans deposited with him; and the said arbitrator may include the amount so ascertained by him as last aforesaid in his general award, or may make a special award in relation to the same in case it shall be necessary or convenient so to do, such special award to be made in the like manner, and to be subject to the like provisions in all respects as such general award; and all

the enactments expressly, or by reference or incorporation, contained in the said Acts, or in this Act with respect to purchase money or compensation ascertained by the award of the arbitrator in respect of lands permanently taken by the company shall be applicable to the purchase money or compensation ascertained as aforesaid by the arbitrator in respect of lands so temporarily occupied as aforesaid.

12. In all cases where costs of conveyances shall be payable by the company such costs shall be taxed by one of the taxing masters of the Court of Chancery in *Ireland* upon the requisition of such company; and all the provisions of any Act of Parliament, and all rules and regulations of the courts of law and equity in *Ireland* relating to the taxation of costs shall be deemed applicable to such costs so payable by the company in like manner in all respects as if the said company were directly chargeable therewith.

13. In the construction of the Railways Act (*Ireland*), 1851, and of the Railways Act (*Ireland*), 1860, and of this Act, the expression "company" shall include any parties, whether company, undertakers, commissioners, drainage board, corporation, or private persons, empowered to execute any work or undertaking, and to take or use any lands, mills, or other hereditaments compulsorily under the provisions of any general or special Act of Parliament, already or hereafter incorporating the said recited Acts and this Act or any of such Acts.

14. When any railway company shall not take possession of or pay for any land within one fortnight from the lodgment of the final award of the arbitrator with the clerk of the peace, the said company shall, before taking possession of the same, in addition to the sum awarded by the arbitrator, pay to the occupant of any land to be taken the value of any crop existing upon or in the land at the time of taking possession of same, and which has not been included in said award, such value to be determined by any three justices of the petty sessions district in which such lands may be situated, one to be named by the railway company, one by the occupant of such land, and the third by two justices so named.

15. Every railway company in *Ireland* shall cause proper fences to be made and maintained for separating the land taken for the use of the railway from the adjoining lands not taken, and shall also provide and maintain proper drains or other passages either over or under or by the sides of the railway to convey water from or to the lands lying near or affected by the railway, in the same manner and to the same extent as it was conveyed from or to the said lands before the making of the railway, or as near thereto as the case may be; and in case any owner or occupier of such land shall complain of the want of or insufficiency of any such fences, drains, or passages, it shall be lawful for such owner or occupier, within five years after the completion of the works of any railway and the opening of the railway for public use, to present a memorial to the Commissioners of Public Works in *Ireland* stating the ground of his complaint, and thereupon the commissioners shall inquire into the matter of such complaint, and, if they shall so think fit, the said commissioners shall appoint an arbitrator to hear and determine the matter of the said complaint.

16. The arbitrator so appointed shall have and exercise all the powers vested in any arbitrator appointed under the "Railway (*Ireland*) Acts, 1851 and 1860," and shall proceed to investigate the said complaint at some convenient place to be named by the said Commissioners of Public Works, after giving ten days notice of the time and place of meeting to the memorialists and to the railway company, and his award may be traversed in the same manner as any award made by an arbitrator appointed under the "Railways (*Ireland*) Acts, 1851 and 1860," and if not traversed shall be final; and the costs of the said arbitration and of the said arbitrator shall be paid in the same manner as the costs of an arbitration or arbitrator under the "Railways (*Ireland*) Acts, 1851 and 1860."

17. The company shall make all such fences, drains, and passages as by the award of the said arbitrator they shall be directed to make; but no company shall be required to make the same in such a manner as will prevent or obstruct the working or using of the railway, nor shall they be required to make any fence, drain, or passage in respect of which the owner and occupier, or any former owner or occupier, shall have agreed to receive and shall have been paid compensation in lieu of the making of the works themselves.

18. The Railways Act (*Ireland*), 1851, and the Railways Act (*Ireland*), 1860, and this Act, shall be construed together as one Act; and this Act, together with the said Acts, shall be held to be incorporated with those Acts in any Act already or hereafter incorporating those Acts or any of them.

19. This Act may be cited as the Railways Act (*Ireland*), 1864.

CAP. LXXII.

An Act to explain certain provisions contained in the Drainage and Improvement of Lands (*Ireland*) Act, 1863.

[25th July, 1864.]

26 and 27 Vic., c. 88.

- Sec. 1. *Monies, &c., chargeable upon undrained townlands, &c., as upon drained lands.*
2. *Persons interested may object to inspector's report.*
3. *Provisions of recited Act to apply to cases where lands drained by means of pumping.*
4. *Drainage boards may contract for erection and maintenance of works.*
5. *Companies, &c., may contract for supply of water.*
6. *Act and recited Act to be as one.*

"WHEREAS an Act was passed in the session held in the twenty-sixth and twenty-seventh years of her Majesty Queen Victoria, being 'The Drainage and Improvement of Lands Act (*Ireland*), 1863:' and whereas doubts may arise as to the priorities in which, under and by virtue of the forty-ninth section of the said Act, the monies, rentcharges, and instalments therein mentioned shall or may be respectively chargeable upon lands other than those actually drained or improved, though being portion of the same townland or denomination as the lands so drained or improved; and it is expedient that any such doubts should be removed: be it therefore enacted and declared by the

Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:

1. In all cases where any such monies, rentcharges, or instalments as aforesaid shall, by virtue of the said Act, become charged upon any townland or denomination, or any portion or portions of the same, in addition to and together with the lands actually drained or improved (such townland or denomination or portion thereof belonging to the proprietor of the said last-mentioned lands and settled to the same uses as such last-mentioned lands), the said monies, rentcharges, and instalments respectively shall be deemed and taken to be charged upon such townland or denomination, or portions of the same, as the case may be, in the same priority and in like manner in all respects as the said monies, rentcharges, or instalments shall, by virtue of the said Act, be chargeable upon the lands actually drained or improved under the provisions of the same: provided always, that the priority expressed to be created by this Act shall not affect any incumbrance to which no part of the land drained or improved may be liable.

2. Any person interested in any land within any proposed district to which the report of any inspector appointed by the Commissioners may refer may make objections to such report in like manner, and within the like time as such objections may now be made by any proprietor in such proposed district.

3. 'Whereas in some localities it may be found expedient to drain the lands proposed to be drained by pumping only, or by pumping together with the other means contemplated by the said recited Act: be it enacted, that works proper for the drainage of land by pumping shall be deemed to be drainage works within the meaning of the said recited Act; and all the provisions of the said Act shall apply to cases where the lands to be drained under the provisions thereof shall be drained by pumping, either alone or together with other drainage works: provided always, that in all cases where it shall be proposed to drain any lands by means of pumping as aforesaid, the petition to be presented to the commissioners shall set forth, in addition to the particulars required by the said Act, the estimated expense of erecting and maintaining the works and machinery necessary for such pumping, and the mode in which it may be proposed that the amount of such expense shall be levied and applied; and no drainage district shall be constituted where such drainage is intended to be carried on solely or principally by pumping, unless and until the said commissioners shall be satisfied as to the sufficiency of the means intended to be adopted for the due and proper use and maintenance of such pumping works for relief of the lands proposed to be drained and improved.

4. It shall be lawful for any drainage board in any district intended to be drained by pumping as aforesaid from time to time to contract with any person or company for the erection, maintenance, and repair of any such pumping works and machinery connected therewith, and to apply the funds which may be within the control of such board in liquidation of the liabilities incurred by virtue of any such contract.

5. It shall be lawful for any company or public body now or hereafter to be incorporated for the purpose of supplying water to any town or district to enter into any such contract with any such drainage board for the purpose aforesaid, and to carry out and effectuate the same.

6. This Act and the said Drainage and Improvement of Lands Act (*Ireland*), 1863, shall be construed together as one Act.

CAP. LXXIII.

An Act to apply a Sum out of the Consolidated Fund and the Surplus of Ways and Means to the Service of the Year one thousand eight hundred and sixty-four, and to appropriate the Supplies granted in this Session of Parliament.

[29th July, 1864.]

CAP. LXXIV.

An Act for raising the Sum of One Million Six Hundred Thousand Pounds by Exchequer Bonds for the Service of the year one thousand eight hundred and sixty-four.

[29th July, 1864.]

CAP. LXXV.

An Act to amend the Law relating to certain Nuisances on Turnpike Roads, and to continue certain Turnpike Acts in *Great Britain*.

[29th July, 1864.]

CAP. LXXVI.

An Act to make valid defective Registration of Deeds in certain Cases, and to substitute Stamps in lieu of the Fees now payable on Proceedings in the Registrar of Deeds Office in *Ireland*.

[29th July, 1864.]

6 Anne, c. 2 (I.) 2 & 3 W. 4, c. 87.

- Sec. 1. *Defective registration made valid in certain cases.*
2. *Certain cases in which defective registration shall not be made valid by this Act.*
3. *Stamp duties substituted for fees.*
4. *Adhesive stamps used under this Act to be properly cancelled.*
5. *Fees collected by means of stamps under this Act to be deemed stamped duties.*
6. *Document to be used under this Act to bear the proper stamp.*
7. *Officers guilty of fraud or wilful neglect, &c. subject to dismissal.*
8. *Salaries to be paid out of estimates.*
9. *Act for Ireland on'y.*

'WHEREAS by an Act of Parliament made in *Ireland* in the sixth year of the reign of Queen Anne, intituled *An Act for the public registering of all Deeds, Conveyances, and Wills that shall be made of any Honours, Manors, Lands, Tenements, or Hereditaments*, a public register office was established in the city of *Dublin*, and by other Acts of Parliament made in *Ireland*, and by certain Acts of Parliament of the United Kingdom, various provisions have from time to time been made in respect of such register office: And whereas the requirements of said Acts respecting

the memorials of deeds lodged for registry have in many cases not been strictly complied with, and doubts have arisen as to the validity of the registration of those deeds: and whereas by an Act passed in the third year of the reign of King *William the Fourth*, intituled *An Act to regulate the Office for registering Deeds, Conveyances, and Wills in Ireland*, certain fees were made payable for and in respect of the several proceedings in said office, as contained in a schedule to said Act annexed: And whereas it is expedient to substitute stamps for the fees so paid; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. If it shall appear that the registration of any assurance registered prior to the passing of this Act is defective by reason of the memorial thereof not being written on vellum or parchment, or not being directed to the registrar, or not being attested by two witnesses, or not stating the day of the month and year when such assurance bears date, or the names and additions of all the witnesses to such assurance, or the abodes of the witnesses to such memorial, or by reason of any formal omission or defect in the affidavit of the witness proving the signing and sealing of such memorial, the execution of the assurance mentioned in such memorial, or not stating the day and time of the delivery of such memorial to the registrar, then and in every such case the registration of any such assurance, without any amendment or further registry, shall be as good and valid as the same would have been if there had been no such defect in the registration thereof.

2. Provided always, that where the registration of an assurance shall, before the passing of this Act, have been pronounced by competent authorities wholly invalid, such registration shall not be rendered valid by this Act; and where the registration of any assurance shall, before the passing of this Act, have been pronounced by competent authority invalid as to some only of the parties thereto, or as to some only of the lands therein comprised, such registration shall not be rendered valid by this Act, so far as the same shall have been pronounced invalid; and where any person who would have been barred by any assurance, if well registered, shall, before the passing of this Act, have had any dealings with the lands comprised in such assurance on the faith of the registration of the same being invalid, such registration shall not be rendered valid by this Act; and this Act shall not render valid the registration of any assurance as to the lands of which any person shall, at the time of the passing of this Act, be in possession, in respect of any estate which such assurance, if well registered, would have defeated; nor shall this Act prejudice or affect any proceedings at law or in equity at the time of the passing of this Act, in which the validity of the registration of any assurance shall be in question between the party claiming under such assurance and the party claiming adversely thereto, and the registration of such assurance, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this Act and if such proceedings shall

abate or become defective in consequence of the death of the party claiming under or adversely to such assurance, any person who, but for this Act, would have a right of action or suit by reason of the invalidity of the registration of such assurance, shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

3. From and after the first day of *January* one thousand eight hundred and sixty-five none of the fees authorized and made payable under and by virtue of the said Act passed in the second and third years of the reign of King *William the Fourth*, chapter eighty-seven, and of the Act passed in the session of Parliament holden in the eleventh and twelfth years of the reign of her present Majesty, chapter one hundred and twenty, or otherwise payable in the office of the registrar of deeds, shall be received in money, but the same shall be received by a stamp denoting the amount of the fee which would otherwise be payable, such stamp to be affixed to or impressed on the respective documents, or upon the requisition for any such proceedings respectively; and the stamp duty now payable to her Majesty upon memorials of deeds lodged for the purpose of registration, on searches or requisitions for searches, or upon attested copies and abstracts of memorials, shall be received by means of stamps denoting the amount of such duties, which shall be affixed to or impressed upon such documents respectively: provided always, that the registrar of deeds may, by order in writing, direct that any fees which cannot, in his opinion, conveniently be collected by stamps be received in money, and a memorandum stating the amount of such fees, and the date of payment thereof, shall be entered on the deed to be registered, and the registration of such deed shall date from such entry.

4. Whenever an adhesive stamp shall be used on any document to denote the payment of duty under the provisions of this Act, the officer of the registry of deeds office who shall receive the document so stamped, and also the person who shall present the same, shall cancel the same by writing their respective names across the said stamp, so that the stamp may be appropriated to the instrument and be effectually cancelled, and rendered incapable of being used again.

5. The fees to be collected by means of stamps under the provisions of this Act shall be deemed "stamp duties," and shall be placed under the management of the commissioners of inland revenue, to be collected and paid into the exchequer under the same laws and regulations as those made in respect of the other duties of "stamps;" and the provisions in the several Acts for the time being in force relating to stamps under the care or management of the commissioners of inland revenue shall, in all cases not hereby expressly provided for, be of full force and effect with respect to all stamps to be provided under or by virtue of this Act, and to the vellum, parchment, or paper on or to which the same stamps shall be impressed or affixed, and be applied and put in execution for collecting and securing the sums of money denoted thereby, and for preventing, detecting, and punishing all frauds, forgeries, and other offences relating thereto, as fully and effectually, to all intents and purposes, as if such provisions had been herein repeated and spe-

cially enacted with reference to the same and the said sums of money respectively; but a separate and distinct account of all money received in respect of the said fees, and of the stamps to be affixed in lieu of the fees heretofore payable in the said office, for every year ending the thirty-first day of *March*, shall be laid before both houses of Parliament within one month after the termination of such year of account, or, if Parliament be not then sitting, within one month after the commencement of the next session of Parliament.

6. No document which under this Act ought to have a stamp impressed thereon or affixed thereto shall be received or filed or be used in relation to any proceedings in the registry of deeds office or be of any validity for any purpose whatsoever, unless or until the same shall have the proper stamp impressed thereon or affixed thereto; provided, that if at any time it shall appear that any such document has, through mistake or inadvertence, been received or filed or used without having such stamp impressed thereon or affixed thereto, it shall be lawful for the registrar of deeds, if he think fit, to order in writing that such stamp shall be impressed thereon or affixed thereto; and thereupon when a stamp shall have been impressed on such document or affixed thereto in compliance with any such order in writing, such document, and every proceeding in reference thereto, shall be as valid and effectual as if such stamp had been impressed thereon or affixed thereto in the first instance.

7. If any officer of the registry of deeds office, or any other person employed in the performance of any of the matters aforesaid, shall do or commit or connive at any fraudulent act or practice in relation to any stamp to be used under the provisions of this Act, or to any stamp duty or fee or sum of money to be collected or which ought to be collected by means of any such stamp, or if any such officer or person shall be guilty of any wilful act, neglect, or omission whereby any stamp duty, fee, or money which ought to be collected by means of a stamp under this Act shall be lost, or the payment thereof evaded, every such officer or person so offending shall be subject to be dismissed from his office or employment.

8. It shall be lawful for the commissioners of her Majesty's treasury, out of such monies as may be provided and appropriated by Parliament for the purpose, to cause to be paid all salaries payable to the registrars, clerks, and officers employed in the office of the registrar of deeds, wills, and so forth in *Ireland*, and all other necessary expenses of the said office.

9. This Act shall extend to *Ireland* only.

CAP. LXXVII.

An Act to repeal and in part to re-enact certain Acts of Parliament relating to the *Ionian* States, and to establish the Validity of certain Things done in the said States. [29th July, 1864.]

CAP. LXXVIII.

An Act for impressing by machinery Signatures of Names on Bank Notes and certain Bills of the Bank of *Ireland*. [29th July, 1864.]

Sec. 1. *Power to impress names on bank notes, &c., by machinery.*

‘WHEREAS it is expedient that the name or names of the person or persons for the time being authorized by the governor and company of the Bank of *Ireland* to sign bank notes, bank post bills, and bank bills of exchange on behalf of the said governor and company should be impressed by machinery upon such bank notes, bank post bills, and bank bills of exchange, in such form as may from time to time be adopted by the said governor and company, instead of being subscribed in the handwriting of such person or persons respectively: and whereas it is expedient to remove doubts which might arise respecting the validity of such bank notes, bank post bills, and bank bills of exchange:’ be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That from and after the passing of this Act all bank notes, bank post bills, and bank bills of exchange of the said governor and company whereon the name or names of any person or persons authorized to sign such bank notes, bank post bills, and bank bills of exchange on behalf of the said governor and company, may be impressed by machinery, in such form as may from time to time be adopted by the said governor and company, and with the authority of the same, shall be and be taken to be good and valid to all intents and purposes as if such bank notes, bank post bills, and bank bills of exchange had been subscribed in the proper handwriting of the person or persons authorized by the said governor and company to sign the same respectively, and shall be deemed and taken to be bank notes, bank post bills, and bank bills of exchange within the meaning of all laws and statutes whatsoever, and shall and may be described as bank notes, bank post bills, and bank bills of exchange in all indictments and other criminal and civil proceedings whatsoever, any law, statute, or usage to the contrary notwithstanding.

CAP. LXXIX.

An Act to confirm certain Provisional Orders made under an Act of the Fifteenth Year of Her present Majesty, to facilitate Arrangements for the Relief of Turnpike Trusts. [29th July, 1864.]

CAP. LXXX.

An Act to extend the Provisions of “The Criminal Justice Act, 1855,” to the Liberties of the Cinque Ports and to the District of *Romney Marsh* in the County of *Kent*. [29th July, 1864.]

CAP. LXXXI.

An Act for amending the Act 11th & 12th George the Third, Cap. 17 (L.), in respect of the Charges on the Revenues of the Archbishopric of *Armagh*. [29th July, 1864.]

3 & 4 W. 4, c. 37. 11 & 12 G. 3, c. 17.

Sec. 1. *Re-arrangement of the charges on the revenue of the archbishopric of Armagh.*

‘WHEREAS an Act was passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled *An Act to alter and amend the*

Laws relating to the Temporalities of the Church in Ireland, and thereby it was (after and amongst other things) enacted, that when and so soon as the archbishopric of *Armagh* shall become void, the successor thereto and his successors for ever, archbishops of *Armagh*, shall from and out of the revenues of the said archbishopric, pay over to the ecclesiastical commissioners for *Ireland* the annual sum of four thousand and five hundred pounds, the remaining portion of the income of the see being also liable to a tax at the rate of fifteen pounds *per centum*: and whereas there exist charges amounting to a sum of twelve thousand eight hundred and eighty-four pounds one shilling and fivepence upon the revenues of the said archbishopric for the erection of a see house and offices and improvements therein, and for enclosing the demesne, duly certified by certificates under the provisions of the Act eleventh and twelfth of *George the Third*, chapter seventeen: and whereas the first successor of the late Most Reverend Lord *John George Beresford*, Archbishop of *Armagh*, after paying the aforesaid charges, will be unable, under the laws now in force, to recover from his successor any larger proportion thereof than six thousand and twenty pounds seven shillings and eightpence, and he will therefore be a loser of six thousand pounds eight hundred and sixty-three pounds thirty shillings and ninepence; and his successor will be entitled to receive from his next successor a sum of two thousand six hundred and thirty-seven pounds one shilling and tenpence, and will be a loser of three thousand three hundred and eighty-three pounds five shillings and tenpence, and the third in succession to the late Archbishop of *Armagh*, having paid a sum of two thousand six hundred and thirty seven pounds one shilling and tenpence, will lose the whole of that sum: and whereas it is just and reasonable, in consequence of the great reduction of the revenues of the archbishopric of *Armagh*, to lighten the burden of the aforesaid charges on the first of the successors by distributing it amongst a greater number of successors than it is now by law assigned to: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same:

1. That the first successor of the late Archbishop of *Armagh* having paid to the representatives of the said late archbishop the entire sum of twelve thousand eight hundred and eighty-four pounds one shilling and fivepence now remaining due on account of buildings and improvements in the see house and offices, and the enclosing of the demesne, he or his representatives shall be entitled to and receive or recover from his next successor in the said archbishopric, or from his representatives, three fourths of the said sum, which successor having paid the said three fourths of the said sum shall be entitled to and receive from his successor, or representatives, two thirds thereof, that is, one moiety of the sum of twelve thousand eight hundred and eighty four pounds one shilling and fivepence; which successor having paid the said moiety, he, or his representatives, shall be entitled to and receive from his next successor, or his representatives, one half thereof, that is, one fourth of the entire sum now remain-

ing charged on the revenues of the archbishopric of *Armagh* for buildings and improvements in the see house and offices, and for enclosing the demesne; and the several sums apportioned by this Act to be paid by the several successors of the late Archbishop of *Armagh* shall be charges upon the revenues of the said see, and may be paid and recovered within the times and in the same manner as charges for ecclesiastical buildings and improvements may be paid and recovered under the laws now in force: provided that no archbishop shall be deemed a successor within the intention of this Act liable to the payment of any part of any sum of money charged on the archbishopric of *Armagh* by this Act who shall die or resign or be removed from the said archbishopric within the space of one year from the death, resignation, or removal of the archbishop immediately preceding him in the said archbishopric.

CAP. LXXXII.

An Act to guarantee the Liquidation of a Loan for the Service of the Colony of *New Zealand*.

[29th July, 1864.]

CAP. LXXXIII.

An Act to confirm certain Provisional Orders under "The Local Government Act, 1858," relating to the Districts of *Kingston-upon-Hull*, *Stockport*, *Penzance*, *Shanklin*, *Portsmouth*, *Tunbridge Wells*, *Woolwich*, and *Tormoham*.

[20th July, 1864.]

CAP. LXXXIV.

An Act for continuing various expiring Acts.

[29th July, 1864.]

Sec. 1. *Short title.*

2. *Continuance of Acts in Schedule.*

'WHEREAS the several Acts mentioned in the first column of the Schedule hereto are wholly, or as to certain provisions thereof, limited to expire at the times specified in respect of such Acts in the fourth column of the said Schedule: and whereas it is expedient to continue such Acts, in so far they are temporary in their duration, for the times mentioned in respect of such Acts respectively in the fifth column of the said Schedule: be it enacted by the Queens most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the "Expiring Laws Continuance Act, 1864."

2. The Acts mentioned in column one of the said Schedule and the Acts, if any, amending the same, shall, in so far as such Acts or any provisions thereof are temporary in their duration, be continued until the times respectively specified in respect of such Acts in the fifth column of the said Schedule.

SCHEDULE.

1. Original Acts.	2. Amending Acts.	3. How far temporary.	4. Time of Expiration of temporary Provisions.	5. Continued until
3 & 4 Vict. c. 91. ... Linen, Hempen, Cotton, and other Manufactures (Ireland).	5 & 6 Vict. c. 68. 7 & 8 Vict. c. 47.	Whole Act ...	Five years from the date of 22 & 23 Vict. c. 25, i.e., 5 years from the 13th August, 1859.	13th August, 1869.
10 & 11 Vict. c. 90. ... Poor Laws (Ireland).	14 & 15 Vict. c. 68.	As to Appointment of Commissioners, &c.	23rd July, 1864, and end of then next session. 26 & 27 Vict. c. 95.)	23rd July, 1865, and end of then next session.
10 & 11 Vict. c. 98 ... Ecclesiastical Jurisdic- tion.	... ..	As to Provisions continued by 21 & 22 Vict., c. 50.	1st August, 1863, and end of then next session. (26 & 27 Vict. c. 95.)	1st August, 1865, and end of then next session.
11 & 12 Vict. c. 32. ... County Cess (Ireland).	20 & 21 Vict. c. 7.	Whole Act.	1st August, 1864, and end of then next session. (26 & 27 Vict. c. 95.)	1st August, 1865, and end of then next session.
11 & 12 Vict. c. 107. ... Sheep and Cattle dis- eased.	16 & 17 Vict. c. 62.	Whole Act.	1st August, 1864, and end of then next session. (26 & 27 Vict. c. 95.)	1st August, 1865, and end of then next session.
14 & 15 Vict. c. 104. ... Episcopal and Capitular Estates Management.	17 & 18 Vict. c. 116. 22 & 23 Vict. c. 46. 23 & 24 Vict. c. 124.	Whole Act.	1st January, 1864, and end of then next session. (26 & 27 Vict. c. 95.)	1st January, 1865, and end of then next session.
17 & 18 Vict. c. 117. ... Incumbered Estates (West Indies).	21 & 22 Vict. c. 96. 25 & 26 Vict. c. 45.	As to Appointment of Commissioners.	2nd August, 1863, and end of then next session. (21 & 22 Vict. c. 96.)	2nd August, 1865.
24 & 25 Vict. c. 109. ... Salmon Fishery (Eng- land) Act.	... ..	As to Appointment of Inspectors, s. 31.	1st October, 1864 ...	1st October, 1865.

CAP. LXXXV.

An Act for the Prevention of Contagious Diseases at
certain Naval and Military Stations.

[29th July, 1864.]

Sec. 1. *Short title.*2. *Interpretation of terms.*3. *Act to extend only to places in Schedule.*4. *Provisions as to expenses of Act.*5. *Appointment of inspector of hospitals under
this Act.*6. *Hospitals to be examined and reported on.*7. *Power to certify hospitals on such examina-
tion and report.*8. *Hospital to be inspected from time to time.*9. *Power to withdraw certificate.*10. *The granting or withdrawal of certificate to
be published in gazette.*11. *On information, justice may issue notice to
woman named in information.*12. *Constable to serve notice on woman.*13. *Justice may order medical examination at
certified hospital.*14. *Medical examination at certified hospital.*15. *Power for woman to submit to examination
voluntarily.*16. *Under order of justice woman may be de-
tained for medical treatment in hospital.*17. *Penalty for refusing to be examined or to
conform to rules, or quitting hospital.*18. *Penalty for permitting prostitute having con-
tagious disease to resort to any house, &c.,
for prostitution.*19. *Application of 11 & 12 Vict. c. 43, and 14
& 15 Vict., c. 93.*20. *Forms in Second Schedule to be used.*21. *Limitation of actions, &c.*22. *As to time of this Act coming into force.*23. *Continuance of Act.*

‘WHEREAS it is expedient to make provisions calcu-
lated to prevent the spreading of certain contagious
diseases, in the places to which this Act applies:’

Be it therefore enacted by the Queen’s most excel-
lent Majesty, by and with the advice and consent of
the lords spiritual and temporal, and commons, in this
present Parliament assembled, and by the authority of
the same, as follows:

1. This Act may be cited as The Contagious Dis-
eases Prevention Act, 1864.

2. In this Act—

The term “contagious disease” means venereal
disease, including gonorrhoea:

The term “hospital” includes ward of a hospital:

The term “public place” means a thoroughfare or
other public street or place, or a house or room which
is open to the inspection of the police.

3. The places to which this Act applies, shall be
the places mentioned in the first schedule hereto, the
limits of which places shall for the purposes of this
Act be such as are defined in that Schedule.

4. Expenses incurred in the execution of this Act
shall be paid under the direction of the lord high ad-
miral of the United Kingdom or the commissioners
for executing his office (hereafter in this Act styled the
admiralty,) and of such one of her Majesty’s principal
secretaries of state as her Majesty thinks fit for the

time being to intrust with the seals of the war department (hereafter in this Act styled the secretary of state for war), out of money to be provided by Parliament for the purpose.

5. The admiralty and the secretary of state for war shall, on the passing of this Act, appoint a superior medical officer of her Majesty's navy or army to be, during pleasure, inspector of hospitals certified under this Act, and may from time to time, on the death, resignation, or removal from office of any such inspector, appoint another such officer in his stead.

6. On the application of the authorities having the direction or management of any hospital desiring that such hospital should be certified under this Act, the admiralty and the secretary of state for war may direct the inspector of hospitals to examine and report to them on the condition of that hospital, and on the regulations established for its direction and management.

7. If on such examination and report the hospital appears to the admiralty and the secretary of state for war to be useful and efficient for the purposes of this Act, and is certified in writing to be so by the admiralty and the secretary of state for war, the same shall be deemed a certified hospital for the purposes of this Act; and every such hospital is in this Act referred to as a certified hospital; and the admiralty and the secretary of state for war shall state in their certificate what persons or officers for the time being are to be deemed the authorities of the hospital for the purpose of exercising the powers hereinafter given, and the persons or officers so stated shall be such authority accordingly.

8. The inspector shall from time to time visit and inspect every certified hospital.

9. If on the report of the inspector respecting any certified hospital the admiralty and the secretary of state for war think proper to withdraw their certificate, that hospital shall thereupon cease to be a certified hospital for the purposes of this Act.

10. A notice shall be published in the *London* or *Dublin Gazette* (as the case may require) of the granting or withdrawal of any certificate relative to any hospital under this Act; and a copy of the gazette containing any such notice shall be sufficient evidence of such granting or withdrawal: and any such certificate shall be presumed to be in force until the withdrawal thereof is proved.

11. Where an information, in the form given in the second Schedule to this Act, or to the like effect, is laid before a justice of the peace by a superintendent or inspector of metropolitan police, or by a superintendent or inspector of police or constabulary authorized to act in any place to which this Act applies, or by any medical practitioner duly registered as such, the justice may, if he thinks fit, issue to the woman named in the information a notice in the form given in the same Schedule, or to the like effect.

12. A constable or other peace officer shall serve such notice on the woman to whom it is directed, by delivering the same to her personally, or by leaving the same with some person for her at her last or usual place of abode.

13. In either of the following cases; namely,—

(1.) If the woman on whom such notice is

served appears herself, or by some person on her behalf, at the time and place appointed in the notice, or at some other time and place appointed by adjournment:

(2.) If she does not so appear, and it is shown (on oath) to the justice present that the notice was served on her a reasonable time before the time appointed for her appearance, or that reasonable notice of such adjournment was given to her (as the case may be):

the justice present, on oath being made before him substantiating the matter of the information to his satisfaction, may, if he thinks fit, order such woman to be taken to a certified hospital for medical examination.

14. Such order shall be a sufficient warrant for any constable or peace officer to whom the order is delivered, to apprehend such woman, and to convey her with all practicable speed to the hospital therein named, and for the authorities of the hospital to cause her to be examined by some medical officer of such hospital, for the purpose of ascertaining whether or not she has a contagious disease, and in case, on such examination, it is ascertained that she has a contagious disease, then to detain her in the hospital for twenty-four hours from the time of her being brought there.

15. Any woman on whom notice is served by any constable or peace officer, in pursuance of this Act, may signify to him her willingness to submit herself voluntarily for examination to the medical officers of the nearest certified hospital; and in that case it shall be the duty of such constable or peace officer to accompany her to such hospital, and her examination shall then be made in the same manner and with the same consequences as if she had been brought to that hospital to be examined in pursuance of the order of a justice.

16. Within the said period of twenty-four hours the authorities of such hospital shall cause a certificate, signed by the medical officer who has made such examination, stating (if the fact be so) that on such examination it has been ascertained that such woman has a contagious disease, to be made out and laid before the justice by whom the order was made, or some other justice having the like jurisdiction; and thereupon such justice may, if he thinks fit, order the authorities of such hospital to detain such woman in the hospital for medical treatment until discharged by such authorities, and such order shall be a sufficient warrant to such authorities to detain such woman, and such authorities shall detain her accordingly; provided, that no woman shall be detained under any such order for a longer period than three months.

17. If any woman ordered as aforesaid to be taken to a certified hospital for medical examination refuses to submit to such examination, or if any woman ordered to be detained in a certified hospital for medical treatment refuses or wilfully neglects while in the hospital to conform to the regulations thereof, or quits the hospital without being discharged from the same as aforesaid, every such woman shall be guilty of an offence against this Act, and on summary conviction thereof before two or more justices of the peace shall be liable to imprisonment in the case of a first offence, for any term not exceeding one month and in the case

of a second or any subsequent offence for any term not exceeding two months.

18. If any person, being the owner or occupier of any house, room, or place within the limits of any place to which this Act applies, or being a manager or assistant in the management thereof, knowing or having reasonable cause to believe any common prostitute to have a contagious disease, induces or suffers such common prostitute to resort to or be in such house, room, or place for the purpose of prostitution, every such person shall be guilty of an offence against this Act, and on summary conviction thereof before two or more justices of the peace shall be liable to a penalty not exceeding ten pounds, or, at the discretion of the justices, to be imprisoned for any term not exceeding three months, with or without hard labour.

Provided, that a conviction under this enactment shall not exempt the offender from any penal or other consequences to which he or she may be liable for keeping or being concerned in keeping a bawdy house or disorderly house, or for the nuisance thereby occasioned.

19. All proceedings under this Act before and by justices shall be had, in *England* according to the provisions of the Act of the session of the eleventh and twelfth years of her Majesty (chapter forty-three), "to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within *England* and *Wales*, with respect to Summary Convictions and Orders," and in *Ireland* according to the provisions of the Petty Sessions (*Ireland*) Act, 1851, save so far as those provisions respectively are inconsistent with any provision of this Act, and save also that, except where the woman concerning whom an information is laid under this Act in the form given in the second schedule desires the contrary, the room or place in which a justice sits to inquire into the truth of the statements contained in any such information shall not be deemed an open court for that purpose, and, except in the case aforesaid, such justice may in his discretion order that no person have access to or be or remain in that room without his consent or permission.

20. The forms of orders and certificate given in the second schedule to this Act shall be used for the purposes of this Act, with such variations as circumstances may require.

21. For the protection of persons acting in the execution of this Act, all actions and prosecutions against any person for anything done in pursuance or execution or intended execution of this Act shall be laid and tried in the county where the fact was committed, and shall be commenced within three months after the fact committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action; and in any such action the defendant may plead generally that the act complained of was done in pursuance or execution or intended execution of this Act, and give this Act and the special matter in evidence at any trial to be had thereupon; and the plaintiff shall not recover in any such action if tender of sufficient amends is made before such action brought, or if a sufficient sum of money is paid into Court after such action

brought, by or on behalf of the defendant; and if a verdict passes for the defendant, or the plaintiff becomes nonsuit, or discontinues any such action after issue joined, or if upon demurrer or otherwise judgment is given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant has by law in other cases; and though a verdict is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the judge before whom the trial is had certifies his approbation of the action and of the verdict.

22. This Act shall not come into force in any place mentioned in the said first schedule until a hospital situate within or within fifty miles of the outward limits of such place shall have been duly certified and notice of its having been so certified been duly given in manner provided by this Act.

23. This Act shall continue in force for three years from the passing thereof, and no longer.

The FIRST SCHEDULE.

Portsmouth.....The limits of the municipal borough of Portsmouth, and of the residue of the Island of Portsea, and of the parish of Alverstoke, and of the township of Landport.

Plymouth.....The limits of the following parishes, namely—

St. Andrew,	} Plymouth.
Charles the Martyr.	
St. Peter,	
St. James the Less,	
Holy Trinity,	
Christ Church,	} Devonport
St. John,	
Stoke Damerel,	
St. James the Great	
St. Paul,	
St. Mary,	} Stoke, and
St. Stephen,	
St. George,	
	Morice
	Town.
	Stonehouse.

Woolwich.....The limits of the parishes of Woolwich, Plumstead, and Charlton.

Chatham.....The limits of the following parishes, namely—

Chatham,
Gillingham,
St. Nicholas, Rochester,
St. Margaret, Rochester,
Strood, and
Frindsbury,
and of the Hamlet of Grange, otherwise Grench.

Sheerness.....The limits of the parishes of Minster, and of the township of Queenborough.

Aldershot.....The limits of the following parishes, namely—

Purbright,
Ash,
Compton,
Peppar Harrow,
Frimley,
Puttenham,
Seal, and
Tongham,
Elstead,
Farnham,
Bisley,
Aldershot,
Yateley,
Crandall,
Dogmersfield,
Winchfield,
Hartley Wintney,
Cove,
Eversley,
Farnborough,
Binstead,
Bentley,
Sandhurst, in the County of Berks,

in the
County of
Surrey.

in the
County of
Hants.

Colchester.....The limits of the following parishes,
namely:—

St. Botolph.
St. Giles,
St. Mary at the Wall.
Old Trinity.
St. Runwald's.
St. Peter's.

Shorncliffe.....The limits of the following parishes,
namely:—

Oheriton.
Hythe.
Folkestone.

The Curragh...The limits of the following parishes,
namely:—

Kilcullen.
Kildare.
Ballysax.
Great Conwell.
Morristown-beller.

Cork.....The limits of the borough of Cork for
municipal purposes.

Queenstown....The limits of the town for Queens-
town for the purposes of town im-
provement.

THE SECOND SCHEDULE.

FORM OF INFORMATION.

to wit. } THE information of C.D. of
superintendent of police for [or
medical practioner, or as the case may be], taken
this day of 186 , before the under-
signed, one of her majesty's justices of the peace in
and for the said [county] of who says he has
good cause to believe that A.B. of in the
[county] of is a common prostitute, and has a
contagious disease within the meaning of The Conta-
gious Diseases Prevention Act, 1864, and within
fourteen days before the date of this information, that
is to say, on day, the day of , was
in a public place within the limits of a place to which

the said Act applies, that is to say, in street, in
the parish of for the purpose of prostitution.

Taken before me the day and year first above men-
tioned.

(Signed) L.M.

FORM OF NOTICE.

To A.B. of

TAKE notice, that an information, a copy whereof
is subjoined hereto, has been laid before me, and that,
in accordance with the provisions of the Act therein
mentioned, the truth of the statements therein con-
tained will be inquired into before me, or some other
justice, at , on the day of , at
o'clock.

You are, therefore, to appear before me, or such
other justice, at that place and time, and to answer to
what is stated in the said information.

You may appear yourself, or by any person on
your behalf.

If you do not appear, you may be ordered, without
further notice, to be taken to a certified hospital for
medical examination.

If you prefer it, you may go with the constable [or
as the case may be] who serves this notice to the
hospital at and submit yourself there
to medical examination.

Dated this day of
(Signed) L.M.

Justice of the peace for
[Subjoin copy of information.]

FORM OF ORDER FOR EXAMINATION.

BE it remembered, that on the day of
to wit. } in pursuance of The Contagious Diseases
Prevention Act, 1864, I, one of her Majesty's jus-
tices of the peace in and for the said [county] of
do order that A.B. of be taken to
hospital (being a certified hospital within the meaning
of the said Act) for medical examination.

(Signed) L.M.

FORM OF MEDICAL CERTIFICATE.

To L.M., Esq., and others, her Majesty's justices
of the peace for the [county] of

IN pursuance of The Contagious Diseases Preven-
tion Act, 1864, I hereby certify that I have this day
examined in this hospital A.B. of , and that
she has a contagious disease within the meaning of
the said Act.

Dated at the hospital this day of
186 .

(Signed) E.F.
house surgeon to the hospital
[or as the case may be].

FORM OF ORDER FOR DETENTION IN HOSPITAL.

To the authorities of the
Hospital at

IN pursuance of The Contagious Diseases
to wit. } Prevention Act, 1864, I, one of her Ma-
jesty's justices of the peace in and for the said
[county] of , do order that A.B. of be
detained in the Hospital at for medical
treatment until duly discharged by you, and I do

command you to detain her accordingly: and for so doing this shall be your warrant.

Dated this day of 186 .
(Signed) L.M.

CAP. LXXXVI.

An Act to permit for a limited Period Compositions for Stamp Duty on Bank Post Bills of Five Pounds and upwards in *Ireland*. [29th July 1864.]

16 & 17 Vict., c. 63.

Sec. 1. *Power to treasury to compound with bankers in Ireland for the stamp duty on bank post bills for a period of three years.*

‘WHEREAS by an Act passed in the sixteenth and seventeenth years of her Majesty’s reign, chapter sixty-three, the Commissioners of Her Majesty’s Treasury are authorized and empowered to compound and agree with all or any bankers in *Scotland* or elsewhere for a competition in lieu of the stamp duties payable on the bills of exchange of such bankers: And whereas it is expedient to permit bankers in *Ireland* for a limited period to compound for the stamp duties payable on their bank post bills as well as on their bills of exchange:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. It shall be lawful for the Commissioners of Her Majesty’s Treasury and they are hereby authorized and empowered to compound and agree with any banker in *Ireland* for a composition in lieu of the stamp duties payable on the bank post bills to be made or drawn by such banker at any time during the period of three years from the passing of this Act for any sum of money amounting to five pounds or upwards, and such composition shall be made on the like terms and conditions and with such security as the said Commissioners are by the said Act empowered to require in the case of compounding for the stamp duties on bills of exchange; and upon such composition being entered into by such banker it shall be lawful for him, during the period aforesaid, to make, draw, and issue all such bank post bills, for which composition shall have been made, on unstamped paper, anything in any Act contained to the contrary notwithstanding.

CAP. LXXXVII.

An Act to amend the Law relating to Publication of Accounts of Corn imported, and to Returns of Purchases and Sales of Corn. [29th July 1864.]

CAP. LXXXVIII.

An Act for the better Regulation of the Traffic on *Westminster Bridge*, and for the prevention of Obstructions thereon. [29th July 1864.]

CAP. LXXXIX.

An Act to amend the Defence Act, 1842. [29th July 1864.]

Sec. 1. *Effect of past orders in council under sec. 5 of 5 & 6 Vict. c. 94.*

2. *Effect of future orders in council.*

3. *Saving of rights of all persons.*

4. *Land, &c. vested under this Act to be held according to 27 & 28 Vict. c. 57.*

5. *Short title.*

Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present Parliament assembled, and by the authority of the same, as follows:

1. Where, under section five of the Defence Act, 1842, any order in council has been made before the passing of this Act transferring to any body or persons, for any public service, the management, control, and use of any land, the land in the order comprised, with the appurtenances, shall, from the passing of this Act, be vested in the body or persons in the order described for an absolute estate in fee simple, in trust for her Majesty, her heirs and successors, for the public service in the order mentioned.

2. Where, under the said section, any order in council is made after the passing of this Act, whereby any hereditaments are expressed to be transferred to any body or persons for any public service, the hereditaments in the order comprised shall by virtue of the order and of this Act be vested, to all intents, at law and in equity, in the body or persons to whom the transfer is expressed to be made, for the estate or interest for which the same are in the order expressed to be transferred, to be held by the body or persons aforesaid in trust for her Majesty, her heirs and successors, for the public service in the order mentioned.

3. Nothing in this Act shall affect any estate, interest, right, or claim in or to any land or hereditaments comprised in any such order, made or to be made, other than such estate, interest, right, or claim as at the time of the making of the order was or is had therein or thereto by or in trust for her Majesty, her heirs and successors.

4. Any land or hereditaments vested under this Act in the Lord High Admiral of the United Kingdom, or the Commissioners for executing his office, shall so vest and shall be held and used subject and according to the provisions of the Admiralty Lands and Works Act, 1864, as if the same had been purchased or taken by agreement under that Act.

5. This Act may be cited as “The Defence Act Amendment Act, 1864.”

CAP. XC.

An Act to amend an Act of the present Session, Chapter Eighteen, as to the Stamp Duties on certain Letters or Powers of Attorney. [29th July 1864.]

27 & 28 Vict. c. 18.

Sec. 1. *Letters of attorney, &c. how to be charged with stamp duty.*

2. *As to letters requesting that dividends or interest of stocks, &c. may be paid to nominees.*

‘WHEREAS by an Act passed in the present session of Parliament, chapter eighteen, certain stamp duties are granted and imposed for and upon any letter or power

of attorney for the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds, and also for and upon any letter or power of attorney for the receipt of dividends of any such stocks or funds; and doubts have arisen whether both the said duties may not be chargeable upon one and the same instrument:’ Be it enacted by the Queen’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same as follows:—

1. No letter or power of attorney made for the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds, and duly stamped in that behalf, shall be chargeable with any further or other stamp duty by reason of its containing therein any authority for the receipt of dividends or any such stock or funds.

2. ‘And whereas doubts have arisen as to whether certain letters or writing hereinafter described are chargeable with stamp duty as letters or powers of attorney:’ Be it enacted, that no letter or other writing under hand only containing any request or direction to any joint stock or other company or society, or to any secretary, treasurer, or other officer thereof, or to any banker, by the owner or proprietor of any stocks, funds, or shares of or in any such company or society, to pay the dividends or interest arising from any such stocks, funds, or shares to any person named in such order, request, or direction, shall be chargeable with stamp duty as a letter or power of attorney.

CAP. XCI.

An Act for the more effectual Protection of Her Majesty’s Naval and Victualling Stores.

[29th July 1864.]

CAP. XCII.

An Act for annexing Conditions to the Appointment of Persons to offices in the Governing Bodies of certain Public Schools and Colleges.

[29th July, 1864.]

CAP. XCIII.

An Act for confirming certain Provisional Orders made by the Board of Trade under The General Pier and Harbour Act, 1861, relating to *Brighton, Eastbourne, Sandown, Walton-on-the-Naze, Clevedon, Rhyl, Bray, Kircubbin, Walton (Suffolk), Holywood, Eze Bight, Lytham, Ardglass, Filey, Greenock, Carlinsford, Lough, Wexford, Torquay, and Oban.*

[29th July 1864.]

CAP. XCIV.

An Act to remove Disabilities affecting the Bishops and Clergy of the Protestant Episcopal Church in *Scotland.*

[29th July, 1864.]

32 G. 3, c. 63. 3 and 4 Vict. c. 33. 59 G. 3, c. 60.

Sec. 1. Sec. 9 of 32 G. 3, c. 63, repealed.

2. Definition of “Protestant Episcopal Church in *Scotland.*”

3. 3 and 4 Vict., c. 33, in part repealed.

4. As to application of provisions of 59 G. 3, c. 60.

5. *Persons admitted into holy orders by bishops in Scotland not to be admitted to benefices, &c., in England or Ireland without consent of bishop of the diocese.*

6. *Penalty on such persons officiating in certain cases without consent of bishop.*

“WHEREAS an Act was passed in the thirty-second year of the reign of his Majesty King George the Third, intituled *An Act for granting relief to Pastors, Ministers and Lay Persons of the Episcopal Communion in Scotland*: and whereas by the ninth section of the said Act it is provided and declared that ‘no person exercising the functions or assuming the office and character of a pastor or minister of any order in the episcopal communion in *Scotland* as aforesaid shall be capable of taking any benefice, curacy or other spiritual promotion within that part of *Great Britain* called *England*, the dominion of *Wales*, or the town of *Berwick-upon-Tweed*, or of officiating in any church or chapel within the same, where the liturgy of the church of *England* as now by law established is used, unless he shall have been lawfully ordained by some bishop of the Church of *England* or of *Ireland*:’ and whereas an Act was passed in the third and fourth years of the reign of her present Majesty Queen Victoria, intituled *An Act to make certain Provisions and Regulations in respect to the exercise within England and Ireland of their Office by the Bishops and Clergy of the Protestant Episcopal Church in Scotland*; and also to extend such Provisions and Regulations to the Bishops and Clergy of the Protestant Episcopal Church in the United States of America; and also to make further Regulations in respect to Bishops and Clergy other than those of the United Church of England and Ireland, by which Act the provisions in the said ninth section of the said first-recited Act were altered, extended, and amended; and whereas it is expedient that the disabilities affecting the bishops and clergy of the said Protestant Episcopal Church in *Scotland* imposed by the said recited Acts should be removed, and for that purpose that the said recited Acts should be in part repealed: and whereas by an Act passed in the fifty-ninth year of the reign of his said late Majesty King George the Third, intituled *An Act to permit the Archbishops of Canterbury and York and the Bishop of London for the time being to admit persons into Holy Orders specially for the Colonies*, it is enacted that ‘no person who shall have been admitted into holy orders by the bishops of *Quebec*, *Nova Scotia*, or *Calcutta*, or by any other bishop or archbishop than those of *England* or *Ireland*, shall be capable of officiating in any church or chapel of *England* or *Ireland*, without special permission from the archbishop of the province in which he proposes to officiate, or of having, holding, or enjoying, or of being admitted to, any parsonage or other ecclesiastical preferment in *England* or *Ireland*, or of acting as curate therein, without the consent and approbation of the archbishop of the province and also of the bishop of the diocese in which any such parsonage or ecclesiastical preferment or curacy may be situated;’ and whereas doubts may arise after the passing of this Act whether the provisions of the said last-recited Act would apply to persons admitted into holy orders by bishops of the

Protestant Episcopal Church in *Scotland*, and it is expedient that such doubts should be removed; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The said ninth section of the said first recited Act is hereby repealed.

2. The words "Protestant Episcopal Church in *Scotland*" shall for the purposes of this Act, mean the Episcopal Communion in *Scotland* as mentioned in the said first recited Act.

3. The said second recited Act, so far only as it relates to the Protestant Episcopal Church in *Scotland*, or the bishops and clergy thereof, is hereby repealed.

4. The provisions and enactments of the said last-recited Act shall not be or be held to be applicable to any person admitted into holy orders by a bishop of the Protestant Episcopal Church in *Scotland*.

5. No person admitted into holy orders by any bishop of the Protestant Episcopal Church in *Scotland* shall be entitled to be admitted or instituted to any benefice or other ecclesiastical preferment in *England* or *Ireland*, without the consent and approbation of the bishop of the diocese in which such benefice or other ecclesiastical preferment may be situated; and any such bishop shall be entitled to refuse such consent and approbation without assigning reason for such refusal, any law or practice to the contrary notwithstanding; and every such person seeking to be admitted or instituted to such benefice or other ecclesiastical preferment, or to be licensed to any curacy, shall before being admitted, instituted, or licensed, make and subscribe before such bishop every such declaration and subscription as he would by law have been required to make and subscribe at his ordination if he had been ordained by a bishop of the United Church of *England* or *Ireland*: provided always, that the provisions of this section shall not apply to any such person who shall hold or shall have held any benefice or ecclesiastical preferment in *England* or *Ireland*.

6. Any person admitted into holy orders by any bishop of the Protestant Episcopal Church in *Scotland*, and who does not hold or who has not held any benefice or ecclesiastical preferment in *England* or *Ireland*, who shall knowingly officiate on more than one day within three months in any church or chapel in any diocese in *England* or *Ireland*, without notifying the same to the bishop of the diocese in which such church or chapel is situate, or who shall officiate contrary to any injunction of the bishop of the diocese under his hand and seal, shall for every such offence forfeit and pay the sum of ten pounds to the governor of Queen Anne's bounty, to be recovered by action of debt, brought in the name of the treasurer of the said bounty, in any of her Majesty's Courts of Record at Westminster, or in the Court of Session in *Scotland* at the suit of the public prosecutor, or in *Ireland*, in any court of common law in the name of the Ecclesiastical Commissioners.

CAP. XCV.

An Act to amend the Act Ninth and Tenth Victoria Chapter Ninety three, for compensating the Families of Persons killed by Accident.

[29th July, 1864.]

9 and 10 Vict. c. 93.

Sec. 1. *Where no action brought within six months by executor of person killed, then action may be brought by persons beneficially interested in result of action.*

2. *Money paid into court may be paid in one sum, without regard to its division into shares. If not accepted, defendant entitled to verdict on the issue.*

3. *Acts to be read as one.*

‘WHEREAS by an Act passed in the session of Parliament holden in the ninth and tenth years of her Majesty's reign, entitled *An Act for compensating the Families of Persons killed by Accident*, it is amongst other things provided, that every such action as therein-mentioned shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused as therein mentioned, and shall be brought by and in the name of the executor or administrator of the person deceased: and whereas it may happen by reason of the inability of default of any person to obtain probate of the will or letters of administration of the personal estate and effects of the person deceased, or by reason of the unwillingness or neglect of the executor or administrator of the person deceased to bring such action as aforesaid, that the person or persons entitled to the benefit of the said Act may be deprived thereof; and it is expedient to amend and extend the said Act as herein-after mentioned:’ be it therefore enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. If and so often as it shall happen at any time or times hereafter in any of the cases intended and provided for by the said Act that there shall be no executor or administrator of the person deceased, or that there being such executor or administrator no such action as in the said Act mentioned shall within six calendar months after the death of such deceased person as therein mentioned have been brought by and in the name of his or executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure as nearly as may be, as if it were brought by and in the name of such executor or administrator.

2. ‘And whereas by the second section of the said Act it is provided that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and whose benefit such action shall be brought,

and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided between the before-mentioned parties in such shares as the jury shall by their verdict direct; be it enacted and declared, that it shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under the said Act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

3. This Act and the said Act shall be read together as one Act.

CAP. XCVI.

An Act to enable certain Royal and Parliamentary Burghs in *Scotland* to avail themselves of the Provisions of the Acts Twenty-second and Twenty-third *Victoria*, Chapter Sixty-six, and Twenty-third and Twenty-fourth *Victoria*, chapter One Hundred and Forty-six, for regulating the Sale of Gae.

[29th July, 1864.]

CAP. XCVII.

An Act to make further Provisions for the Registration of Burials in *England*. [29th July 1864.]

CAP. XCVIII.

An Act for extending the Provisions of "The Bleaching and Dyeing Works Act, 1860."

[29th July 1864.]

23 & 24 Vict. c 78.

Sec. 1. *Extension of Bleaching and Dyeing Works Act.*

2. *Short title.*

WHEREAS by the Act of the session of the twenty-third and twenty-fourth years of the reign of her present Majesty, chapter seventy eight, and hereinafter referred to as "The Bleaching and Dyeing Works Act, 1860," the employment of Women, young persons, and children in the process of finishing any yarn or cloth of cotton, wool, silk, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, is placed under the regulations of the Acts therein recited, and generally known and hereinafter referred to as the Factory Acts, in cases where the said process is carried on in bleaching and dyeing works in which steam, water, or other mechanical power is used: And whereas by the Act of the session of the twenty-sixth and twenty-seventh years of the same reign, chapter thirty-eight, the provisions of the said Bleaching and Dyeing Works Act, 1860, are extended to the employment of women, young persons, and children in calendering and finishing works, in which steam, water, or other mechanical power is used: And whereas the process of finishing is carried on in other works besides those specified in the said Acts, and as so carried on is attendant with the same evils to the health of the women, young persons, and children employed as in the above-mentioned works: And whereas it is expedient

that the process of finishing, wheresoever carried on, should be regulated in the same manner as it is regulated in the above-mentioned works, and that the provisions of the Factory Acts should also be extended to the employment of women, young persons, and children in the processes of hooking or lapping, or making up and packing: Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. After the passing of this Act, all such provisions of the said Bleaching and Dyeing Works Act, 1860, as are now in force, shall apply to women, young persons, and children employed for hire in any building or premises whatever in the processes of finishing, hooking, or lapping, or of making-up and packing, any yarn or cloth of cotton, wool, silk, or flax, or any of them, or any mixture of them, or any yarn or cloth of any other material or materials, or any of such processes; and in the construction of the said Bleaching Act of 1860, and the Acts therein recited, "bleaching works" and "dyeing works" and "factory" shall include any buildings or premises in which the said processes or any of them are carried on: Provided always, that this Act shall not apply to any building or premises in which all the persons employed are males over the age of fourteen years; provided also, that in buildings and premises within this Act the owner or owners may from time to time, by notice to be given in writing to the inspector, elect what shall be the working hours in such buildings and premises, so as that the total number of hours during which females, young persons, and children may be lawfully employed in any one day or week, according to the provisions of the said recited Act, be not exceeded, and so as the working hours elected be between six in the morning and six in the evening, or seven in the morning and seven in the evening, or eight in the morning and eight in the evening.

2. This Act may be cited for all purposes as the "Bleaching and Dyeing Works Extension Act, 1864."

CAP. XCIX.

An Act to amend the Procedure of the Civil Bill Courts in *Ireland*. [29th July, 1864.]

Sec. 1. *Commencement of Act.*

2. *Short title.*

3. *Interpretation of terms.*

4. *Decrees of the Civil Bill Courts to be executed by the sheriffs and their bailiffs.*

5. *Sheriffs to appoint assistant bailiffs.*

6. *Chairman may fine bailiffs for neglect or misconduct.*

7. *Names of bailiffs to be published.*

8. *Particulars of fees, &c. to be printed on decrees.*

9. *Judge may order writ of certiorari to remove judgment of Civil Bill Court into Superior Court.*

10. *Form of warrant for execution of decrees.*

11. *Fees to be taken by sheriff according to the schedule (B.)*

12. *Party demanding execution to lodge certificate of sum due.*
 13. *Sheriff to levy only for sum stated.*
 14. *Sheriff to receive poundage fees on a levy upon the goods of a party.*
 15. *Fee to sheriff from party demanding execution against the body of a party.*
 16. *Decree to be executed within two months, or returned, with a statement of the reasons for its non-execution.*
 17. *Penalty on sheriff or bailiff receiving other than the fees allowed.*
 18. *Bailiff extorting guilty of a misdemeanor.*
 19. *Sheriff or his bailiff to execute all decrees for possession of land.*
 20. *Under-sheriff to keep "ejectment" and "decree and order" books.*
 21. *Proceedings on lodging civil bill decree for execution.*
 22. *Outgoing sheriff to give a list of decrees, &c. remaining unexecuted to his successor.*
 23. *Sheriffs, in execution of decrees, to have the same powers as high sheriffs, &c.*
 24. *Priority of executions issuing out of Superior Court and Civil Bill Court.*
 25. *Execution not to be unlawful by reason of any irregularity in the mode of executing it.*
 26. *Rescuing goods, or assaulting sheriff or bailiff in the execution of their duty, a misdemeanor.*
 27. *Under-sheriff to attend the Civil Bill Court.*
 28. *Regulates the sale of goods taken in execution.*
 29. *As to interest in land.*
 30. *Power of under-sheriff or bailiff to sell by auction. Goods taken in execution.*
 31. *Provides for the appointment of a deputy under-sheriff as to the duties of the Civil Bill Court, in case of illness, &c. of under-sheriff.*
 32. *Execution to be superseded on payment of debt and costs.*
 33. *Clerks of peace to retain a poundage on the fees lodged with them for the account of the sheriffs.*
 34. *General power of appeal in all proceedings under this Act.*
 35. *Judge of assize may state case for opinion of Superior Courts.*
 36. *Courts of common law shall finally hear and determine such cases.*
 37. *Special case may be amended.*
 38. *Judges to make rules.*
 39. *Cost of special case.*
 40. *No suit to be brought in the Superior Courts or a civil bill decree, &c.*
 41. *No civil bill to be brought upon any judgment or decree of a Superior or Petty Session Court.*
 42. *Amending the 50th section of 14 & 15 Vict. c. 57, by directing the time within which executors' accounts should be lodged.*
 43. *Chairman may issue a warrant for bringing up a prisoner to give evidence.*
 44. *Chairman may renew decree in ejectment within six months, if possession unlawfully taken by the defendants*
 45. *Affidavits to be used in Civil Bill Courts may be sworn before particular persons out of sessions.*
 46. *Affidavit of landlord or agent admissible in ejectment for nonpayment of rent.*
 47. *Power to chairman to adjourn case to another division.*
 48. *Power of amendment.*
 49. *Amendment of orders or convictions of magistrates on appeal.*
 50. *Power to take fresh recognizances on appeals where those entered into may be defective in form.*
 51. *Power to give costs when appeal not proceeded with.*
 52. *Expenses to be allowed to witnesses, as chairman shall direct.*
 53. *Process out of a county may be served by any person, and when served by a process officer of the county may be proved by affidavit.*
 54. *This Act incorporated with recited Act.*
 55. *Existing decrees to remain in force, and to be executed with annexed warrants, &c.*
 56. *Original not necessary to be shown at time of service, &c.*
 57. *Entries in clerk of the peace's book evidence.*
 58. *General rules may be made from time to time.*
 59. *Schedules to be part of this Act.*
 60. *Repeal of Acts and parts of Acts as in schedule (C.)*
 61. *Under-sheriff shall not act as an attorney before the chairman. Penalty, £100.*
 62. *Under-sheriff to keep an office in the county town or in one of the quarter sessions towns.*
 63. *Decrees and other documents may be delivered to the sheriff personally or by registered letter at the under-sheriff's office, and not elsewhere.*
 64. *Protection of sheriffs acting in execution of this Act.*
 65. *Fees in schedule (B) to be the lawful fees for the discharge of the duties named.*
 66. *Fees in schedule (B.) to be chargeable against the unsuccessful party, save where otherwise provided.*
 67. *When business of court shall not be transacted.*
- ' WHEREAS it is expedient to amend the procedure in the Civil Bill Courts in Ireland and to make provision for the better execution of the decrees and orders of such courts: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:
1. The provisions of this Act shall come into operation on the first day of March one thousand eight hundred and sixty five.
 2. This Act may be cited for all purposes as "The Civil Bill Courts Procedure Amendment Act (Ireland) 1864."
 3. In the construction of this Act the following words and expressions shall have the force and meaning hereby assigned to them, unless there be something in the subject or context repugnant thereto:

The word "person" or "party" shall extend to and include any body politic, corporate, or collegiate, whether aggregate or sole, and any public company:

The word "lands" shall include houses, messuages, and tenements and premises, whether corporeal or incorporeal; and the word "premises" shall include lands, houses, and tenements, whether corporeal or incorporeal:

The word "county" shall extend to and include a county of a city, a county of a town, a town, a city, a borough, and a riding of a county:

The word "decree" shall include a dismiss, or any renewal of a decree or dismiss, or any order of the Civil Bill Courts for the payment of money, or any warrant, or any "order" for, or "writ of restitution," issuing out of or awarded by such Courts:

The word "defendant" shall mean also the person or party whose body, goods, or chattels may be liable to be taken under any decree, dismiss, renewal, or order of the Civil Bill Courts:

The word "bailiff" shall mean any bailiff duly appointed by the sheriff under and in pursuance of this Act, and shall include any person assisting the sheriff, under sheriff, or such bailiff, with the authority and in the presence of such sheriff, under-sheriff, or bailiff, in the execution of any decree, dismiss, renewal, order, writ, or warrant of the Civil Bill Courts:

The expression "Civil Bill Court" shall mean the Court for the hearing of civil bill causes held in the several counties of *Ireland*:

The expressions "Chairman of the Court of Quarter Sessions," "Chairman of the County," and "Chairman" shall include the Judge of the Court for hearing civil bill causes for such county, and shall extend to and include the Recorders of the city of *Dublin* and the city of *Cork*, and the Recorder of any city, borough, or town in *Ireland*, under the Act passed in the third and fourth years of her Majesty's reign, intituled *An Act for the Regulation of Municipal Corporations* in *Ireland*, and their Deputies lawfully appointed:

The expression "clerk of the peace" shall include the acting or deputy clerk of the peace, registrar, or other officer of the county or Recorder's Courts, lawfully discharging the duties of a clerk of the peace, either in a county, county of a city, or county of a town:

The word "sheriff" shall include the "under-sheriff;" and in Borough Civil Bill Courts where an officer of such Courts, and not the sheriff, has now by law the execution of the decrees of such Courts, shall include and mean such officer:

The expression "process of the Court" shall include any decree, dismiss, renewal, order, or writ or other proceeding of the Civil Bill Courts:

The word "plaintiff" shall include, in addition to the plaintiff in any decree, such person as may by any decree, order, or writ of the Civil Bill Court be entitled to receive the possession of any land, chattel, or money:

The expression "Lord Lieutenant" shall include the Lords Justices of *Ireland*.

4. All decrees of the Civil Bill Courts signed before the commencement of this Act, and remaining unexecuted, and all decrees of such courts hereafter to be signed by the chairman of the several counties in *Ireland*, shall be executed by the sheriffs of the several counties, counties of cities and of towns respectively, or by their bailiffs appointed under this Act, and by no other persons; and the said sheriffs shall be entitled to receive all fees and sums of money allowed by this Act in the name of fees, payable to the sheriffs, out of which they shall provide for the execution of the duties for which such fees are allowed, and for the payment of the bailiffs appointed to assist them under this Act; and every such sheriff shall, save as hereinafter otherwise specially provided, be responsible for his own acts and defaults, and for the acts and defaults of his bailiffs in the execution of the duties imposed on him by this Act, as the sheriff of any county in *Ireland* is responsible for his acts and defaults, and for the acts and defaults of his officers in the execution of any writ or process out of the Superior Courts in *Ireland*: Provided that whenever the sheriff shall be a party in any proceeding by civil bill, and that any decree shall be made therein against him, the chairman shall appoint a special bailiff to execute such decree, and the precept of the clerk of the peace shall be directed to such special bailiff, who shall be entitled to receive the bailiff's fees for executing the same.

5. The sheriff of each county, county of a city, and county of a town in *Ireland* shall, within one week after the commencement of this Act, and from time to time thereafter as occasion shall require, appoint, by writing under his hand, a sufficient number of persons resident within the county, and one at least of whom shall be resident within each quarter sessions district thereof, to be bailiffs to assist the said sheriff in the execution of the duty imposed on him by this Act; and it shall be lawful for the sheriff, at his pleasure, to dismiss all or any of such bailiffs, and appoint others or additional bailiffs as he shall see fit: Provided, that the appointment of such bailiffs shall not be vacated by the death or removal from office of the sheriff, but the acts of such bailiffs done after the death or removal of the sheriff until the appointment of the succeeding sheriff shall be as valid as if such sheriff had not died or been removed: Provided always, that no action or other proceeding shall be taken against any sheriff for any act, neglect, or omission in respect of the provisions of this Act after the expiration of six calendar months from the day on which the succeeding sheriff shall be sworn into office.

6. The chairman shall have power to fine any of the bailiffs appointed to execute civil bill decrees for neglect or misconduct in a sum not exceeding five pounds, to be levied by distress on the goods and chattels of such bailiffs.

7. The name and place of abode of every bailiff to be so appointed from time to time by the sheriff, and of every bailiff who may be so dismissed or suspended as aforesaid, shall be published immediately after the date of such appointment, suspension, or dismissal, in some one or more newspaper or newspapers published

or circulated within the county, and shall be returned to the office of the clerk of the peace of such county, and shall be otherwise promulgated by the sheriff, in such manner as to the chairman of the county shall seem expedient; and a list of the bailiffs for the time being shall be at all times posted and kept open for public inspection in the office of the under-sheriff, and in every quarter sessions court house and in every petty sessions room in the county.

8. On every civil bill decrees to be signed after the commencement of this Act there shall be printed, either at the foot or on the back thereof, a true copy of the fees payable to the sheriff for executing decrees and to the keepers for the charge of the goods seized, as specified in part II of schedule (B.) to this Act annexed, and also a copy of the sixteenth section of this Act.

9. If a judge of a superior court shall be satisfied that a party against whom judgment for an amount exceeding twenty pounds, exclusive of costs, has been obtained in a Civil Bill Court has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of certiorari to issue to remove the judgment of the Civil Bill Court into one of the Superior Courts, and when removed it shall have the same force and effect and the same proceedings may be had thereon as in the case of a judgment of such Superior Court, but no action shall be brought upon such judgment.

10. The warrant to be added to all civil bill decrees to be executed after the commencement of this Act, whether such decrees shall have been signed before or shall be signed after the commencement of this Act, shall, instead of the form to a special bailiff of the plaintiff's nomination as heretofore used, be in the form following, or as near thereto as may be:

‘County of } I authorize and empower A.B. of
to wit. } and C.D. of , bailiffs,
or either of them, and their assistants, to execute the
above decree.

‘Given under my hand and, seal this day of
186 .

‘L.M. sheriff of the said county.

The sum to be levied hereunder is £

‘L.M. sheriff.’

And such warrants shall not be addressed to any other persons than the bailiffs to be appointed by the sheriffs in pursuance of this Act: provided that such warrant, if duly signed by the then sheriff, shall, whilst such decree shall remain in force be a sufficient authority for the execution of the same, notwithstanding that such sheriff may have died or been removed from office, and that such warrant shall not have been signed by his successors; but no such warrant shall be in force after the dismissal or suspension of the bailiff to whom same is directed, but such dismissal or suspension shall be a revocation of such warrant.

11. There shall be payable to the sheriffs of the several counties, counties of cities and of towns, for the performance of the duties imposed on them by this Act, the fees specified in respect of such duties in the schedule (B.) to this Act annexed, and no other fees; and a table of such fees shall be placed and maintained in some conspicuous place in every court-house

where civil bill causes shall be heard and in the offices of the under-sheriffs and of the clerks of the peace of the several counties; and the grand jury of every county are hereby required, at any assizes to be held in and for such county, without previous application to presentment sessions, to present the reasonable and actual expenses of preparing, exposing, and maintaining such table of fees to be raised off such county, and to be paid to the clerk of the peace.

12. No sheriff shall, for executing any decree, demand or receive fees on any larger sum than shall be certified in writing to be justly due thereon by the party on whose behalf such execution shall be demanded, or his attorney known agent, or receiver; and the party demanding such execution shall, when he shall so demand the same, lodge with the sheriff, either by delivering the same at the office of the under-sheriff in the town in which such office shall be kept, to the sheriff, under-sheriff, or clerk in charge of such office, or by sending the same through the general post office in a letter duly registered according to the regulations of the post office, and addressed to the sheriff at the office of such under-sheriff, a certificate under his hand, or under the hand of his attorney, or known agent or receiver, stating the sum then claimed to be due on foot of such decree, after all equitable deductions, which certificate shall be filed in the office of the said under-sheriff, and the sum therein stated shall be entered in the “decree and order-book” hereinafter mentioned, and also at the foot of the decree when delivered for execution, for which the fee of sixpence shall be paid to the sheriff by the party demanding such execution.

13. No sheriff shall levy for any greater sum than shall be entered at the foot of the decree, together with the poundage fees on the sum so entered, or on such portion thereof as shall be actually levied, with the keeper's fees, according to the scale specified in part II. of schedule (B.) to this Act annexed; and no decree shall be executed at the foot of which such entry shall not have been made as aforesaid; and if the party at whose suit such execution shall be demanded, or his attorney, agent, or receiver, shall neglect or omit to deliver such certificate as aforesaid, or shall appear to have wilfully and maliciously overcharged in such certificate the party against whom such execution shall issue, the party at whose suit such execution shall be demanded shall be liable to an action for damages at the suit of the party aggrieved.

14. Upon every levy under a decree by execution against the goods of a party, the sheriff shall and may, after such execution executed, demand and take therefor the poundage fees mentioned in that behalf in part II. of schedule (B.) to this Act annexed, on the sum stated to be due by the entry at foot of such decree, if levied, and in addition thereto, or if the goods taken shall not amount in value to the sum stated in such entry, then on so much only as he shall levy, and which in such case he shall be entitled to retain out of the sum levied by him, paying the balance to the party demanding such execution.

15. Upon every warrant for execution under a decree against the body of a party there shall be payable to the sheriff the fee specified in that behalf in part II. of schedule (B.) to this Act annexed, to be

paid by the party by whom such execution shall be demanded on or before the delivery of the decree to the sheriff for execution, and in default of such payment the sheriff may refuse to execute the same; and such fee shall not be chargeable against the party against whom such execution shall be issued: Provided, that if the party against whom such warrant shall be issued shall not be arrested within two months from the delivery of such decree to the sheriff, such fee shall be returned by the sheriff to the person by whom the same shall have been paid.

16. The sheriff shall, unless where otherwise directed in writing by the party delivering the same, execute every decree delivered to him as aforesaid, and pay over the proceeds thereof to the party on whose behalf execution shall be demanded, or his attorney thereto lawfully authorized, with all expedition, and at the latest within two calendar months after the said decree shall be delivered to him for execution; and if the sheriff shall within the said period of two months be unable, from sufficient legal causes, to execute the said decree, he shall, at the expiration of the said period, if required so to do by the party who shall have delivered the same to him for execution, or his attorney thereto lawfully authorized, return the decree to such party or to his attorney, and state in writing on the back thereof the cause of the non-execution of such decree, by which statement the sheriff shall be bound in any proceeding taken against him for neglect of duty: Provided, that if the sheriff shall execute any decree before the expiration of the said period of two months, nothing herein contained shall authorize him to retain the proceeds so levied until the expiration of such period; and provided further, that nothing herein contained shall prevent the sheriff from executing any decree after the expiration of two months from its delivery to him for execution, so long as the said decree shall be in force.

17. Any sheriff or under-sheriff or any bailiff empowered to execute a decree, or any assistant of such sheriff, under-sheriff, or bailiff, or any keeper, who shall demand or receive from any person, on or in respect of the execution of such decree, any money or gratuity other than the poundage fees legally payable on the execution thereof as in this Act mentioned, and the keeper's fees, in case of a seizure of goods thereunder, as specified in part II. of schedule (B.) to this Act annexed, or who shall knowingly permit or suffer anyone on his behalf to receive the same, shall be liable to pay a sum not exceeding twenty pounds to any person who may sue for the same by civil bill.

18. If any bailiff, or any person assisting such bailiff, acting under a decree of a Civil Bill Court, or under colour of the process of such Court, shall extort any money, security for money, chattel, or other thing, such person so offending shall be guilty of a misdemeanour, punishable by a fine not exceeding twenty pounds, or by imprisonment not exceeding twelve calendar months, with or without hard labour, or by both fine and imprisonment; and in any indictment for such offences it shall only be necessary to aver that the party charged with the offence was a bailiff or the Civil Bill Court of the particular county or a person assisting such bailiff, and that under or

under colour of the process of such Civil Bill Court he did extort money, or a security for money, or some chattel, as the case may be.

19. All decrees for the possession of land, and all orders made by any judge of assize upon appeal from any decree relating to the possession of land, and under which the possession of land may be given or taken, shall be executed by the sheriff of the county in which the said lands or any part of them are situated, or by his bailiffs, and by no other person, and the sheriff shall himself or by his bailiffs execute such decrees and orders within one calendar month after the same shall have been delivered to him for execution, unless otherwise directed by the party delivering the same, and such decree or order shall justify the sheriff or his bailiffs in entering upon the premises named therein, with such assistants as he or they shall deem necessary, and in taking and giving possession thereof accordingly; and in every decree for the possession of land the sheriff shall be commanded to put the plaintiff into the possession of the same; and the warrant to be annexed to every such decree shall be in the form following, or as near thereto as may be:

'County of _____ I authorize and empower A. B. of _____ to wit. _____ and C. D. of _____, bailiffs, or either of them, and their assistants, to execute the above decree.

'Given under my hand and seal, this _____ day of _____ 18____

(Seal.) L.M. Sheriff of said County.'

Provided always, that no entry shall be made upon any premises under any decree or order for the purpose of taking possession thereof except between the hours of nine in the morning and three in the afternoon, and no such entry shall be made on a *Sunday*, *Good Friday*, or *Christmas Day*; and whenever the sheriff shall be a party to any ejectment by civil bill, the decree for possession in such proceeding shall not be executed by the sheriff, but such decree or order as herein before mentioned, shall be directed to a special bailiff, to be named by the chairman of the county, who shall be commanded to execute the same, and no other person shall execute the same; and such special bailiff shall have all the powers and authority hereby conferred on the sheriff for giving or taking possession under any decree or any such order of a judge of assize on appeal.

20. The under sheriff of each county shall enter in a book to be kept by him for that purpose, to be called the "ejectment book," the several decrees in ejectment which shall be delivered to the sheriff for execution, specifying the names of the parties therein, the names of the lands and the barony in which the same are situated, the date of the decree, and the date at which the same was delivered to him for execution, and in cases for the nonpayment of rent the sum ascertained by such decree as due for rent, and shall state in the said book the time when such decree shall have been executed, or if not executed the cause of the non-execution thereof; and the under sheriff shall also keep a book, to be called the "Decree and Order Book," in which he shall enter the several decrees, other than those last-mentioned, given to the sheriff for execution, specifying the names of the parties therein, the sums due on foot thereof, as stated by the person delivering

the same, and the precise time and hour at which such decrees were delivered to him for execution, such time and hour of delivery in all cases to be endorsed by him on the said decrees, and shall enter in the said book the time at which the said decrees were executed, and the sum (if any) and poundage fees levied or received thereunder, and if such decrees shall not have been executed, the cause of the non-execution thereof; and when more than one decree shall be given to him for execution against the same person, the sheriff shall execute such decree in the order of time in which the same shall have been respectively delivered to him; and whenever the sheriff shall not execute any such decree in ejectment, he shall endorse on such decree the reason why the same was not so executed, and shall, at the request of the plaintiff or such other person as may be entitled to demand the same from him, deliver back such decree to the plaintiff or such other person, when required by him so to do; and the under sheriff shall produce the said books for the inspection of the chairman of the county, or of the clerk of the peace, whenever he shall have been required by the said chairman or by the clerk of the peace, after reasonable notice so to do.

21. On any civil bill decree being lodged for execution, the person receiving the same for the sheriff shall give to the person lodging the same a certified copy of the entry made by him in his "Ejectment Book" or "Decree and Order Book."

22. The sheriff of every county, county of a city, or county of a town, shall, within one week after the expiration of his term of office, deliver to the succeeding sheriff a correct list under his hand of all decrees and other processes in his possession not wholly executed by him, with all such particulars as shall be necessary to explain to the succeeding sheriff the several matters intended to be transferred to him, and shall thereupon transfer to the succeeding sheriff all such decrees and processes, and all records, books, and matters connected with the Civil Bill Court of such county, and relating to his duties under this Act; and the succeeding sheriff shall thereupon sign and give a duplicate of such list to the sheriff retiring from office, to whom the same shall be a sufficient discharge from the further execution of the decrees, processes, and other matters therein contained; and the succeeding sheriff shall thereupon stand charged with the execution and care of the said decrees, processes, and other matters contained in the said list, as fully and effectually as if such decrees and processes had been made over to him by indenture and schedule; and if any sheriff shall refuse or neglect, on the expiration of his term of office, to deliver such list within such period as aforesaid, or shall wilfully make out an untrue or incorrect list, or shall refuse or neglect to transfer such decrees and processes records, books and matters, in manner aforesaid, it shall be lawful for the chairman of the county, on complaint made to him in court by the incoming sheriff as to any of the said matters, after notice given to such outgoing sheriff six clear days before such application, and upon proof of such refusal or neglect as aforesaid in any of such particulars, to fine the said outgoing sheriff in any sum not exceeding fifty pounds; and every such outgoing sheriff so neglecting or

refusing to perform any of the particulars aforesaid shall be further liable to make such satisfaction, by damages and costs, to the party aggrieved thereby, as he, she, or they shall sustain by such neglect or refusal, such damages to be recovered in the ordinary way by process in the Civil Bill Court, and not elsewhere.

23. The sheriff of each county in *Ireland* and his bailiffs shall have in the execution of the decrees of the civil bill court of such county all the powers, privileges, and rights which the sheriffs of the several counties in *Ireland* have or are entitled to in the execution of all writs delivered to them for execution out of the superior courts in *Ireland*; and all constables and other peace officers within their several jurisdictions, and all and every other person or persons whom the sheriff of the county would be entitled to call upon to assist him in the execution of any writ, shall to the same extent be liable to assist the sheriff in the execution of any decree of the civil bill courts.

24. When a writ against the goods of a party shall have issued from a superior court, and a decree against the goods of the same party shall have issued from the civil bill court, and been lodged for immediate execution, the priority of right to the goods seized under such writ and decree shall be determined by the priority of the delivery of such writ and decree at the office of the under sheriff in the town in which such office shall be kept under this Act.

25. The sheriff or his bailiffs, in executing any decree of the civil bill court, shall not be deemed trespassers by reason of any irregularity or informality in the form of such decree, or in the mode of executing it, but the party aggrieved may proceed for the special damage which he may have actually sustained by such irregularity or informality against the sheriff or the bailiff guilty thereof.

26. Whosoever shall, by violence to, or threat of violence to, or restraint of the person of any sheriff, under sheriff, or bailiff when executing any civil bill decree, or by force, compel or induce such sheriff, under sheriff, or bailiff to abandon any seizure of the body or goods of any person previously made by such sheriff, under sheriff, or bailiff while in the execution of such decree, or who shall rescue or attempt to rescue the body or goods of any person taken under a civil bill decree by such sheriff, under sheriff, or bailiff, shall be guilty of a misdemeanor, and upon conviction thereof shall be liable to be imprisoned for a period not exceeding six calendar months, with or without hard labour.

27. The under sheriff of each county, or his deputy duly appointed by him in writing, shall attend every sitting of the civil bill court of such county, except when his absence shall be allowed by the chairman, and shall in the execution of his duties conform to all such general rules as shall be from time to time made for regulating the proceedings of the court as herein-after provided, and, subject thereto, to the orders and directions of the chairman.

28. No goods or cattle which shall be taken in execution under any decree of a civil bill court shall be sold until after the end of three clear days at least next following the day on which such goods or cattle shall have been so taken, unless such goods be of a perishable nature, or upon the request in writing of

the party whose goods or cattle shall have been so taken; and it shall be lawful for the sheriff from time to time to appoint such persons as he shall think proper for keeping possession of goods or cattle so taken in execution; and the sheriff shall be entitled to receive out of the proceeds of the sale of all goods or cattle taken in execution, and sold by him or by his bailiffs, a sum of money for the expenses of the bailiffs or persons in charge of the property taken (if such property shall remain in their charge), over the amount entered at foot of the decree, at the rate of two shillings and sixpence for each bailiff or person for every twenty-four hours or any fractional part of such period that he shall be so in charge, together with such sum, if any, as he shall actually incur in the sustenance and keep of such cattle: Provided always, that the number of bailiffs or persons for whom the said sheriff may so charge shall not exceed two, and the length of time for which he shall so charge shall not exceed five days; and the said cattle or goods shall be sold by public cant to the highest and best bidder, between the hours of ten in the forenoon and three in the afternoon on such day after such third day as aforesaid, and at such place, as the sheriff or his bailiffs shall appoint, first causing notice in writing, entitled in the cause, of the time and place intended for such sale to be posted up two clear days previous thereto in the market town next to the place of such intended sale at the usual place for posting public notices there.

29. It shall not be lawful to seize or sell under any civil bill execution any term for years, or any estate or interest in lands.

30. The under sheriff or any of his bailiffs shall have authority to sell goods taken in execution by him or by the sheriff or any bailiff, without the assistance of a licensed auctioneer: Provided always, that the sheriff shall be answerable for the proper care and sale of the goods so taken, to the same extent as sheriffs in *Ireland* are answerable for the care and sale of goods taken in execution by them under writs out of the superior courts.

31. In case of the death of any under sheriff, or of the inability of any under sheriff to perform the duties imposed on him by this Act from illness or other cause, the high sheriff of such county shall forthwith appoint a fit and proper person to act as under sheriff or deputy under sheriff for the execution of the duties of the civil bill court required by this Act, whose name shall be returned to the clerk of the peace within three days from such appointment: Provided that in the event of the high sheriff being absent from *Ireland*, or otherwise unable to appoint such deputy under sheriff, it shall be lawful for the Lord Chancellor of *Ireland* to appoint a fit and proper person to act as such under or deputy under sheriff in reference to the duties of such civil bill court until such appointment shall be made by the high sheriff for the time being, or any successor to be duly appointed in his place.

32. If the party against whom an execution under a civil bill decree shall be issued shall, before an actual sale of his goods seized thereunder, pay or tender or cause to be paid or tendered to the sheriff, or to the bailiff employed to execute the decree, the amount speci-

fied to be levied at the foot of such decree, or such part thereof as the person entitled thereto shall agree to accept in full or in part payment of his debt, together with the lawful poundage fees and charges to the bailiffs or keepers in care of the same, the execution of the said decree shall be superseded or suspended, as the case may be, for such time as the person issuing such execution shall direct, and the goods of the said party shall be released; and any person taken into custody under any such decree who shall have satisfied the sum stated in the entry at foot thereof, or or such portion thereof so agreed to be accepted as aforesaid, shall be discharged from custody, but shall be liable to be again taken for the residue, if any, which shall remain due on such decree, provided such residue shall, exclusive of the costs of such decree, exceed ten pounds.

33. 'And whereas it is fit that the clerks of the peace should be indemnified for the trouble and responsibility imposed on them by this Act in receiving the fees mentioned in Part I. of Schedule (B.) to this Act annexed for the account of the sheriff on the entry of processes for hearing, and issuing the decrees of the civil bill court: Be it enacted, that the clerks of the peace, when acting in person, or if not so acting, then the deputy or acting clerk of the peace, shall be at liberty to retain for their own use one penny out of each shilling to be so paid to them for the account of the sheriff on the entry of processes for hearing and on issuing said decrees.

34. In any case where a party shall be dissatisfied with the judgment or decree of the chairman in respect of any proceedings instituted by virtue of this Act, it shall be lawful for such party to appeal against such judgment or decree in like manner, and upon the like terms and stipulations, as appeals in other cases are allowed to be brought under the Acts now in force relating to proceedings by civil bill.

35. It shall be lawful for any judge of assize, upon the trial of any appeal, to direct a special case to be stated for the opinion of a superior court of common law in *Ireland* in case any question of law shall arise before him on the trial of any appeal which in his judgment may be proper to be decided by a superior court of common law, and the case when stated shall be signed by the judge, and the appellant shall lodge the case, and take all other necessary steps to have the case set down for hearing before one of the said superior courts of common law within such time as any general rule to be made as herein-after provided shall require, and in default of his so doing the decree shall stand affirmed with costs, unless on special application the judge shall otherwise order.

36. The several superior courts of common law in *Ireland* are hereby empowered to hear and determine such special cases when submitted to them, and for that purpose they shall severally have and exercise all the powers vested by this or any other Act in the judge of assize in respect of said cases, and on said cases the decision made by any superior court of common law shall be final and conclusive.

37. Any superior court of common law before whom any case may be pending may direct said case to be amended by consent of the parties, or on the certificate of the judge who signed said case.

38. The judges of the Queen's Bench in *Ireland* shall, as soon as may be convenient after the passing of this Act, make rules and regulations, and may from time to time alter and amend said rules and regulations, for the hearing and disposal of all such special cases as may be stated by a judge of assize for the decision of a superior court of common law, and for regulating the costs of said proceedings, and for directing when and where such cases shall be lodged, and for providing that all such cases shall be distributed in rotation among the three superior courts of common law in *Ireland*.

39. In addition to any costs now by law recoverable from any unsuccessful party on an appeal, it shall be lawful to recover from such party such additional costs as may be awarded by the court by whom the special case shall be decided, not exceeding in any case the costs to be fixed by any general rule as aforesaid.

40. No action or other proceeding shall be brought in the superior courts of common law in *Ireland* upon any decree of any civil bill court; but nothing herein contained shall be deemed to repeal or alter the seventeenth and eighteenth sections of the Act passed in the twelfth and thirteenth years of her Majesty, chapter one hundred and four, for filing and enrolling, as judgments of the superior courts, civil bill decrees for the recovery of poor rates.

41. It shall not be lawful for any person who shall have obtained a judgment in any of the superior courts at law, or a decree or order of any petty sessions court in *Ireland*, to sue by civil bill in *Ireland* upon such judgment, decree, or order, nor to proceed by civil bill for the recovery of any money which was the subject of the suit upon which such judgment, decree, or order was obtained.

42. 'And whereas provision is not made in the Act passed in the fourteenth and fifteenth years of her Majesty, chapter fifty seven, section fifty, for the time within which executors and administrators should lodge the accounts and schedules in the said section of the said Act mentioned:' Be it enacted, that such executor or administrator shall lodge with the clerk of the peace such schedule or schedules or accounts within one calendar month after he shall have been called on in writing to do so by any person entitled to demand that the same should be lodged as in that section named, or within such other time as the court shall order; and in default of his so doing, if no sufficient cause shall be shown for such default, such executor or administrator shall forfeit a sum not exceeding twenty pounds, to be recovered as in the said section of the said Act is mentioned.

43. The chairman of the county, upon application on affidavit by either party in a suit depending before him, may, if he shall think fit so to do, issue an order under his hand and seal for bringing up before the civil bill court any prisoner or person confined in any gaol, prison, or place within his county to be examined as a witness in any cause or matter depending before such court; and the person so required to be brought before such court shall be brought under the same custody and shall be dealt with in all respects as a prisoner required by any writ of habeas corpus awarded by any of her Majesty's superior courts of law at

Dublin to be brought before such court to be examined as a witness is now by law required to be brought and dealt with: Provided always, that the person having the custody of such prisoner or person shall not be bound to obey such order unless a reasonable sum be tendered to him for the conveyance of a proper officer or officers, and of the prisoner or person, in going to and returning from such court, such sum to be part of the witness's expenses incident to the hearing of the cause, unless otherwise ordered by the chairman; provided also, that no person confined in a county or city gaol shall be brought up under any such order to any other place than to the court house of such county town, or city or town, where such gaol is situated.

44. Where a decree for the possession of lands shall have been pronounced by the chairman of the county, and the defendant in such decree shall, after the same shall have been executed by the sheriff, and within six calendar months after the execution of such decree, unlawfully re enter or take possession of the lands mentioned therein, it shall be lawful for the chairman, upon the application of the plaintiff therein, to renew such decree for the purpose of enabling the said plaintiff to re execute the same; provided that such application shall be made at a sessions to be held for the division in which such lands are situated of which such possession shall have been unlawfully taken as aforesaid by the defendant in any such decree, such renewal to be granted upon such notice and in like manner as renewals of decrees in ordinary civil bill cases are now by law authorized to be granted.

45. All affidavits to be used in any civil bill court in *Ireland* may be sworn before the chairman of the county out of quarter sessions, and anywhere in *Ireland*, or before any master extraordinary in Chancery in *England* or *Ireland*, or any commissioner for taking affidavits in any of the superior courts at *Westminster* or *Dublin*; provided that all affidavits taken as in this section mentioned shall be filed as of record in the court where the same are intended to be used before the same shall be read, for the filing of which the clerk of the peace shall be entitled to receive a fee of sixpence.

46. 'And whereas the eighty-eighth section of the Act of the fourteenth and fifteenth years of her Majesty, chapter fifty-seven, is repealed by the Act of the twenty-third and twenty-fourth years of her Majesty, chapter one hundred and fifty-four, and it is expedient to re-enact the provisions of the said section to such extent as is herein-after next mentioned:' Be it enacted, that in all proceedings by civil bill ejectments for nonpayment of rent, where the defendant shall not appear to defend the same, the affidavit of the landlord or lessor, or his agent, or receiver, for ascertaining the amount of the rent due, shall be admissible.

47. If the chairman of the county shall be satisfied that any suit pending by civil bill in his court can be more conveniently tried in any other division of his county than that to which it has been returned for hearing, or if during the hearing of any suit it shall appear to the chairman that it would meet the ends of justice to adjourn the further hearing of the said

suit to some town in another division of the county, it shall be lawful for him to direct that such case shall be heard in such other division, or he may adjourn the hearing of the same to any town in such other division; and any decree made in such other division shall in that case have the same effect as if the same were pronounced in the division to which the suit was originally returned for hearing.

48. It shall be lawful for the chairman of the civil bill court, or any judge of assize on appeal at all times to amend all processes by adding or striking out parties, whether plaintiffs or defendants, and all other defects and errors in any civil bill process or notice, or other proceeding of the civil bill court, whether there may be anything in writing to amend by or not; and all such amendments may be made in such manner as shall be thereby directed, and with or without costs, and upon such terms as to the said chairman or judge shall seem fit; and all such amendments as may be necessary for the purpose of determining in any existing suit the real question in controversy between the parties shall be so made; and when such amendment shall be allowed, the order for allowing the same, specifying the amendment, shall be entered as of record upon the court book of the clerk of the peace: Provided always, that no such amendment shall be made if it shall appear to the chairman or to the judge of assize on appeal that the same is calculated to mislead and injuriously prejudice the opposite party in the merits of his case.

49. If on the trial of any appeal to any court of general quarter sessions of the peace in *Ireland*, or to the chairman of the county, against any conviction or order made or pronounced by any justice or justices of the peace, any objection shall be taken on account of any omission or mistake in the making or drawing up of such conviction or order, or any variance between the facts stated in such conviction or order and the evidence adduced in support thereof, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such conviction or order to have authorized the drawing up thereof free from the said omission or mistake, or that such variance is in some point not material to the merits of the case, it shall be lawful for the court to amend such conviction or order on such terms as it shall think fit, and to adjudicate thereupon as if no such omission or mistake or variance had existed.

50. 'And whereas the Act now in force giving a right of appeal to the courts of general quarter sessions in *Ireland*, or the chairman of the civil bill courts in *Ireland*, frequently require a recognizance or recognizances to be entered into as a condition of such appeal, and appellants are liable to be prevented from trying their appeals upon the merits in consequence of imperfections in the taking of such recognizances:' Be it enacted, that where any recognizance or recognizances which shall have been entered into within the time by law required, before any justice or justices, for the purpose of complying with any such condition of appeal, shall appear to the court before which such appeal is brought to have been insufficiently entered into, or to be otherwise defective or invalid, it shall be lawful for the court, if it shall so think fit, to per-

mit the substitution of a new and sufficient recognizance or new and sufficient recognizances to be entered into before such court, in the place of such insufficient, defective, or invalid recognizance or recognizances, and for that purpose to allow such time, and make such examination, and impose such terms as to payment of costs to the respondent or respondents, as to such court shall appear just and reasonable, and such substituted recognizance or recognizances shall be as valid and effectual to all intents and purposes as if the same had been duly entered into at any earlier time or times as required by any Act or Acts now in force.

51. And for the more effectual prevention of frivolous appeals be it enacted, that any court of general or quarter sessions of the peace, upon proof of notice of any appeal to such court having been given to the clerk of the petty sessions court, and such recognizance having been entered into as in "The Petty Sessions (*Ireland*) Act, 1851," is in that behalf mentioned, though such appeal may not be afterwards prosecuted or entered, or though notice in writing of the intention of the party to prosecute the same shall not have been served seven clear days before the commencement of said sessions, as by said Act required, may, if it shall so think fit, at the sessions for which such notice of appeal was given, order to the party receiving the same such costs and charges not exceeding forty shillings as by the said court shall be thought reasonable and just to be paid by the party giving such notice, such costs to be recoverable in the same manner as the costs in ordinary cases of appeal are now by law recoverable.

52. It shall be lawful for the chairman of the county or judge of assize upon appeal to allow reasonable expenses to any person examined before him in any proceeding by civil bill, and to tax and award against the unsuccessful party in any such proceeding the expenses so allowed, not to exceed the sum of five pounds to any one witness.

53. Every process which shall be required to be served out of the county in which the cause is to be heard may be served by the process officer of any civil bill court or by any other person; and when the service of process out of the county shall be made by a process officer of the county where such service shall be made, such service may be proved by affidavit purporting to have been made before a master extraordinary in Chancery or any other person now authorized by law to take affidavits; and the fee for taking such affidavit shall be one shilling, and shall be part of the costs incident to the civil bill; and such affidavit shall be filed with the clerk of the peace of the county in which the same shall be used as evidence of service, and before the hearing of the cause in which such affidavit is intended to be used, and shall specify fully the residence of the parties served, and the residence of the person making such affidavit, and the manner in which service was effected, for the filing whereof such clerk of the peace shall be entitled to a fee of sixpence.

54. The Act of the fourteenth and fifteenth years of her Majesty, chapter fifty-seven, intituled *An Act to consolidate and amend the Laws relating to civil bills and the Courts of Quarter Sessions in Ireland, and to transfer to the Assistant Barristers certain Ju-*

jurisdiction as to Insolvent Debtors, and "The Landlord and Tenant Law Amendment Act, *Ireland*, 1860," shall, as to such of the provisions of said Acts as relate to the Civil Bill Courts of *Ireland*, or any proceeding therein, be incorporated with this Act, and shall, so far as the same are not inconsistent with this Act be read as if the said recited Acts (except such parts thereof as have been repealed or amended by this Act) and this Act were one Act.

55. All decrees and other proceedings of every nature and kind obtained in any county court in *Ireland*, and in force and unexecuted at the time of the commencement of this Act, shall, notwithstanding anything herein contained, remain and be in force so long as the same would have been in force and effect if this Act had not been passed, and may be executed with such warrant annexed thereto as is by this Act directed.

56. So much of section sixty-five of the fourteenth and fifteenth *Victoria*, chapter fifty-seven, as requires the original of a civil bill process to be shown to the party served with such process, and so much of section sixty-six of said Act as requires, in the case of lodgers, that a copy of the process shall be posted on the usual place for posting notices on the nearest police barrack to the house in which the defendant shall so lodge, shall be and the same are hereby repealed.

57. In all proceedings, civil or criminal, the entry in the clerk of the peace's book of a decree or dismissal shall be conclusive evidence that a decree or dismissal between the parties named in such entry, and to the purport and effect mentioned therein, was pronounced by the chairman of the county at the sessions of which such book shall purport to be the record, and it shall not be necessary in any case to produce the decree or dismissal signed by the chairman.

58. It shall be lawful for the several chairman of quarter sessions in *Ireland*, or for any five of them, to be selected at a meeting of the said chairmen to be convened for that purpose, to make and issue such general orders, rules, and regulations as they shall think fit, from time to time and as often as may be deemed necessary, for regulating the forms, proceedings, and general practice of the Civil Bill Courts in *Ireland*, and from time to time to alter, vary, and annul any previous order relating to the practice of the said courts, and to make any new or other rule or rules, orders and regulations, in lieu thereof, provided that any such rules, orders, and regulations shall not be inconsistent with this Act, or any Act in force in *Ireland* relating to civil bills. Such rules, orders, and regulations shall be submitted to the Chief Justice of *Ireland* for his approval, and copies of all such rules, orders, and regulations, when so approved, shall be transmitted to the under-sheriff and the clerks of the peace of the respective counties in *Ireland*, to be by them kept and preserved in their offices, and there to remain open at all times to public inspection; and such rules, orders, and regulations, when approved by the said Chief Justice, shall be as binding as if they were contained in this Act.

59. The schedules to this Act annexed shall be taken to be a part of this Act; and the forms herein contained, or any other forms to the like effect, may be used in the respective cases to which they are ap-

plicable, and shall be good and sufficient for such cases.

60. From and after the commencement of this Act the several Acts and parts of Acts set forth in the schedule (C.) to this Act annexed, to the extent to which such Acts or parts of Acts are by such schedule expressed to be repealed, and every other Act or Acts, or such parts of every other Act or Acts, as shall be inconsistent with this Act, shall be and the same are hereby repealed, except as to anything done before the commencement of this Act, and except so far as any of the said Acts or parts of Acts repeal any former Act or part of an Act, and except so far as may be necessary for the purpose of supporting and continuing any proceeding taken before the commencement of this Act, and except as to the recovery or application of any penalty for any offence which shall have been committed before the commencement of this Act.

61. No under-sheriff, or any person for his use or benefit, shall act as an attorney in any cause or proceeding to be heard or determined before any chairman of any county in *Ireland*; and if any such under-sheriff, or any person for his use or benefit, shall so act as an attorney in any such cause or proceeding, such under-sheriff shall thereupon forfeit the sum of one hundred pounds, to be recovered by any person, within one year after such offence committed, by action or information in any of her Majesty's Courts of record in *Dublin*.

62. The under-sheriff for each county in *Ireland* shall at all times have and keep in the county town of the county for which he shall be so appointed, or in such one of the quarter sessions towns of the county as may be most convenient and as may be approved by the chairman of quarter sessions, an office for the performance of his duties under this Act, and such office shall be kept open every day in the year (*Sundays, Christmas Day, and Good Friday* only excepted), from ten o'clock in the morning until three o'clock in the afternoon, such office to be in charge of a clerk to be appointed by such under-sheriff, and the delivery of every decree and other document to such clerk shall be a delivery to the said under-sheriff, and the application for a return of a decree to the said clerk shall be an application to the said under-sheriff; and the said under-sheriff shall keep in the said office, and not elsewhere, the "ejectment" book, and "decree and orders" book in this Act mentioned.

63. All decrees, certificates, or other documents in relation to any matter under this Act may be delivered to the sheriff, either by giving the same personally to the sheriff, under sheriff, or clerk in charge of the under sheriff's office in the county of which he is under sheriff at such office, and not elsewhere, or by sending the same through the General Post Office in a prepaid letter, duly registered, and addressed to the sheriff or under sheriff, at the office of the under sheriff in the town in which such office shall be kept; and in all proceedings against any sheriff in which it shall be necessary to prove a delivery of such decree, certificate, or other document, proof that such decree, certificate, or document was duly posted in a prepaid registered letter, directed to the sheriff or under sheriff at the office of such under sheriff, in the town

in which such office shall be kept, shall be conclusive evidence that such decree, certificate, or document was received by the said sheriff or under sheriff at the time at which such registered letter would have been delivered at the said office in due course of the post, unless the said sheriff or under sheriff shall prove that such registered letter was not delivered at the said office, or was not delivered there until after the usual time for its delivery in due course of the post; and no delivery of any decree, certificate, or other document in any other mode than as herein-before mentioned shall be a good delivery for the purpose of charging the sheriff with the receipt thereof.

64. And for the protection of sheriffs acting in the execution of this Act, be it enacted, that all actions or proceedings to be brought against any sheriff for anything done in pursuance of this Act shall be commenced within six calendar months after the fact committed, and not afterwards or otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of such action or proceeding; and no plaintiff shall recover in any such action or proceeding if tender of sufficient amends shall have been made before such action or proceeding brought, or if after action or proceeding brought a sufficient sum of money shall have been paid into court, with costs, by or on behalf of the defendant.

65. In all actions and proceedings by civil bill under this Act the fees specified in the Schedule (B.) to this Act annexed shall be established, and be deemed and taken as the lawful fees and emoluments for the discharge of the several duties therein specified by the respective persons therein mentioned, and by the process officers for the service of all civil bill processes, whether under this Act or otherwise, and no other fees or payments shall be recoverable for the discharge of such duties; and every sheriff, clerk of the peace, attorney, bailiff, or process officer who shall receive any greater fee, gratuity, emolument, or other consideration for any of the services herein-before or in the said schedule specified, shall forfeit and pay the sum of ten pounds sterling for every such offence, to be recovered by civil bill by any person who may sue for the same.

66. The several fees mentioned and set forth in the schedule (B.) to this Act annexed in that behalf shall, save wherein herein-before or in the said schedule otherwise expressly declared, be chargeable against the party against whom any decree or dismiss shall be pronounced upon any civil bill or other proceeding brought under the provisions of this Act, and in all cases whatsoever as to the fees hereby provided for the process office.

67. It shall not be lawful for the chairman of any county in Ireland to open his court or to hear any case of civil bill on *Good Friday*, neither shall it be lawful for him to open his court or to hear any case of civil bill before ten of the clock in the morning, nor shall it be lawful for him to commence the hearing of any civil bill after five of the clock in the afternoon of any other day.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (B.)

PART I.

Fees payable to the sheriff (in lieu of the fees of one

shilling and two and sixpence now payable to him under the 14th and 15th Victoria, chapter 57, for granting a warrant to the special bailiff so the plaintiff's nomination in ordinary and ejectment decrees.)

£ s. d.

On every process or ejectment entered for hearing with the clerk of the peace ... 0 0 6

Such fee to be paid to the clerk of the peace for the account of the under sheriff, at the time of the entry, to be taxed with the plaintiff's costs, if a decree be made in his favour.

On every decree, dismiss, renewal, or order (save those in ejectment cases or orders or writs of restitution as to lands):—

For any sum not exceeding 20*l.* 0 1 0

Exceeding 20*l.* ... 0 2 0

On every decree, dismiss, and renewal in ejectment cases, and on every order or writ of restitution as to lands ... 0 2 6

Such fees to be paid to the clerk of the peace, for the account of the under sheriff, by the person in whose favour the decree is pronounced, before he shall be entitled to receive the same, and to be taxed at foot of the decree as portion of the costs payable by the party against whom such decree shall be pronounced.

PART II.

Fees payable to the Sheriff

For executing any decree, dismiss, renewal or order (except decrees or renewals in ejectment cases, or writs or orders of restitution as to lands)

One shilling in the pound (or for any fractional part of the first pound) on the amount stated in the entry at foot of the decree, dismiss, or renewal, or order, if the entire amount shall be levied; or if the entire amount shall not be levied, then on the amount actually levied, and so in proportion for any fractional part of a pound after the first pound; one shilling to be paid in every case of a levy, though the amount produced may not be one pound.

In all cases for executing any decrees, dismiss, renewal, or order, by arrest of the party ... 0 10 0

To be paid to the sheriff on the delivery of the decree by the person desiring to execute the same by arrest of the party, and also 6*d.* per statute mile

for the conveyance of the party, if arrested, from the place of his arrest to the county gaol, to be chargeable to and recovered from the person demanding such execution by arrest.

For executing any decree or renewal in ejectment, or writ or order of restitution as to lands not exceeding five pounds annual valuation, and where the personal attendance of the sheriff is not required ... 0 10 0

And where the personal attendance of the sheriff shall be required, or where the lands exceed five pounds annual valuation ... 1 1 0

And where the personal attendance of the sheriff shall be required by the party executing the decree, 6d. additional shall be paid to the sheriff for every statute mile he shall necessarily travel on going to such lands, such mileage not to be charged against the opposite party.

In cases of replevin, for drawing affidavit of value by replevinders, and in full of all charges in relation to such cases ... 0 4 0

To the sheriff in full for proceedings by interpleader ... 0 3 6

For returning a jury in any case ... 0 3 6

To keepers (not exceeding two in number) of goods seized under any decree or dismissal per day each (not exceeding five days) ... 0 2 6

For filing the certificate and making the entry at foot of the decree, as in section 11 of this Act mentioned... 0 0 6

To be paid by the party presenting such certificate.

PART III.

Fees payable to the Clerk of the Peace.

£ s. d.

For the filing of any affidavit sworn under the special provisions of the 44th and 52nd sections of this Act ... 0 0 6

To be paid by the person requiring such affidavit to be filed, and not to be taxable against the opposite party.

For preparing a fresh recognizance in cases of appeal, when required so to do under the 49th section ... 0 3 6

And one penny in every shilling lodged with them for the account of the sheriff, as herein-before mentioned, to be retained by them out of the monies so lodged.

PART IV.

Attorney's Fees.

£ s. d.

For preparing, presenting, &c. the certificate of the sum due on foot of any decree, as in section 11 of this Act ... 0 1 0

To the plaintiff's attorney in full for all proceedings as to the re-execution of ejectment decrees, under the 43rd section of this Act, and making the application to the court, as thereby directed... 0 10 6

For attending the clerk of the peace with any affidavit to be filed under the special provisions of the 44th and 52nd sections of this Act ... 0 1 0

Not to be chargeable against the opposite party.

PART V.

Process Officers Fees.

£ s. d.

Serving civil bill in any case where there is but one defendant, or several defendants residing in the same house, where the sum sought to be recovered shall not exceed 10*l.* ... 0 0 6

For serving two or more defendants not residing in the same dwelling-house, where the sum sought to be recovered shall not exceed 10*l.* ... 0 1 0

For serving one defendant, or several defendants residing in the same house, where the sum sought to be recovered shall exceed 10*l.* ... 0 1 0

For serving two or more defendants not residing in the same dwelling-house, where the sum sought to be recovered shall exceed 10*l.* ... 0 2 0

SCHEDULE (C.)

Acts and parts of Acts to be repealed, so far only as they may relate to any proceedings by civil bill under this Act.

The portion printed in Italics shows the extent of repeal.

14 & 15 Vict. c. 57.—An Act to consolidate and amend the Laws relating to Civil Bills and the Courts of Quarter Sessions in Ireland, and to transfer to the Assistant Barristers certain Jurisdiction as to Insolvent Debtors.—Section 95. *So much of the forms 26 and 27, Schedule (C.) as relate to the forms of the sheriff's warrants to special bailiffs of the plaintiff's nomination on decrees and dismisses. So much of section 139, providing that no civil bill decree for possession of any lands or tenements, or any affirmances of such decree, shall be renewed, save for the costs thereby decreed, as is inconsistent with the power of renewal specially given by this Act. Section 145. Section 146. Section 147. So much of section 152, and schedule (D.) therein referred to relating to fees payable to sheriffs, process servers, and keepers, as is inconsistent with the fees given to them by this Act.*

23 & 24 Vict. c. 154.—An Act to consolidate and amend the Law of Landlord and Tenant in Ireland.—Section 92. Section 93.

CAP. C.

An Act to confirm certain proceedings of the Justices for the County of Sussex.

[29th July 1864.]

CAP. CI.

An Act to amend the Act for the better Management of Highways in *England*. [29th July, 1864.]

CAP. CII.

An Act for amending The *Harwich Harbour Act*, 1863. [29th July, 1864.]

CAP. CIII.

An Act to authorize the Acquisition of Lands by the Admiralty with a view to the Extension of *Portsmouth Dockyard*, and for other purposes connected therewith. [29th July, 1864.]

CAP. CIV.

An Act to extend the Powers of the Public Works (Manufacturing Districts) Act, 1863. [29th July, 1864.]

CAP. CV.

An Act to explain the Statutes of her present Majesty for amending the Laws relating to the Removal of the poor. [29th July, 1864.]

CAP. CVI.

An Act to authorize the Lords Commissioners of the Treasury to make Provision in regard to the Salaries of certain Sheriffs Substitute in *Scotland*. [29th July, 1864.]

CAP. CVII.

An Act to confirm a Provisional Order under "The Drainage and Improvement of Lands (*Ireland*) Act, 1863." [29th July, 1864.]

26 & 27 Vic. c. 88.

- Sec. 1. *Provisional order in schedule confirmed.*
 2. *Nothing in 26 and 27 Vict., c. 88, construed to render legal works that would have been illegal if Act had not passed.*
 3. *Short title.*

‘WHEREAS the Commissioners of Public Works in *Ireland* have, in pursuance of "The Drainage and Improvement of Land Act (*Ireland*), 1863," duly made the provisional order contained in the schedule to this Act annexed, and it is by the said Act provided that no such order shall be of any validity whatever until it shall have been confirmed by Parliament, and it is expedient that the said order should be so confirmed: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The provisional order contained in the schedule hereunto annexed is hereby confirmed, and from and after the passing of this Act shall be deemed to be a public general Act of Parliament of the like force and effect as if the provisions of the same had been enacted in the body of this Act.

2. It is hereby declared, that, as against any person owning or interested in any land or other property

situate beyond the limits of the jurisdiction of the board established by this Act, nothing contained in the said Drainage and Improvement of Land Act (*Ireland*), 1863 or in the said provisional order, or in this Act, shall be construed to render legal any work executed or to be executed by such board that would, if the said Acts had not been passed, have been illegal by reason of its injuriously affecting such land or property; and any damages adjudged to be paid by the said board to any person as aforesaid shall be deemed to be part of the costs incurred by such board in defending legal proceedings instituted against them, and shall be defrayed in manner in which the said costs are authorized to be defrayed by "The Drainage and Improvement of Lands Act (*Ireland*), 1863."

3. The Act may be cited for all purposes as The Drainage and Improvement of Lands Supplemental Act, *Ireland*, 1864,

SCHEDULE to which the Act refers.

Drainage and Improvement of Lands Act
(*IRELAND*), 1863.

In the matter of *ATHBOY DRAINAGE DISTRICT*, County of Meath.

Whereas certain proprietors of and persons interested in the lands adjoining the *Athboy river*, on or about the 2nd day of January, 1864, presented their petition to the Commissioners of Public Works in *Ireland* under the Provisions of the Drainage and Improvement of Lands Act (*Ireland*), 1863, accompanied by the proper schedules, maps, plans, sections, and estimates, together with other particulars and information required by the said Act, showing, by reference to the said maps, the boundaries and area of the proposed drainage districts, and stating the exigencies rendering the formation of such drainage district necessary, and praying that the said lands within the proposed district should be constituted a separate drainage district under the provisions of the said Act:

And whereas the said commissioners referred the same to Samuel U. Roberts, Esquire Civil Engineer, an inspector duly appointed under the said Act:

And whereas all notices and inquiries required by the said Act have been duly given and made and the said inspector has duly reported to us, the said commissioners, in writing, the result of his inquiries; and we, the said commissioners, have duly considered the same, and no objections to the report of the said inspector have been made to us, and all preliminaries required by the said Act to precede the making of this provisional order have been performed and complied with:

And whereas we, the said Commissioners of Public Works in *Ireland*, upon consideration of the premises, are satisfied of the propriety of constituting the proposed separate drainage district, and that the proprietors of two third parts in value of the lands in the proposed district are in favour thereof, and have subsequently to the date of the report of the said inspector assented thereto in writing;

Now, therefore, in pursuance of the power given to us by the said Act, we, the Commissioners of Public Works in *Ireland*, do, by this provisional order under our common seal, constitute the area in the said petition and report (and the boundaries and extent of

which are set forth within yellow lines on certain maps to which we have caused our common seal to be attached, and which maps are deposited in the office of Public Works in Ireland) a separate drainage district, by the name of "The Athboy River Drainage District;" and we do declare that the lands to be purchased for the proposed works in such district (subject to such alterations and deviations therefrom as we, the said commissioners, may hereafter sanction) are the lands in that behalf shown and set forth in the said maps and the schedule thereto annexed, marked with the letter B. and also sealed with our common seal.

And we, the said commissioners of public works, do, by this our order, order and direct that the time for completion of the necessary works in the said district shall be limited to the first day of July which will be in the year one thousand eight hundred and sixty-six.

And we do further by this our provisional order make the following regulations with respect to the drainage board:

That the drainage board for the said district shall consist of seven members:

That the following persons shall be the members of the first drainage board, viz.:—

William Chapman, South Hill in the County of Westmeath, esquire;

George A. Rotheram, of Kilbride in the County of Meath, esquire;

Henry Atkinson, of Frankville in the County of Meath, esquire;

Matthew Morrison, of Bachelor's Walk in the city of Dublin, esquire;

Edward Thomas Stapleton, of College Green, in the city of Dublin, esquire;

Abraham Colles, of Ballyfallen in the County of Meath, esquire;

Nathaniel Hone Dyas, of Athboy House, in the County of Meath, esquire;

That the first meeting of the said board shall be summoned by notice under the hands of any two or more of the said board published in the Dublin Gazette, and some newspaper generally circulated in the said district, at least fourteen days next before the day of meeting:

That the qualification of any subsequent member of the said board shall be, that he shall be the proprietor (as defined by the said Act, and the Acts referred to therein or incorporated therewith,) of not less than twenty acres of land situate within the area of the said district, or the land agent for the time being of a person being a proprietor as aforesaid of not less than one hundred acres of land situate within the area of said district, and acting as receiver of the rents and profits of such lands:

That the members of the first board shall vacate their offices on the first Thursday in September in the year following the date of this provisional order:

That the electors for members of the drainage board shall be the persons in that behalf mentioned in the said Act: provided always, that no such elector shall be entitled to vote or exercise any privi-

lege as such unless the land of which he is the proprietor, or some portion thereof, shall be rateable on account of the works in the district, and he shall have previously paid all rates or arrears of rates which may be payable by him in respect of any drainage rate for the aforesaid district.

In witness whereof, we, the said commissioners of public works in Ireland, have hereunto caused our common seal to be affixed this fourth day of July one thousand eight hundred and sixty-four.

E. HORNSBY. (L.s.)

Office of Public Works,
Dublin.

CAP. CVIII.

An Act to amend "The *West Indian Incumbered Estates Acts*." [29th July, 1864.]

CAP. CIX.

An Act for providing a further Sum towards defraying the Expenses of constructing Fortifications for the Protection of the Royal Arsenals and Dockyards and the Ports of *Dover* and *Portland*, and of creating a Central Arsenal. [29th July, 1864.]

CAP. CX.

An Act for the Amendment of the Law relating to the Mitigation of Penalties. [29th July, 1864.]

CAP. CXI.

An Act to transfer certain Houses in and near *Cranbourne Street* in the City of *Westminster* from the Commissioners of Her Majesty's Works to Her Majesty, for the Considerations therein mentioned. [29th July, 1864.]

CAP. CXII.

An Act to amend the Law relating to future Judgments, Statutes, and Recognizances. [29th July, 1864.]

CAP. CXIII.

An Act to amend the Laws relating to the Conservancy of the River *Thames*; and for other purposes relating thereto. [29th July, 1864.]

CAP. CXIV.

The Improvement of Land Act, 1864. [29th July, 1864.]

12 & 13 Vict. c. 100.

Sec. 1. *Recited Act 12 & 13 Vict. c. 100, repealed.*

COMMISSIONERS, LANDOWNERS, &c.

2. *Interpretation of "the commissioners."* 1 & 2 W. 4, c. 33. 5 & 6 Vict. c. 89.

3. *Provisions of 9 & 10 Vict. c. 101, &c., to extend and be applicable to proceedings of commissioners.*

4. *Assistant commissioners may take declarations and examine witnesses.*

5. *Punishment of persons giving false evidence.*



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